Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION NO. 422 OF 2018
WITH
NOTICE OF MOTION NO. 714 OF 2018
WITH
COMMERCIAL ARBITRATION PETITION NO. 686 OF 2018

Premji Kara Charitable Trust through its Trustees …Petitioners
Versus
Raunak Infra (Girgaum) …Respondent

Mr Kirit Munshi, *i/b Nita Solanki, for the Petitioners in CARBP/422/18 & for the Respondents in CARBP/686/18.*
Mr Gouresh Mogre, *with Amogh Khadye, for the Respondent in CARBP/422/18 & for the Petitioner in CARBP/686/18.*

CORAM: G.S. PATEL, J
DATED: 25th February 2019

PC:-

1. The challenge in these two cross-Commercial Arbitration Petitions is to an arbitral award dated 4th December 2017 of a learned Sole Arbitrator, an Advocate at this Bar. I will take the relevant references from Commercial Arbitration Petition No. 422 of 2018 as both sides have used the compilation in that matter.

2. Before the Sole Arbitrator the Respondent in this Petition, Raunak Infra (Girgaum) (**"Raunak Infra"**) was the claimant. Raunak Infra is the Petitioner in Commercial Arbitration Petition No. 686 of 2018. It sought specific performance of a Memorandum of Understanding (**"MoU"**) dated 11th December 2012 regarding sale by the Respondent Trust (**"The Trust"**) of an immovable property on a land and building at Girgaum in Mumbai. Raunak Infra paid the Trust Rs. 51,10,000/- as earnest money and Rs. 2,14,50,000/- as part payment of the total consideration. The unpaid amount was Rs. 2,65,40,000/-.

3. The Trust made a Counter Claim in which it sought damages under different heads and costs of the litigation. Evidence was led before the learned Sole Arbitrator after pleadings were filed and points for determination or issues were framed. The total claim for damages by the Trust was Rs. 18,22,90,000/-.

4. The learned Sole Arbitrator framed four issues for determination. There is no challenge by either of the parties to the finding on the jurisdictional issue. On the second issue, the learned Sole Arbitrator returned a finding that Raunak Infra was not entitled to specific performance of the MoU in question. Issues 3 and 4 were whether in the alternative Raunak Infra was entitled to an amount of Rs. 2,72,60,000/- with or without interest, and whether the Respondent proved that it was entitled to damages in the amount of

Rs. 18,22,90,000/-. Both these were answered partly in the affirmative.

5. The principal reason for declining the claim for specific performance, and this is set out in paragraphs 8 to 14 of the Award, is that Raunak Infra admitted its inability to pay the balance and, therefore, the learned Arbitrator held that it has failed to prove readiness and willingness as required by law.

6. Coming to the third issue, the claim by Raunak Infra was on the basis of Clause 15 of the MoU which said that 10% of the earnest money would be forfeited in the event of a default by the purchasers. Both sides point out that there was also, on this limited third issue, a correction to the Arbitral Award and the reference in that Award to Clause 15 of the MoU. Ultimately, the learned Arbitrator answered issue No. 3 by holding that the Trust was not entitled to hold on to the amount deposited with the Trust except the earnest money deposit of Rs. 51,10,000/- and was liable to refund the amount of Rs. 2,14,50,000/- but without interest. No pre-suit interest was payable by the Trust to the Raunak Infra on a reading of Clause 15. The operative portion of the Award was that the Trust would pay to the Claimant a sum of Rs. 78,40,441/- which was the net amount after considering the other Awards also made by the learned Sole Arbitrator, i.e. Rs 2,14,15,000/- less the two amounts awarded to the Trust, namely, Rs. 1,01,09,559/- and Rs. 35 lakhs.

7. These two amounts of Rs. 1,01,09,559/- and Rs. 35 lakhs are really the substance of the two rival challenges in these two

