

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

COMMERCIAL ARBITRATION PETITION NO.221 OF 2021

Tulika Devidayal,		
Adult, Indian Inhabitant,		
Having residence address at 201B,		
Vivarea, Sane Guruji Marg,		
Jacobs Circle, Mumbai – 400 011.		.. Petitioner
Vs.		
1. Pradipkumar Laxmanbhai Patel,		
Adult, Indian Inhabitant,		
Having residence address at 1112, 11 th Floor,		
The Landmark, Sector No.7, Plot No.26A,		
Kharghar, Taluka–Panvel, Dist. Raigad		
Navi Mumbai – 410 209.		
2. L.K. Veer Associates,		
A Partnership Firm,		
Having its registered address at Shop Nos.6,7,8,		
Star Light-1, Plot No.1, Sector-5, Kamothe Tal.		
Navi Mumbai – 410 209.		
3. Abhyudaya Co-op. Bank Ltd.,		
Through Branch Manager,		
Dharti Complex, Manas Complex Road,		
Sector – 18, Kamothe, Panvel,		
Navi Mumbai – 410 206.		.. Respondents

Mr. A.S. Pal, i/by Mehta & Padamsey, for the Petitioner.

Mr. Shardul Singh, with Mr. Vinod U. Shinde, i/by Idris M. Vohra, for Respondent Nos.1 and 2.

CORAM : A. K. MENON, J.
DATE : 11TH AUGUST, 2021.

ORAL JUDGMENT :

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996. It is filed by the petitioner who has succeeded before the arbitral tribunal. The petitioner seeks post award relief of (i) disclosure of assets in accordance with Order XXI Rule 41 of the Code of Civil Procedure, 1908; (ii) appointment of Court Receiver; (iii) injunction restraining the respondents 1 and 2 from dealing with and disposing their assets and; (iv) freezing of the bank accounts and deposit of Rs.4,04,45,000/-.

2. Mr. Pal, the learned counsel appearing on behalf of the petitioner has contended that post-award relief under Section 9 can and may be granted in the aforesaid terms. Inviting my attention to the award, Mr. Pal submitted that the award is passed by consent and it specifically provides that immovable property described in Schedule-1 was agreed to be transferred to the petitioner under a registered Tripartite Agreement dated 5th September 2013 without payment of any consideration. Respondent no.1 had then agreed to sign all documents necessary for ensuring this transfer. Respondent no.1 also agreed to undertake to do all things necessary and bear all costs, charges and expenses payable to the City and Industrial Development Corporation (*CIDCO*), as may be required for transfer of the title of the property described in Schedule-1. The arbitral tribunal has on the basis of a consent recorded, proceeded to pass an award in terms of the consent terms signed by the parties.

3. Mr. Pal has submitted that respondent no.1 has failed and neglected to act upon clause 2(d) of the consent terms dated 20th September 2019, it is now beyond compliance. Time for transfer was to be extended by upto two months only consensually by both parties, but that has not occasioned. The award is dated 20th September 2019 and the period of six months expired on 20th March 2020. Till the expiry of the period of six months, the respondent no.1 had failed and neglected to transfer the plots and is now taking shelter under the pandemic driven lock-down to contend that no steps could be taken within time. It is the case of the petitioner that despite a specific provision requiring transfer to be completed within a period of six months from the date of filing the consent terms, respondent no.1 has failed to comply. Time has not been extended and the consent award provides that in the event 1st respondent commits breach of the provisions of the consent terms, which includes the obligation to transfer the land, the respondent no.1 would be liable to pay a sum of Rs.4,04,45,000/- along with interest @ 18% p.a. from 25th November 2015. The petitioner now proposes to enforce the Award. It is on this basis that the petitioner has approached this court seeking to invoke Section 9 of the Arbitration and Conciliation Act, 1996.

