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

COMMERCIAL ARBITRATION PETITION NO.343 OF 2019

- | | | | |
|-----|--|---|----------------|
| 1). | Arvind V. Sheth, |) | |
| | Aged about 73 years, Occupation |) | |
| | Business, having his residential |) | |
| | address at 104, Jolly Maker – 3, |) | |
| | Prakash Pethe Marg, Colaba, |) | |
| | Mumbai – 400 005, and |) | |
| | business address at - |) | |
| | Indo World Trade Collaborations, |) | |
| | 1016, 10 th Floor, Raheja Chambers, |) | |
| | Nariman Point, Mumbai – 400 021. |) | |
| | |) | |
| 2). | Indo World Trade Collaborations |) | |
| | Proprietary Firm of Petitioner No.1 |) | |
| | abovenamed, having its office at |) | |
| | 1016, 10 th Floor, Raheja Chambers, |) | |
| | Nariman Point, Mumbai – 400 021. |) | |
| | |) | ...Petitioners |

....Versus....

- | | | | |
|--|--|---|---------------|
| | Mahendra Mohanlal Jain, |) | |
| | Age about 50 years, Occupation : |) | |
| | Business of Mumbai, Indian Inhabitant |) | |
| | Sole Proprietor of – M/s.Mahendra Sales |) | |
| | having its office at - “Mahendra Sales”, |) | |
| | 119, Abdul Rehman Street, Mumbai – 03. |) | |
| | |) | ...Respondent |

Mr.Karl Tamboly with Mr.Omkar Kulkarni & Mr.Anuj Desai i/b
M/s.Najma J. Sharif for the Petitioners.

Mr.Sharan Jagtiani with Mr.Sumeet Nankani & Ms.Nita Solanki i/b
M/s.Kiran Jain & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 11TH SEPTEMBER, 2019.

ORAL JUDGMENT :-

1. By this petition, filed under section 34 of the Arbitration &
Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioners

have impugned the arbitral award dated 1st December, 2017 passed by the learned arbitrator directing the petitioners to pay a sum of Rs.1,37,70,861/- along with further interest at the rate of 18% p.a. from the date of filing of the statement of claim till realization and costs of the arbitration in the sum of Rs.10,00,000/-.

2. There is no dispute between the parties that under the Memorandum of Understanding dated 14th June, 2007 entered into between the petitioners and the respondent, the petitioners were appointed as the sole selling agents for a project of the respondent on the terms and conditions recorded in the said Memorandum of Understanding. Clause 7 of the said Memorandum of Understanding provided that the respondent to pay a sum of Rs.2,00,000/- per month to the petitioners and if the project of the petitioners does not start or whatsoever situation arises and the project is not going for any reason, the petitioners would be entitled to recall the entire amount whatever is paid by the respondent by the respondent to the petitioners to the respondent with 12% p.a. simple interest to be calculated within three months from the expiry of 36 months. Clause 9 of the Memorandum of Understanding provided that till the project was not finalized and could not get any concrete platform till then, whatever amount given by the respondent to the petitioners for pre-launch preliminary expenditure to the petitioners would be calculated as a deposit / loan amount in the account.

3. It is not in dispute that the respondent paid a sum of

Rs.72,00,000/- plus Rs.4,50,000/- to the petitioners. It is also not in dispute that the project of the petitioners did not commence.

4. The petitioners did not refund the amount with interest as contemplated under the said Memorandum of Undertaking to the respondent. The disputes were referred to arbitration under the arbitration agreement recorded under clause 10 of the Memorandum of Understanding. Learned arbitrator made an award directing the petitioners to pay a sum of Rs.1,37,70,861/- with further interest at the rate of 18% p.a. from the date of filing of the statement of claim and costs of Rs.10,00,000/-.

5. Mr.Tamboly, learned counsel appearing for the petitioner invited my attention to clause 7 of the Memorandum of Understanding and also the statement of claim filed by the respondent and would submit that the respondent was not entitled to recover interest from the petitioners at the rate of 18% p.a. on the sum of Rs.72,00,000/- but could at most claim interest at the simple rate of 12% p.a. He submits that in the statement of claim filed by the respondent, the respondent has claimed compound interest which would be more than 18% p.a.

6. It is submitted by the learned counsel that the learned arbitrator has allowed the entire claim of Rs.1,37,70,861/- with further interest thereon at 18% p.a. from the date of filing of the statement of claim till realization. It is submitted by the learned counsel that since

this Court cannot sever bad part of the award from good part of the award made by the learned arbitrator, the entire award deserves to be set aside on this ground alone.

7. Mr.Jagtiani, learned counsel appearing for the respondent on the other hand would submit that clause 7 of the Memorandum of Understanding has to be read with clause 9 of the Memorandum of Understanding which would indicate that the entire amount paid by the respondent to the petitioners would be treated as deposit / loan amount in the account of the petitioners and has to be paid with interest from the date of such deposit every month till the said amount was liable to be refunded within three months after expiry of 36 months.

8. It is submitted by the learned counsel that insofar as the amount of Rs.4,50,000/- paid by the respondent to the petitioners is concerned, the said amount was not paid towards the documentation charges but was paid along with other deposit. No plea was raised by the petitioners in the statement of defence filed before the learned arbitrator that the said amount was paid by the respondent towards documentation charges and was not liable to be refunded to the respondent by the petitioners.