Petitions. The Trust has obtained Awards in these amounts. The first represents interest at 9% per annum on the balance consideration unpaid, and this was computed from 28th September 2012, the date of deposit of the earnest money, until the date of the High Court's reference to arbitration, 22nd December 2016. The interest was awarded on the balance unpaid amount of Rs. 2,65,40,000/- and worked out to Rs. 1,01,09,559/-. The reasoning in this regard is to be found in paragraphs 19 to 26. The learned Sole Arbitrator held that Section 31(7)(a) of the Arbitration Act would not permit a standalone claim for interest, and that interest would have been awarded only if there was an underlying money award. Therefore, in the absence for a claim of the balance, under the Arbitration Act simpliciter the claim for interest was perhaps outside the contours of the Arbitration Act. The learned Arbitrator however had regard to Section 4(2)(a) of the Interest Act 1978 and held that a Court—which would include an Arbitral Tribunal—"shall" allow interest in certain circumstances at a reasonable rate. One of those reasons was where money was deposited as a security for the performance of a contractual obligation and the interest would run from the date of the deposit until the date of institution of the proceedings. The Tribunal held that while the Interest Act did not specify the sum *on* which interest was to be paid it stood to reason that the interest could not be awarded on the amount deposited because the Trust already had use of that money but on the amount not deposited. It appears to me that the Tribunal looked at this interest award as a claim for an 'opportunity cost'; and seems to have said as much in paragraph 23 of the Award where the learned Sole Arbitrator said that the Trust had been deprived of the opportunity of investing the balance sum. The argument by Raunak

Infra is that no interest was payable under Clause 15 and that in any event it could not be from the date of the deposit. That is not a reason to find in favour of Raunak Infra and does not disclose an infirmity of the kind that would warrant interference with the Award in terms of the decision of the Supreme Court in *Associate Builders v Delhi Development Authority*.[1] The Tribunal provided reasons. It referenced a statute. It laid out an interpretation of that statute. Merely because some other view might be possible is no ground for interference with an Award made in circumstances such as these.

8. This leaves the three challenges mounted by the Trust which essentially seeks an enhancement. One of those challenges is that the Trust ought to have been awarded costs and that the learned Sole Arbitrator was in error in not awarding costs but costs are always in the discretion of every Court and the Tribunal and this furnishes no ground for interference.

9. The other ground canvassed by the Trust is that the Arbitrator did not grant any amount of damages for loss or decrease in the value of the property. The Trust claimed Rs. 3.31 crores on this ground. I find that the Arbitrator carefully considered the evidence. In paragraph 28, he found that other than producing a solitary offer from some builder at a lower price, the Trust did nothing to establish a depreciation or a decline in the value of the property. The Tribunal held that a single indicator or instance is not always significant. I am unable to accept Mr Munshi's submission that some evidence, no matter how meagre, should have been

1 (2015) 3 SCC 49.

sufficient. That is always unwise. The learned Arbitrator found that the Trust had not seriously conducted any exercise to establish the true market value of the property. It had issued no public notice. It had merely received a solitary offer and this could not in itself be used as proof sufficient of a depressed market value. Again, this is an conclusion arrived at after an examination of the evidence, and it is not possible in a Petition under Section 34 to re-appreciate the sufficiency of the reasons or to sit in appeal over them.

10. The Trust also made a claim for repair costs and said that the building had deteriorated in the time that Raunak Infra took to leave the MoU incomplete. It argued that none of this expenditure would have been necessary had Raunak Infra completed the transaction as required by the contract. That the building was dilapidated to begin with could have been no surprise to anyone. What the learned Arbitrator found was that the claim was untethered to any actual expenditure. All that the Trust had obtained was a quotation for repairs, and this was only an estimate prior to tenders being invited. Even that process had not begun. The learned Arbitrator correctly held that damages that result from a single cause of action must be assessed and recovered once and for all and that a plaintiff must sue in a single action for all his losses, past, present and future, certain and contingent. The Tribunal also held that these damages were incapable of determination with any mathematical precision. In addition there were other possibilities. Instead of repairs, an entire redevelopment might yet be possible. The amount of repair cost claimed by the Trust was Rs. 1 crore and this the Tribunal declined, in my view quite correctly. The quotation that the Trust obtained of 9th February 2017 was about Rs. 1.13 crores. Believing that some repairs would undoubtedly be necessary the Tribunal in its discretion awarded Rs. 35 lakhs, just under half the total amount received in the quotation. Mr Munshi's submission that the entire amount ought to have been awarded is not one that commends itself. Indeed, it is a submission that more or less answers itself because even today nobody knows whether the actual costs are going to be higher or lower that the quotation received. Further, as the learned Arbitrator himself said, there are other possibilities still afloat. Again, this is an exercise of a discretion well within an Arbitral Tribunal's remit. There is no demonstrated illegality or perversity of the kind that would bring this matter within the frame of the Supreme Court decision cited above.

11. There is no merit in these Petitions. Both the Petitions are dismissed. There will be no order as to costs.

12. The Notices of Motion do not survive and are disposed of as infructuous.

(G. S. PATEL, J)