4. The 1st respondent's learned counsel Mr. Singh has opposed this petition. Mr. Singh also questioned the petitioner's attempt at invoking jurisdiction of this court on the basis that there has been no default on the part of respondent no.1. Respondent no.1 is ready and willing to transfer the

land even today and there was no occasion to seek relief that has now been sought. Mr. Singh submits this court has no jurisdiction to entertain and try this petition under Section 9 of the Arbitration and Conciliation Act, 1996. Effectively, this is an application that seeks execution of the award and the executing court would be the court in Panvel Taluka since the property in question, in respect of which the respondent no.1 seeks relief, is located in Panvel. Moreover, respondent no.1, against whom the award is enforceable today and the respondent no.2-partnership firm also, carry on business in Kamothe Taluka, New Bombay, outside the jurisdiction of this court and hence Mr. Singh has contended that this court will not have jurisdiction to entertain and try this petition.

5. The respondent no.1 has contended, as canvassed by Mr. Singh, that upon passing of the consent award, the 1st respondent, as a primary step, has got the partnership firm reconstituted and had appointed a liasoning agent, handed over to him all requisite papers to get transfer of the property in Schedule-1 to the name of the petitioner in terms of the consent award and also paid fees due to the liasoning agent. It is contended in the affidavit-in-reply of respondent nos.1 and 2 dated 12th July 2021 that all steps necessary were taken and the petitioner was kept duly informed, but since March, 2020, due to lock-down, no further progress could be made. It is further contended that the file pertaining to the property was not traceable in the CIDCO office and therefore time was lost. This aspect I find is fairly vague inasmuch as if

the file was missing, there is no averment now to establish the fact that the file has since been traced, nor does the affidavit set out any details of steps that the respondent no.1 has adopted to comply with his obligations under the consent award.

6. On the aspect of jurisdiction, Mr. Pal has contended and in my view correctly that the arbitral proceedings were conducted in Mumbai, pursuant to appointment of the tribunal by the Supreme Court in a Special Leave Petition filed against an order passed under Section 11 of the Arbitration and Conciliation Act in Arbitration Petition No.72 of 2017 filed on the Appellate Side of this court. He submitted that it is thereafter that an application was filed under Section 27 for securing presence of an officer of the 3rd respondent-bank in order to seek relief of disclosure of the personal bank details of respondent no.1. It is therefore contended that once this court has been moved not only under Section 11 but also under Section 27, this court alone would have jurisdiction to entertain any further applications by virtue of Section 42 of the Arbitration and Conciliation Act.

7. Per contra, Mr. Singh reiterated that the court at Panvel, Dist. Raigad had territorial jurisdiction over the property and that the 1st respondent had already filed an execution petition seeking a direction to the petitioner to act upon the award. He reiterated his contention that the respondent no.1 has been following up with the petitioner for several months, but the petitioner

has shown reluctance to sign the transfer forms. Mr. Singh however admitted that the execution petition was filed after the present petition.

8. In rejoinder, the contentions of the respondent no.1 have been denied. The rejoinder dated 19th July 2021 sets out that the respondent no.1 appears to have made clandestine attempts to defeat the award. The objections as to jurisdiction are baseless. No explanation has been given for not having been acted for six months period during which the transfer could have taken place and in any event, on 28th June 2021, the respondent no.1 has made a statement before this court that respondent nos.1 and 2 shall not part with possession, create third party rights or interest in the land mentioned in Schedule-1 and shall maintain status-quo in respect of the land at Schedule-2 in view of the fact that there is a *“cloud on the title of the said property”*. This statement has been accepted by this court as an undertaking given to this court.

9. Having heard the learned counsel, on the preliminary aspect of jurisdiction, I must hold in favour of the petitioner inasmuch as the contention that this court has no jurisdiction to entertain this petition cannot be sustained, principally because an application under Section 27 seeking assistance of this court has already been considered and allowed. Parties have therefore submitted to the jurisdiction of this court. Moreover the seat of the arbitral proceedings was Mumbai and by virtue of the fact that the parties

had consciously proceeded with the arbitration in Mumbai within the jurisdiction of this court, the objection is unsustainable.