9. Mr.Jagtiani, learned counsel for the respondent fairly pointed out that clauses 7 and 9 of the Memorandum of Understanding did not contemplate payment of interest at the rate of

18% p.a. or compound interest. He however, submits that clauses 7 and 9 have to be read together and on interpretation of these provisions, the respondent was entitled to claim interest on each installment which was to be treated as deposit / loan amount on reducing balance amount. His client would be entitled for interest at the rate of 12% p.a. till the date of payment after expiry of 36 months.

10. Learned counsel invited my attention to the particulars of claim annexed to the statement of claim and would submit that each installment paid by the respondent to the petitioners was separately reflected in the particulars of claim. Separate amount of interest was added to sch installment. He submits that this Court has power to sever that part of the award and to modify the award under section 34 of the Arbitration Act. The respondent has already attached the immovable property of the petitioners in the execution of the arbitral award.

11. The short question that arises for consideration of this Court is whether the learned arbitrator could have awarded interest in favour of the respondent at the compound rate and that also at the rate of 18% p.a. and whether that part of the award is in the teeth of clauses 7 and 9 of the Memorandum of Understanding entered into between the parties or not.

12. A perusal of the record clearly indicates that there is no dispute that the respondent had paid an amount of Rs.76,50,000/- to

the petitioners under the said Memorandum of Understanding which was inclusive of 36 installments of Rs.2,00,000/- each and separate amount of Rs.4,50,000/-. It was not the case of the petitioner before the learned arbitrator that the said amount of Rs.4,50,000/- paid by the respondent to the petitioners was towards the documentation charges. I am thus not inclined to accept the submission of Mr.Tamboly, learned counsel for the petitioners that under the Head "Income and Expenditure" at page 42 of the petition, since it was the alleged liability of the respondent to pay the documentation charges, the petitioners were not liable to refund the said amount of Rs.4,50,000/-. Neither any such plea was raised by the petitioners nor the same was proved before the learned arbitrator. The factum of payment of Rs.4,50,000/- from the respondent to the petitioner is not disputed even before the learned arbitrator or even in this arbitration petition. The factum of receipt of Rs.72,00,000/- towards installments paid by the respondent is also not in dispute. The petitioners have not disputed that the project of the petitioners did not start within the time prescribed under the Memorandum of Understanding.

13. Insofar as the submission of the learned counsel for the petitioners that the learned arbitrator could not have awarded interest at the compound rate of interest and also at the rate of 18% p.a. is concerned, in my view, Mr.Tamboly, learned counsel for the petitioners is right in his submission that interest could not be awarded at the compound rate and that also at the rate of 18% p.a. on the amount paid by the respondent to the petitioners. Under

clause 7 which has to be read with clause 9 of the Memorandum of Understanding, in my view since the petitioners admittedly did not start their project and since the amount paid by the respondent was to be treated as deposit / loan amount in the account of the petitioners, the respondent was entitled to claim simple interest on each installment at the rate of 12% p.a. from the date of deposit till the date of payment. Section 31(7)(a) of the Arbitration Act itself clearly provides that unless otherwise agreed by the parties, where insofar as an arbitral award is for the payment of money is concerned, the arbitral tribunal may include in the sum for which the award is made interest at such rate as it deems reasonable. In my view, since the parties had agreed for fixed rate of interest under clause 7 which has to be read with clause 9 of the Memorandum of Understanding, learned arbitrator could not have awarded compound interest and that also at the rate of 18% p.a. This part of award thus deserves to be modified.

14. Insofar as the submission of Mr. Tamboly, learned counsel for the petitioners that this Court has no power to modify any part of award and thus the entire award deserves to be set aside is concerned, in my view, there is no merit in this submission of the learned counsel for the petitioners. Since the respondent itself had claimed separate amount towards the principal and towards interest as is apparent from the particulars of claim annexed to the statement of claim, in my view this Court can sever that portion of the award which grants 18% p.a. interest at the compound rate from the other

portion of the award by modifying that part of the award by exercising the powers under section 34 of the Arbitration Act. The Full Bench of this Court in case of **R.S. Jiwani (M/s.) Mumbai vs. Ircon International Limited (2010) BCR 529 (FB)**, has held that there is no bar in law in applying the doctrine of severability of the awards which are severable. The judicial discretion vested in the Court in terms of provisions of section 34 of the Arbitration & Conciliation Act, 1996 takes within the ambit power to set aside an award partly or wholly depending upon the facts and circumstances of the given case. The said judgment of this Court applies to the facts of this case. I am respectfully bound by the said judgment.

15. I therefore, pass the following order :-

a). Arbitral award dated 1st December, 2017 is modified as under :-

i). The petitioners would be liable to pay the principal amount of Rs.76,00,500/- to the respondent. The interest shall be paid by the petitioners to the respondent on each of the installment of Rs.2,00,000/- from the date of deposit till payment at the rate of 12% p.a. and also on Rs.4,50,000/- from the date of deposit till payment with interest at the same rate.

ii). The arbitral award in respect of costs of Rs.10,00,000/- is upheld.

b). Rest of the arbitral award is upheld.

c). The arbitration petition is disposed of on aforesaid terms.
There shall be no order as to costs.

(R.D. DHANUKA, J.)