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

COMMERCIAL ARBITRATION PETITION NO.221 OF 2019

Vibhushan Estate Pvt. Ltd.	...Petitioner
V/s.	
Vivek O. Abrol	...Respondent

Mr.Praveen Samdani, Senior Counsel with Mr.Gautam Ankhad, Mr.Sunny Shah, Mr.Viral Shukla, Mrs.Priti Shukla, Mr.Darshan Ashar and Ms.Heena Jewani I/b M/s.Shukla & Associates for the Petitioner.

Mr.Chirag Mody with Mr.Jayesh Mestry I/b M/s.Ashok Purohit & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 30TH JULY, 2019.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "the Arbitration Act"), the petitioner has impugned the arbitral award insofar as the directions in paragraphs 44 (c) and (d) of the operative part of the arbitral award is concerned. The petitioner has not impugned the reliefs granted by the learned arbitrator in paragraphs 44(a) and (b) of the impugned award.

2. It is not in dispute that in the statement of claim, the respondent had prayed for specific performance of the Memorandum

of Understanding dated 21st May, 2006 and in the alternate for refund of the security deposit, and damages.

3. During the course of hearing of the arbitral proceedings before the learned arbitrator, the petitioner filed an application giving no objection to the grant of prayer for specific performance. Learned arbitrator recorded that the prayer for specific performance was initially opposed in the statement of defence filed by the petitioner. It was surprising that the petitioner made an application for allowing prayer for specific performance.

4. Learned arbitrator observed that there was litigation pending between the petitioner and one Mr.Prajapati. The petitioner was not in a position to make any statement as to when the dispute with the said Mr.Prajapati would be settled by the petitioner. In these circumstances the learned arbitrator held that if the dispute with Mr.Prajapati is not settled by the petitioner within six months, the respondent (original claimant) would be entitled to the relief of refund of Rs.4.50 crores with interest at the rate of 14% p.a. from 9th June, 2006 till 31st March, 2012 and at the rate of 12% p.a. from 1st April, 2012 till the date of payment and/or realization.

5. Mr.Samdahi, learned senior counsel for the petitioner invited my attention to the prayer in the statement of claim filed by the respondent and would submit that the learned arbitrator could not

have awarded the relief of specific performance and at the same time claim for refund in the sum of Rs.4.50 crores in lieu of specific performance. In support of this submission, learned senior counsel placed reliance on Order XXI Rule 32 of the Code of Civil Procedure, 1908 and also placed reliance on the judgment of the Supreme Court in case of **Rajendra Kumar vs. Kuldeep Singh & Ors. (2014) 15 SCC 529** and in particular paragraph 41 thereof.

6. It is submitted by the learned senior counsel that it is for the respondent to execute the decree for specific performance and if the petitioner is unable to perform its part of obligation by settling the dispute with Mr.Prajapati under the said arbitral award rendered by the learned arbitrator, the respondent in that event could have applied for sale of the suit property by invoking the provisions of Order XXI Rule 32 of the Code of Civil Procedure, 1908. It is submitted that interest awarded by the learned arbitrator is exorbitant.

7. Mr.Mody, learned counsel for the respondent (original claimant) submits that the prayer for specific performance was vehemently opposed in the statement of defence filed by the petitioner before the learned arbitrator. Only during the course of arguments, the petitioner itself filed an application thereby agreeing to grant prayer for specific performance. Learned arbitrator rightly

made the observation about this conduct on the part of the petitioner. Learned arbitrator raised a query upon the petitioner as to when the dispute would be settled with Mr.Prajapati and the objections set out in the Memorandum of Understanding to be complied with by the petitioner. The petitioner did not give any satisfactory reply to the said query raised by the learned arbitrator.

8. The learned counsel submits that in these circumstances since the petitioner had not disputed the receipt of Rs.4.50 crores from the respondent, learned arbitrator while rejecting the claim of the respondent for damages awarded the claim for specific performance and granted six months time for specific performance in paragraph 44 (a) and (b) and only if the petitioner does not specifically perform its part of obligation under the Memorandum of Understanding then only to refund of Rs.4.50 crores with interest to the respondent.

9. Learned counsel for the respondent submits that the petitioner had filed an application under section 9 of the Arbitration Act before this Court bearing Commercial Arbitration Petition (Lodging) No.412 of 2019 *inter-alia* praying for extension of time for further period of six months to specifically perform the said Memorandum of Understanding by settling the dispute with the said Mr.Prajapati and/or get the said Mr.Prajapati evicted from the suit

property in terms of the arbitration award dated 17th October, 2018. He invited my attention to some of the averments made in the said arbitration petition and would submit that this Court has rejected the said Commercial Arbitration Petition (Lodging) No.412 of 2019 by an order passed by this Court yesterday i.e. 29th July, 2019.