10. Mr. Singh, relying upon the decision of the Supreme Court in *Mankastu Impex Private Ltd. Vs. Airvisual Limited*¹, has contended that the intention of the parties as to the seat of the arbitration should be determined by reading the agreement as a whole and that the expression “*seat of arbitration*” and “*venue of arbitration*” cannot be used interchangeably. According to him, this petition could not be filed in Mumbai since the respondents 1 and 2 were located at Navi Mumbai and the property in question is situate at Panvel, Dist. Raigad. Mr. Singh has also relied upon the decision of the Supreme Court in *State of West Bengal and Ors. Vs. Associated Contractors*², in support of his submission that the bar under Section 42 is not applicable to the applications made under Section 11, as in the present case.

11. In my view, these decisions will not come to the assistance of Mr. Singh because the arbitration itself took place in Mumbai. Moreover, in *GS SGS Soma JV (Supra)*, the Supreme Court has, in no uncertain terms, observed in paragraph 45 as follows :-

“45. It was not until this Court’s judgment in *Indus Mobile Distribution (P) Ltd. Vs. Datawind Innovations (P) Ltd.*³

1 (2020) 5 SCC 399

2 (2015) 1 SCC 32

3 (2017) 7 SCC 678

that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, "Amendments to the Arbitration and Conciliation Act, 1996" (August, 2014) (hereinafter referred to as "the Law Commission Report, 2014"), under which Sections 20(1) and (2) would refer to the "seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the courts at the seat for the purpose of interim orders and challenges to the award."

12. Thus, the parties having chosen to proceed in arbitration and having chosen Mumbai as the seat of arbitration did choose courts in Mumbai. The petitioner did in fact act thereon and filed proceedings under Section 27. By virtue of the operation of Section 42, this court alone has jurisdiction to pass appropriate orders in this petition. The respondents 1 and 2 submitted to a consent award in Mumbai and moreover they have submitted to the jurisdiction of this court. They have acquiesced in and submitted to the jurisdiction of this court when they made a statement that they shall not part with possession, create third party rights or interest in the land mentioned in Schedule-1 and shall maintain status-quo in respect of the land at Schedule-2. That statement was accepted as an undertaking to this court and it is not

possible today to accept the contention that this court has no jurisdiction since the respondents 1 and 2 have clearly waived any such objections.

13. Besides, even applying Section 42, this court would be the only court having jurisdiction in the matter since an application under Section 27 had been filed and was allowed by this court. Thus, the issue of jurisdiction cannot be agitated further.

14. Mr. Pal, learned counsel for the petitioner had invited my attention to the decision of this court in *United Phosphorous Ltd. Vs. A.K. Kanoria*⁴ in support of his contention that filing of an execution application is not mandatory prior to moving an application under Order XXI Rule 41 of the CPC and to that extent, this court has taken a view that proceedings seeking relief under Order XXI Rule 41 of CPC can be filed without filing execution application. However, that by itself does not come to the assistance of Mr. Pal inasmuch as those are the proceedings specifically under the Code of Civil Procedure and it was so observed in a case where drawing-up of a decree was found not to be a condition precedent for filing an execution application. The factual aspects in *United Phosphorous Ltd. (Supra)* being so different and specifically pertaining to execution and enforcement, I am of the view that no assistance can be derived from that judgment.

15. Reliance is also placed on the decision of this court in *Afcons*

4 2002 (4) Mh.L.J. 358

*Infrastructure Ltd. Vs. Konkan Railway Corporation Ltd.*⁵ in support of the contention that the application under Section 11 would not be before a “court” as defined in the Act and hence was of no avail. Yet, in another decision of this court in *Deccan Chronicle Holdings Ltd. Vs. L & T Finance Ltd., along with connected matter*⁶, a Division Bench found that the application under Section 9 had included a relief for disclosure of assets and properties on oath and an order came to be passed directing disclosure. In appeal against the order of a learned Single Judge, the Division Bench found that the Single Judge was justified in passing the impugned order.

