

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

ARBITRATION PETITION NO. 1326 OF 2013

Mrs.Kusumben Mahendra Dadia & Ors.

...Petitioners

vs

Dr.Panalal Amratlal Dadia & Ors.

...Respondents

Mr.Subhash Jha with Hare Krishna Mishra, Ankita Pawar & Sanjana Pardeshi for Petitioners.

CORAM : S.C.GUPTE, J.

DATE : 15 JANUARY 2019

P.C. :

Heard learned Counsel for the Petitioners. The Respondents are absent.

2 The Petitioners challenge an order passed by a sole arbitrator in a reference arising out of a family arrangement, which was recorded in a document signed by the parties on 4 February 1999. The document contains an arbitration clause requiring reference of disputes concerning implementation of the family arrangement or interpretation or enforcement of any of its terms and conditions to the sole arbitration of an agreed arbitrator. The agreed arbitrator was a chartered accountant well known to the family by the name of Hemraj Jain. The disputes and differences having arisen between the parties in pursuance of the family arrangement, the arbitration agreement was invoked and the matter was carried before the named arbitrator. In a challenge to his award, by consent of parties, the award was set aside and the disputes were referred to the sole arbitration of another arbitrator. The award rendered by this arbitrator is the subject

matter of challenge in the present petition.

3 The main objection of the Petitioners to the impugned award is that the family arrangement is contained entirely in the document signed on 4 February 1999. This family arrangement was contested by Respondent No.1, who was the claimant before the arbitral forum. It is submitted that though the Respondent's case in answer to the family arrangement and his refusal to perform the same was not countenanced by the learned arbitrator, the learned arbitrator appears to have directed payment under an oral agreement, which was not reflected in this family arrangement. It is submitted that there was no credible evidence before the learned arbitrator on the oral agreement and particularly, the commitment on the part of the Petitioners herein (original Respondent Nos.1 to 5 to the reference) to pay a sum of Rs.60 lakhs in cash to Respondent No.1 (claimant in the reference). Learned Counsel submits that not only was there no credible evidence for the oral agreement to pay Rs.60 lakhs, but that there were contradictions emerging from the correspondence made by Respondent No.1 in this behalf as to the exact amount agreed to between the parties. Learned Counsel further submits that in any event, this being an agreement for payment of unaccounted money, the agreement would be clearly termed as illegal and no court can come to the rescue of the party, who complains of any breach thereof. It is submitted that the loss in such cases must be allowed to lie where it falls. Learned Counsel also relies on Section 92 of the Evidence Act in this behalf.

4 It was the case of Respondent No.1 before the learned arbitrator that payment of Rs.60 lakhs in cash agreed to by the parties was

a condition of the family arrangement. It was submitted that out of this amount, a sum of Rs.20 lakhs was in fact paid by the Petitioners to Respondent No.1 on the same day. It was submitted that it was agreed at the time of the family arrangement, on the advice of the chartered accountant of the parties, the said Hemraj Jain, that this payment would not be reflected in the family arrangement, but that the Petitioners would pay the balance amount in eighteen instalments. It was the case of Respondent No.1 that only one instalment of Rupees One Lakh was paid by the Petitioners and as a result, a sum of Rs.39 lakhs, which was to be paid in 17 instalments, was outstanding. This amount was part of the Respondent's claim before the learned arbitrator. The learned arbitrator found in his impugned award that Respondent No.1 had deposed to the oral agreement between the parties and its particulars in his examination in chief. The learned arbitrator found that the evidence of Respondent No.1 had gone unchallenged in the reference. Firstly, there was no suggestion in the cross-examination of Respondent No.1 that his claim of oral agreement was either wrong or that no such agreement was ever entered into. Secondly, the learned arbitrator noted that none of the Respondents was examined to deny the claim of oral agreement made by the claimants. Even Hemraj Jain, who had eventually gone against the claimants, was not examined by anyone in respect of the alleged oral agreement. The learned arbitrator also found that there was an adequate explanation why the oral agreement concerning payment of Rs.60 lakhs was not incorporated in the written deed. Even the evidence given by Respondent No.1 in this behalf had gone unchallenged, i.e. not challenged in the cross-examination or in the evidence of the Petitioners. The learned arbitrator also considered in this behalf the correspondence addressed by Respondent No.1 as well as

Hemraj Jain, which referred to the documents including surrender or relinquishment of tenancy rights executed by Respondent No.1 being kept in his custody to be handed over after payment of the agreed sum by the Petitioners to Respondent No.1. The learned arbitrator also considered the rationale for payment of Rs.60 lakhs as the value of leasehold premises of Brite Tools Company Pvt.Ltd., shares of which were surrendered by Respondent No.1. In these circumstances, the learned arbitrator held the agreement to pay Rs.60 lakhs as proved. Respondent No.1 having claimed to have received Rs.21 lakhs from out of this amount, the learned arbitrator granted an award in the sum of Rs.39 lakhs to Respondent No.1 claimant. The learned arbitrator simultaneously directed the claimants (including Respondent No.1 herein) to comply with the terms of the family arrangement by executing the requisite documents in favour of the Petitioners after this payment was received from the Petitioners.

