JPP

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

APPEAL (LODG.) NO. 90 OF 2019
in
NOTICE OF MOTION NO. 2077 OF 2015
with
NOTICE OF MOTION (LODG.) NO. 204 OF 2019
in
EXECUTION APPLICATION NO. 1695 OF 2015

Mehrunnissa Sheikh Abdul Rahim … Appellant.

V/s.

Rashidabai Allarakha & Ors. ... Respondents.

Mr. Kevic Setalvad, Senior Advocate a/w. Mr. Akhilesh Dubey, Mr. Parag Joshi, Mr. Awais Ahmedji and Mr. Uttam Dubey I/b. Dharmesh S. Joshi for the Appellant.

Mr. Chirag Balsara a/w. Mr. Uzai Kazi and Mr. Huda Diamondwala I/b. Diamondwala & Co. for the Respondent Nos. 1 to 11.

Mr. Javeed Hussein I/b. Hussein & Co. for Respondent Nos. 12 & 13.

CORAM : NARESH H. PATIL,C.J. &
N.M. JAMDAR, J.

DATE : 4 MARCH 2019.

P.C. :-

The Respondents moved for executing the Arbitral

Award in their favour. The Appellant, against whom the Award is passed, raised an objection that the award is being executed in respect of properties which are not a part of the Claim. The objection was rejected by the learned Single Judge by the impugned order. Hence, this Appeal.

2. The objection of the Appellant is that instead of 33 rooms referred to in the claim of the Respondents, the Award is being executed against 38 rooms. The Respondents contend that the arbitral Award granted them the entire, ground, first, second and third floor, and the number of rooms in these floors is irrelevant, and the objection raised is a pure afterthought since the challenge on merit has failed.

3. The Respondents – Claimants and the Appellant were partners of a partnership firm-M/s. Hotel Sagar. The firm was governed by the Deed of Partnership dated 12 July 2002. The partnership firm had certain properties. Dispute arose between the partners, and the partnership firm was sought to be dissolved. Arbitration clause was invoked. The Respondents filed an Arbitration Petition No.1276 of 2010 under the provisions of Section 9 of the Arbitration and Conciliation Act, 1996. The learned Single Judge, by order dated 24 January 2011, directed the parties to maintain status-quo and referred the dispute for arbitration.

4. The Respondents contended before the Arbitrator that the partnership firm stood dissolved by notices of dissolution dated 20 February 2009 and 13 May 2009. The Respondents called upon the Appellant and the other Respondents therein to render true and correct accounts of the firm. They also sought that the assets of the firm be sold and the sale proceeds be disbursed. The Appellant contested the claim made by the Respondents on merits. The Arbitrator framed the points for determination. One of the point was whether the building alongwith basement is an asset of the firm. The Arbitrator interalia held that the ground floor, the first floor, the second floor and the third floor terrace of the building are the partnership properties, but the basement was not as it was mentioned in the Partnership Deed. Accordingly the Arbitrator passed an Award on 30 September 2014.

5. Both, the Appellant and the Respondents, challenged the Award. The Appellant filed Arbitration Petition No. 456 of 2015. Respondent Nos. 1 to 11 filed Arbitration Petition No. 1683 of 2014 and the Respondent – Original Decree Holder filed Arbitration Petition No. 646 of 2015 challenging the portion of the Award regarding basement. The learned Single Judge, by common order dated 30 July 2015, dismissed the three Arbitration Petition.

6. The Respondent Nos. 1 to 11 filed Execution Application No. 1695 of 2015 on 7 August 2015. On 28 August

2015, the learned Single Judge passed an order on application for appointment of Commissioner for Taking Accounts for carrying out sale of the property. He filed a report regarding 38 rooms. Meetings were held before the Commissioner on 7 September 2015, 14 September 2015, 5 October 2015, 19 October 2015, 20 December 2015. On 27 January 2016 the Commissioner settled draft of proclamation of sale. A programme for sale was drawn up. The date of public notice was fixed as 31 January 2016. The Respondents – Original Decree Holders and Respondent Nos.2 and 3 gave their joint offer of Rupees Twenty One Crores and alongwith the demand draft of Rupees One Crore as earnest money deposit.