16. In the facts of the present case, I find that apart from disclosure, the petition also seeks appointment of Court Receiver and injunction restraining the respondents 1 and 2 from dealing with and disposing their assets. It also seeks freezing of the bank accounts and deposit of Rs.4,04,45,000/-. Only prayers (a) and (b) are substantial prayers. Prayers calling for appointment of Receiver, injunction, freezing of bank accounts and deposit are sought as interim prayers pending this petition. Ad-interim reliefs are also sought in those terms.

17. At the hearing of this petition, the learned counsel for the petitioner restricted the reliefs sought to prayer clauses (a) and (b) viz. disclosure by respondent nos.1 and 2 of particulars of the respective assets, movable and

⁵ *Arbitration Petition No.10 of 2019; Judgment dt. 2nd June 2020*

⁶ *Appeal (Lodging) No.130 of 2013 in Arbitration Petition No.1095 of 2012, along with connected matter, dt. 8th August 2013.*

immovable, and imprisonment in the event of default. The consent terms, based on which the award has been passed, provides for the 1st respondent transferring the land based on a tripartite agreement presumably with CIDCO, being a confirming party. The petitioner has contended that after making of the award but before enforcement, the petitioner was entitled to apply to this court for securing the amount in dispute. Unless the disclosure is made, filing an execution application may be futile and to that extent, Mr. Pal submitted that one of the reliefs that is sought for in this petition is disclosure of assets. According to him, the default was not curable. Upon expiry of the six months period when the parties have not consensually extended time for the two additional months, all that remains is the monetary award. The responsibility for payment of amount is joint and several, as obvious from clause 9. I am in agreement with Mr. Pal that disclosure of assets in the present case is justified.

18. Section 9 of the Act contemplates grant of interim measures by the court. The dominant purpose of the section is to provide an interim measure of protection before and during arbitral proceedings such that the subject matter of the arbitration is protected. However, such relief can be granted only before the award is enforced. Section 9 does not contemplate enforcement of the award. It operates upto the stage of enforcement. Enforcement of an award is under Section 36, which contemplates that an award shall be enforced in accordance with the provisions of the CPC as if it

were a decree of the court. Thus, Section 9 does not contemplate active enforcement after the passing of an award.

19. I am unable to agree with Mr. Singh that no default has been committed. Prima facie, I am not satisfied that the respondent no.1 made bonafide attempts to transfer the property, but in the facts of the case save and except for prayer clause (a), which seeks disclosure, none of the other reliefs can be sought under Section 9 since all other prayers viz. prayer clauses (b) to (f) are seeking (i) order for detaining the Judgment Debtor in civil prison in the event of disobedience of the order; (ii) for appointment of Court Receiver, High Court, Bombay as Receiver to take possession of the properties described in prayer clause (c) of the petition and till such time, (iii) to pass an order of injunction restraining the respondents from dealing with, disposing assets, movable and immovable, of respondent no.1 and 2 or creating any third party interest therein; (iv) a further relief is sought in terms of freezing of debits in specified bank accounts of respondent no.2 and; (i) for a direction to deposit a sum of Rs.4,04,45,000/- with interest thereon @ 18% p.a. from 25th November 2015 till date in this court. All of these reliefs are in the nature of enforcement and enforcement must be pursued by filing an execution application. Even though the petitioner has restricted the petition to prayer clauses (a) and (b), prayer clause (b) is in the nature of enforcement and in the facts of the case cannot be granted in a petition under Section 9.

20. Accordingly, I pass the following order :-

- (i) Arbitration Petition is made absolute in terms of prayer clause (a). Disclosure shall be made within three weeks from today.
- (ii) In the meantime, till further orders, the statement made on behalf of respondents 1 and 2 shall continue to operate and the property in question shall not be dealt with without leave of this court.
- (iii) In respect of other reliefs, the petitioner shall be at liberty to apply in execution proceedings.
- (iv) Arbitration Petition is disposed in the above terms.

(A. K. MENON, J.)