IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 468 OF 2017
WITH
NOTICE OF MOTION NO. 639 OF 2017

Savannah Lifestyle Pvt.Ltd. & Ors. ...Petitioners
vs.
Nishant Kanodia ...Respondent

Dr.Birendra Saraf with Aditi Bajaj I/b. ALMT Legal for Petitioners.
Mr.Sarosh Bharucha with Alya Khan an Cyrus Jal I/b. Vashi & Vashi for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 22 OCTOBER 2018

P.C. :

Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole Arbitrator.

3 The disputes between the parties arose out of a Memorandum of Understanding/Share Purchase Agreement dated 6 December 2008. Under this agreement, the Respondent (original claimant) invested a sum of Rs.66 lakhs in Petitioner No.1 company. Against the amount Rs.60 lakhs mentioned in the agreement, the Respondent was to be allotted 60,000 fully paid-up shares of Rs.10/- each by the company. It was the Respondent's grievance that despite having invested the entire amount of Rs.60 lakhs and in fact a further sum of Rs.6 lakhs, he was issued only 5000 shares of Rs.100/- each by Petitioner No.1. It was the Respondent's

case that sometime in Mid 2011, it was agreed between the parties that the amount invested by the Respondent would be repaid to him. To that end, cheques aggregating to Rs.66 lakhs were issued towards return of the Respondent's investment. The cheques were, however, not honoured on the basis of 'stop payment' instructions issued by the drawer. That is how disputes arose between the parties and were referred to arbitration.

4 Neither the agreement nor the investment of Rs.66 lakhs is disputed by the Petitioner herein. What is disputed is the recoverability of this amount on account of the time-bar contained in Articles 54 and 55 of the Schedule to the Limitation Act or, in the alternative, under the residuary article, namely, Article 113. It is the case of the Petitioners (original Respondents to the reference) that 60,000 equity shares under Clause 2 of the agreement between the parties were to be issued to the Respondent within 30 days from the date of investment. Since the grievance was that these shares were not issued to him, a notice invoking the arbitration agreement issued by the Respondent on 4 November 2015 was beyond limitation under Article 54 so far as the specific performance was concerned, the date for performance being on or before 5 January 2009. In the alternative, it is submitted that even under Article 55 of the Limitation Act, 1963, if the claim is treated as a claim for damages/compensation for loss of value of investment or profit on account of breach of contract, the suit is required to be preferred within three years from the date of the breach of the contract. Even otherwise, it is submitted that the agreement between the parties for returning the Respondent's investment was arrived at in the meetings between the parties held in May and June 2011 and that such agreement was recorded in the letter of 9

June 2011, which *inter alia* provided for payment within 30-40 days. The cheques issued in pursuance of this agreement were dishonoured in October 2011 and November 2011 and even on that basis, the suit filed (or arbitration agreement invoked) on 4 November 2015 is barred by the law of limitation under Article 113.

5 The learned Arbitrator held the claim for specific performance to be barred by the law of limitation, the time for performance (i.e. issuance of the requisite shares) being on or before 5 January 2009. Likewise, the Arbitrator held the claim for damages or compensation for breach of contract as also barred by the law of limitation. As for the claim for payment to be made of Rs.66 lakhs towards buying out of the Respondent's shares, the Arbitrator held that the meetings between the parties were held in May 2011 and June 2011, when it was agreed that the Respondent's investment would be returned; the agreement was recorded in the letter of Petitioner No.2 dated 9 June 2011; cheques aggregating to a sum of Rs.66 lakhs were thereafter issued but those were dishonoured in October 2011 and November 2011; and thereafter within three years of dishonour of these cheques, the Petitioners acknowledged their liability to pay an amount of Rs.66 lakhs to the claimant in a whatsapp conversation between Petitioner No.3 and the Respondent/his brother. The Arbitrator held that the liability being acknowledged and admitted within three years of limitation, a further period of three years was available from the date of such acknowledgement. The Arbitrator accepted the authority cited by the Respondent that a whatsapp message was sufficient to constitute an acknowledgement in writing within the meaning of Section 18(1) of the Limitation Act, 1963. In the premises, the Arbitrator held the alternative

claim for refund of investment to be within time.

6 The Arbitrator's conclusion in this behalf is clearly a possible view, which a fair and judiciously minded person could have arrived at. There is nothing in the conclusion that would shock the conscience of the court. The award, in other words, cannot be said to be in contravention of the fundamental policy of Indian Law or vitiated by any patent illegality on the face of the award. The Arbitrator, in this case, has not disregarded the law of limitation. What he has done is that he has applied it to the fact situation before him after construing the agreement between the parties and appreciating the correspondence between the parties. No award can be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. The award displays a possible conclusion, which is supported by some evidence.

7 Learned Counsel for the Petitioners submits that the liability for return of investment under the agreement between the parties was of Petitioner No.2 herein, who was described as the promoter director under the MOU, and who was to purchase the shares of the Respondent in the event an offer was made by the latter after the lock-in period. Learned Counsel submits that in pursuance of this obligation, the responsibility to return the investment was undertaken by Petitioner No.2 personally and not by either Petitioner No.1 or Petitioner No.3. The whatsapp message, in which the liability was affirmed, on the other hand, was between the Respondent's brother and Petitioner No.3. It is submitted by learned Counsel for the Petitioners that this message could not bind either Petitioner No.1 or 2 so as to extend the period of limitation against them.

The learned Arbitrator has held all three Petitioners to be jointly liable. The existence of the liability and the identity of the persons, who owe such liability, is a mixed question of law and facts. The Arbitrator's conclusion in this behalf, by application of law and by appreciation of evidence, cannot be faulted before this court in a challenge under Section 34 of the Act, unless, as I have noted above, the conclusion is such as would shock the conscience of the court or such as no fair and judiciously minded person could have arrived at. The same goes for the Petitioner's submission on the admission of liability with particular reference to the person making such admission and the binding effect of such admission.

7 Accordingly, there is no merit in the arbitration petition. The petition is dismissed.

8 In view of the dismissal of the arbitration petition, the notice of motion does not survive and the same is also dismissed.

(S.C. GUPTE, J.)