7. Appeals were filed both the Appellant and the Respondents, challenging the dismissal of their Arbitration Petition. On 17 February 2016, the public auction was stayed. Thereafter, according to the order passed, the Commissioner opened the bids and found that there was only one joint bid from the Respondent and an offer of Rupees Twenty One Crores.

8. On 31 August 2018, the Division Bench dismissed both the Appeals. On 12 November 2018, the Appeal filed by the Appellants was dismissed by the Supreme Court. On 14 December 2018, notice was issued by the Supreme Court in the appeal filed by the Respondents in respect of the basement.

9. The two things emerge from this chronology. First that the Appellant's challenge on merits of the Award stands concluded. The second that the Appellant was aware that the Award is being executed in respect of 38 rooms and not 33, before the challenge to the award concluded finally.

10. The Appeal arises from arbitration proceedings and not a Civil Suit. The Award holds that the firm owns the ground floor, first floor, second floor and third floor terrace of the building. There is no reference to the rooms but to the entire floors. It is not that that the operative portion of the Award refers to 33 rooms yet the Award is being executed for 38 rooms, but it is the contention of the Appellant that this direction will have to be restricted to the 33 rooms. For that purpose, the Appellant has relied upon the schedule of the properties of the partnership firm as stated in the claim. The Appellant has also relied upon the order passed by the learned Single Judge on 28 August 2015 in the execution application referring to the suit property. The Appellant also relied upon the provisions of Order 14 Rule 1 of the Code of Civil Procedure and the decision of the Apex Court in the case of *Bachhaj Nahar v/s. Nilima Mandal and Anr.*[1] In short, it is the contention of the Appellant that the Award can be executed only in respect of 33 rooms as that is all that was specified in the claim and the matter was argued on that basis. It was contended that the learned Single Judge should have seen that

1 (2008) 17 SCC 491

there was no discussion or dispute as regard the number of rooms, because the Respondents had restricted the claim to only 33 rooms.

11. We are unable to accept the contention of the Appellant. The Arbitrator was considering a dispute regarding dissolution of a partnership firm. The Arbitrator was considering the distribution of shares, after sale of partnership properties. The property in the proceedings inter-alia consisted of a building which had basement, ground floor, first floor, second floor and third floor. As the pleadings of the parties and the arguments before the Arbitrator show, the debate was broad based and not specific to number of rooms. Nothing in the Award or pleading shows that there was conscious delineation of 33 and 38 rooms. The number of rooms, was not a determining factor. Challenge raised before the Arbitrator was to the building as property of the partnership. The Arbitrator held that the ground, first, second and third floors belong to partnership and the basement did not. Therefore there is no reason to narrow down the Award to exclude 5 rooms, when the operative portion does not say so.

12. To examine the conduct of the Appellant, it was possible that the Award could be construed irrespective of the number of rooms, yet the Appellant did not raise this ground before the learned Single Judge when the Arbitration Petitions were heard. Not

only that, before the Appeal was heard on merits by the Appeal Bench, the Respondents – Decree Holders had made their intention clear that they are executing the Award in respect of 38 rooms. Even at that stage no arguments were made before the Division Bench. Thereafter, the challenge was further taken to the Supreme Court and there also the ground was not taken.

13. It is now when the Award is to be executed and after the Respondents have submitted their bid of Rupees Twenty One Crores depositing Rupees One Crore as earnest money, that this ground is being put forth. The learned Single Judge has considered all these aspects and has held that the issue of 33 and 38 rooms was irrelevant. We do not find that there is any error in the approach adopted by the learned Single Judge.

14. The decision of *Bachhaj Nahar* relied upon by the Appellant arose from the judgment passed by the High Court in the Second Appeal. The Supreme Court observed that the evidence cannot be led in respect of a plea not put forward in the pleadings, factual issue cannot be considered first time in the First Appeal and the Court cannot make out the case not pleaded, suo motu. In the present case the parties were fully aware what was being claimed. The claim was to the building as a partnership asset. The claim was not put forth room-wise. The basement was excluded on the basis that it was not mentioned in the partnership deed. In the

circumstances, the ratio in *Bacchaj Nahar* cannot be directly applied to the case at hand.

15. There is no reason to interfere. The Appeal is accordingly dismissed.

N.M. JAMDAR, J. **CHIEF JUSTICE**