

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

APPEAL NO.281 OF 2019
IN
REVIEW PETITION NO.6 OF 2018
IN
ARBITRATION PETITION NO.1325 OF 2012
WITH
NOTICE OF MOTION NO.515 OF 2019
IN
APPEAL NO.281 OF 2019

D. M. Builders & Developers	..Appellant
Versus	
Kukreja Construction Company	..Respondent

Mr. Mandar Soman a/w Divakar Rai, Advocates for the Appellant.
Mr. Mahesh Menon i/by Mahesh Menon & Co., Advocate for the Respondent.

CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.
DATE : 19th NOVEMBER, 2019

P.C.

1] The facts of the Appeal are peculiar and thus the order which we propose to pass would take colour from the peculiarity of the facts and therefore would be a peculiar order.

2] D. M. Builders and Developers, a partnership firm (Appellant) had two partners: Mr. Mohan Ghugh and Mr. Daulat Chugh.

3] The partnership firm executed a written Memorandum of Understanding (“MoU”) dated 25.08.2005 with Kukreja Construction Company (Respondent). As per the MoU, Kukreja Construction Company purchased development rights on land admeasuring 8700 sq.mtrs. out of a larger parcel of land admeasuring 10,541.30 sq.mtrs. at the rate of ₹ 675 per sq.ft. of FSI and paid thus ₹ 70,00,000/- to D. M. Builders and Developers.

4] Dispute arose between the parties to the MoU which had an arbitration clause and the dispute was referred to Justice H. Suresh, a retired Judge of this Court, vide order dated 16.09.2010 passed by a learned Single Judge of this Court.

5] The learned Arbitrator was constrained to pass an ex-parte Award on 19.07.2012 recording therein that Appellant refused to pay the fee of the Arbitrator. Their counsel Mr. Taneja filed a written statement-cum-claim and agreed to deposit Appellant’s share of the fee before the Arbitrator within six weeks of 21.06.2011 but did not do so. The counsel stopped appearing. Mr. Mohan Chugh, partner of the Appellant appeared on 14.11.2011 and undertook to pay the fee of the learned Arbitrator and ensured that his counsel is present but thereafter both disappeared.

6] The learned Arbitrator was thus constrained to proceed ex-parte against the Appellant. The Respondent led ex-parte evidence. The claim of the Respondent was decreed in sum of

₹ 15,00,00,000/- (₹ Fifteen Crores) together with interest at the rate of ₹ 18 percent per annum from the date when the statement of claim was filed.

7] The Appellant challenged the Award dated 19.07.2012 under Section 34 of the Arbitration and Conciliation Act, 1996, which was registered as Arbitration Petition No.1325 of 2012. It was listed before the learned Single Judge on 25.11.2013 when statement of learned counsel for the Appellant was recorded that within six weeks from 25.11.2013 ₹ 1 Crore would be deposited in this Court. A peremptory order was passed to the effect that if ₹ 1 Crore was not deposited in the Court the Petition would be dismissed without further reference to the Court.

8] The amount not being deposited, when Arbitration Petition was listed before the learned Single Judge on 24.01.2014 it was ordered that in view of the order dated 25.11.2013 the Arbitration Petition would be deemed to have been dismissed.

9] The Appellant filed Appeal (L) No.115 of 2014 challenging the order dated 25.11.2013 and the subsequent order dated 24.01.2014 which was allowed to be withdrawn requiring the Appellant to file an application seeking variation/modification of the order dated 25.11.2013 followed by the order dated 25.01.2014. The Appellant filed an application seeking review of the two orders and along therewith filed an application to condone the delay in seeking

review. This was in the year 2014. Delay being condoned in the year 2018, Review Application was registered as No.6 of 2018 which has been dismissed vide impugned order dated 13.08.2018 recording that the same was thoroughly misconceived and the reason to hold so is that the order dated 25.11.2013 was self operative order.

10] Now, when Arbitration Petition No.1325 of 2012 was filed under Section 34 of the Arbitration and Conciliation Act, 1996, the legal position was that the Award could not be enforced till the Petition was decided and thus the arguments by learned counsel for the Appellant that where was the need for the Appellant to deposit ₹ 1 Crore and give an undertaking to said effect before the learned Single Judge on 25.11.2013.

11] The second limb of the argument is that assuming such a deposit had to be made the right to challenge the Award which was a substantive right could not have been taken away. At best the Award could have been executed.

12] Under what circumstances Mr. Taneja the counsel engaged by the Appellant made a statement as recorded in the order dated 25.11.2013 can be inferred by us.

13] As noted above, the Appellant received ₹ 70,00,000/- from the Respondent under the MoU dated 25.08.2005. The Appellant was in breach of the terms of the MoU and the Award was

(13) -APP-281-19. doc.

in sum of ₹ 15,00,00,000/- (₹ Fifteen Crores). The Award is an ex-parte Award. Probably, the learned Single Judge must have put it to the counsel that ₹ 70,00,000/- received by the Appellant without any consideration flowing as required by the MoU to the Respondent would at least justify the Appellant depositing ₹ 1 Crore in this Court. The counsel readily accepted the same.

14] The peculiar facts noted herein-above would warrant the Appeal to be disposed of restoring Arbitration Petition No.1325 of 2012 but upon the condition that the Appellant deposits ₹ 1 Crores with the Prothonotary within 60 days from today. If deposited, the said amount would be received by the Respondent without any security. Upon deposit of ₹ 1 Crore, the impugned order dated 25.11.2013 as also order dated 13.08.2018 shall be treated to having set aside and Arbitration Petition No.1325 of 2012 restored for adjudication on merits.

15] In view of disposal of Appeal, Notice of Motion does not survive and is accordingly disposed of.

**Balaji G.
Panchal**

Digitally signed by
Balaji G. Panchal
Date: 2019.11.20
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SMT. BHARATI DANGRE, J

CHIEF JUSTICE