5 The conclusion on the oral agreement for payment of Rs.60 lakhs was arrived at by the learned arbitrator after assessment of oral and documentary evidence. The conclusion is a pre-eminently possible view. After all, Respondent No.1 had clearly and unequivocally deposed to the oral agreement in his examination-in-chief. In cross-examination, there was no suggestion that the Respondent's claim of oral agreement was either wrong or that no such agreement was arrived at between the parties. There was no suggestion that the family arrangement, which is found recorded in the document, was the only agreement between the parties. So also, none of the Petitioners, who are claimed to have signed the document of family arrangement, and agreed to such payment in terms of the oral agreement, was examined before the learned arbitrator, to deny the claim. There was,

as noted above, a reference to the oral agreement in a communication addressed by Hemraj; Hemraj had informed the parties in this communication that he was holding all documents of relinquishment, etc. executed in pursuance of the family arrangement and that he would be handing over the same to the respective parties after the amount agreed to between the parties was paid to Respondent No.1 herein. All this evidence is capable of supporting the conclusion drawn by the learned arbitrator. It is true that in one of the letters addressed by Respondent No.1 to the Petitioners, there is a reference to an outstanding amount of Rs.35 lakhs and payment of Rupees One Lakh subsequently made, making the balance outstanding at Rs.34 lakhs. There is no explanation for this reference in the face of the specific case of the total outstanding being of Rs.40 lakhs and payment made being of Rs.1 lakh, suggesting a balance of Rs.39 lakhs. But this is one circumstance, possibly a pointer in favour of the Petitioners. There are the other circumstances referred to by the arbitrator. The arbitrator had to assess the evidence led before him on a balance of probabilities and find whether the claimant's case was proved. If the arbitrator assesses the evidence and comes to a finding, all that the challenge court has to do under Section 34 is to examine, whether the view of the arbitrator is an impossible view, that is to say, there is nothing to support it in evidence; the arbitrator has considered irrelevant or non-germane material; or disregarded relevant material. If no such case is found, it is not for the court to upset the award on the ground of want of sufficient evidence or by re-appreciating the evidence.

6 Mr.Zha, learned Counsel for the Petitioners, relies on judgments of the Supreme Court in the cases of **Sahu Madho Das vs.**

Pandit Mukand Ram¹ and Maturi Pullaiah alias Naga Pullaiah vs. Maturi Narasimham² in support of his submission that the court is bound to make every effort to sustain a family arrangement. Relying on these judgments, learned Counsel submits that the family arrangement has a special purpose and that is to bring about harmony in the family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all. There is no quarrel with the proposition laid down in these judgments. The point here is that the arbitrator has not disregarded the family arrangement or allowed the parties to resile from the same. The arbitrator has instead considered the oral agreement to pay the amount as a condition of the family arrangement and has enforced such condition along with the family arrangement. This was also with a view to keep peace and harmony within the family and no fault can be found with the same with reference to the law stated by the Supreme Court in these two judgments.

7 Learned Counsel also relies on the judgment of the Supreme Court in the case of **G. Pankanakshi Amma vs. Mathai Mathew (Dead) Through LRs.³** Relying on this judgment, it is submitted that no unaccounted transaction, which is illegal *per se*, can be upheld by the court. It is submitted that no court can come to the aid of a party in an illegal transaction; it was settled law that in such cases, the loss must be allowed to lie where it falls. There is nothing in this case to suggest either that the amounts to be paid to Respondent No.1 constitute an illegal transaction or that the amounts were to be unaccounted. Merely because the payment is

1 (1955) 2 SCR 22 : AIR 1955 SC 481

2 AIR 1966 SC 1836

3 (2004) 12 SCC 83

required to be made in cash and in that sense, not reflected in the document of family arrangement signed by the parties, it cannot be said either that the money to be paid was illegitimate or it was unaccounted for. At any rate no such case was brought out either in the pleadings or evidence.

9 Learned Counsel relies on the case of **T.V.R. Subbu Chetty's Family Charities vs. M. Raghava Mudaliar**⁴. Relying on this case, learned Counsel submits that the party not having taken objection to a transaction and having elected to assent to the same, cannot be allowed to avoid or go back on the same at a later stage. The proposition of law enunciated by the Supreme Court in this case has no relevance to the facts of our case. The matter before the Supreme Court was a case where the party before the court, with knowledge of his rights, had assented to a transaction which was otherwise voidable at his instance and taken benefits under it. The court, in the premises, held that having once elected to assent to the transaction which was voidable at his instance, the party could not be permitted to avoid or go back on it at a later stage; having made his election, he is bound by it. There is no relevance of this proposition as far as the facts of the present petition are concerned. There is no case of voidable agreement or assent to the transaction here. The express case of the party throughout has been that his consent was subject to a condition, namely, compliance with the oral agreement of payment of Rs.60 lakhs.

9 Lastly, learned Counsel submits that an oral agreement, terms whereof are at variance with a contemporaneous written agreement,

4 (1961) 3 SCR 624 : AIR 1961 SC 797

cannot be permitted to be set up or proved at a trial; that is the effect of Section 92 of the Evidence Act. The record of the case does not indicate that any such argument was advanced before the learned arbitrator. There is no such objection or argument to be found in the grounds of challenge set out in the present petition. Be that as it may, even as a matter of law, existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any contract, grant or disposition of property, is covered under the third proviso to Section 92 and is certainly provable. Anyway, these are all matters of fact and are to be pleaded and proved. No such plea or evidence was placed before the learned arbitrator and none can be urged before the challenge court.

10 There is, accordingly, no merit in the challenge to the impugned award. The arbitration petition is dismissed.

(S.C. GUPTE, J.)