10. Mr.Mody, learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of **Mrs.Chandnee Widya Vati Madden vs. Dr.C.L. Katilal & Ors., A.I.R. 1964 SC 978** and in particular paragraph 5 in support of his submission that if specific performance could not be granted, the Supreme Court in that event granted prayer for damages in the same decree.

11. It is not in dispute that the respondent had prayed for specific performance and in the alternate for damages as well as for refund of the amount paid by the respondent. It is also not in dispute that the petitioner itself had made an application before the learned arbitrator thereby agreeing to grant of specific performance in favour of the respondent as prayed. It is not in dispute that there was some litigation pending between the petitioner and said Mr.Prajapati in respect of the same property. Learned arbitrator enquired with the learned counsel for the petitioner while hearing the said application filed by the petitioner as to time required for performance of contract

and for settling the dispute with the said Mr.Prajapati. The petitioner however, could not give any satisfactory reply to the said query raised by the learned arbitrator.

12. There is no dispute that the petitioner had received a sum of Rs.4.50 crores from the respondent in respect of the suit property as and by way of earnest money. The petitioner initially refused to perform the obligation under the said Memorandum of Understanding dated 21st May, 2006 and at the same time refused to pay compensation to the respondent.

13. Considering the conduct of the petitioner in submitting to the decree of specific performance fully knowing well that the petitioner would not be able to comply with the said decree, learned arbitrator in these circumstances was justified in granting six months more time to the petitioner to comply with its obligation under the said Memorandum of Understanding dated 21st May, 2006 and in the event of the petitioner not performing the Memorandum of Understanding specifically within the time prescribed in paragraph 44(a) and (b) of the award, granted prayer for refund of Rs.4.50 crores with interest. Learned arbitrator rightly did not find the application of the petitioner for allowing the prayer for specific performance as prayed by the respondent genuine and *bonafide*.

14. It is not in dispute that the learned arbitrator has rejected

the claim for damages prayed by the respondent in addition to the said amount of Rs.4.50 crores for refund of the amount paid by the respondent in lieu of prayer for specific performance.

15. A perusal of the arbitral award rendered by the learned arbitrator indicates that the learned arbitrator awarded the prayer for refund of a sum of Rs.4.50 crores with interest awarded only in the event of the petitioner not complying with its obligation under the said Memorandum of Understanding within six months. There is no substance in the submission made by Mr.Samdani, learned senior counsel for the petitioner that the learned arbitrator has granted both the reliefs at the same time.

16. It is not in dispute that the petitioner itself had prayed for extension of time to comply with the obligations under the said Memorandum of Understanding in terms of the arbitral award rendered by the learned arbitrator by filing Commercial Arbitration Petition (Lodging) No.412 of 2019. This Court has already rejected the said petition filed by the petitioner. The learned arbitrator has directed refund of the amount which was paid by the respondent to the petitioner as and by way of earnest money in the event of the petitioner refusing to comply with the directions issued in paragraph 44(a) and (b) of the award.

17. It is not in dispute that there was no stay to the arbitral

award rendered by the learned arbitrator granted by this Court. The time of six months granted in paragraph 44 (a) and (b) while granting prayer for specific performance with a direction to settle the litigation with the said Mr.Prajapati has already expired. In my view, the alternate relief granted in paragraph 44 (c) for refund of an amount of Rs.4.50 crores with interest only is thus in force today. The challenge to the arbitral award on the ground that both the reliefs are granted by the learned arbitrator even otherwise does not survive. Judgment of the Supreme Court in case of **Rajendra Kumar** (supra) is clearly distinguishable in the facts of this case. In my view reliance placed by the learned senior counsel on Order XXI Rule 32 of the Code of Civil Procedure is misplaced in the facts and circumstances of this case.

18. In so far as the rate of interest granted by the learned arbitrator at the rate of 14% p.a. for the period from 9th June, 2006 till 31st March, 2012 and at the rate of 12% p.a. from 1st April, 2012 till the date of payment and/or realization on Rs.4.50 crores is concerned, it is not in dispute that the learned arbitrator has rejected the claim for damages made by the respondent. The amount of Rs.4.50 crores was paid by the respondent to the petitioner in the year 2006. The rate of interest thus awarded by the learned arbitrator at the rate of 14% p.a. for the period 9th June, 2006 till 31st March,

2012 is justified and does not warrant any interference by this Court.

19. Insofar as the interest awarded from 1st April, 2012 till payment is concerned, the rate of interest is reduced to 9% p.a.

20. The award is partly set aside to the aforesaid extent. The Commercial Arbitration Petition No.221 of 2019 is partly allowed. There shall be no order as to cost.

(R.D. DHANUKA, J.)