IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH: NAGPUR

WRIT PETITION NO. 3940 OF 2021

Reatox Builders & Developers Pvt. Ltd. and anr.
Vs.
Omprakash S/o Bapuappa Khake and anr.

Office notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

Mr. S.P. Dharmadhikari, Senior Advocate assisted by Mr. U.P. Dable, Advocate for petitioners.
Mr. Masood Shareef, Advocate a/w Mr. A.J. Mirza, Advocate for respondent No.1.

CORAM : MANISH PITALE J.

RESERVED ON : 05.04.2022

PRONOUNCED ON : 06.05.2022

By this writ petition, the petitioners have challenged order dated 08.09.2021, passed by the Court of District Judge – 2, Nagpur, whereby an application for grant of stay filed by the petitioners for execution of Award of an Arbitral Tribunal, has been granted, but, subject to condition that the petitioners shall deposit amount of ₹ 2,47,50,000/- in the Court. According to the petitioners, they had made out such a strong case in the application filed under Section 34 of the Arbitration and Conciliation Act, 1996, before the said Court that an unconditional order of stay ought to have been passed in their favour.

2. The contesting respondent No.1 appeared through counsel and the petition was taken up for final disposal.

3. The facts in brief leading up to filing of the present petition are that the petitioner No.1 – Company, of which the petitioner No.2 is a Director, is involved in the business of Real Estate Development. In furtherance of its business, the petitioner company took up a project of developing land in Village Khapri, Nagpur (Rural) belonging to the respondent No.2. The respondent No.2 invited bids for implementation of the project and in the process the petitioner company was selected and appointed as a Developer. In order to implement the project of development the petitioners approached the respondent No.1 for financial assistance and ultimately the petitioners and the respondent No.1 entered into an agreement dated 02.03.2006, for raising funds for the project called "First City Project". Thereafter, on 04.01.2007, a formal agreement was executed between the parties.

4. As per the agreement between the parties, the project was to be implemented according to time schedule and the petitioners were supposed to deliver possession of flats as per the schedule. The respondent No.1, who was the original claimant before the Arbitrator claimed that the petitioners failed to adhere to the schedule, as a result of which serious financial loss was caused to it. As the aforesaid agreement executed between the parties consisted of an arbitration clause, arbitration proceedings came to be initiated by appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act,1996. On 15.09.2017, this Court passed the order appointing Arbitrator for resolution of the disputes between the parties. Since, in the present writ petition, challenge is raised to conditional interim stay granted by the Court below, this Court is not referring to and entering into the details of the disputes between parties and the manner in which the Arbitrator dealt with the rival contentions of the parties on merits.

5. The limited enquiry in the present petition, is on the aspect as to whether the petitioners are justified in claiming that they had been able to demonstrate before the Court below, such a strong *prima facie* case that they were entitled to unconditional stay of the award whereby the Arbitrator held that the petitioners were liable to pay to the respondent No.1 the aforesaid amount of ₹ 2,47,50,000/- with simple interest @ 12% p.a. from 16.07.2012, till the amount was fully realized.

6. In the application filed under Section 34 of the aforesaid Act challenging the said award, the petitioners moved the application for stay (Exhibit 5), pressing for grant of unconditional stay. The petitioners specifically raised grounds pertaining to limitation, as also on the aspect that unstamped Award could not be received in evidence and could not be acted upon. The Court below held against the petitioners on the aforesaid grounds regarding strong *prima facie* case for grant of unconditional stay and found that *prima facie* the initiation of the arbitration proceedings appeared to be within limitation and that the question of the Award being unstamped could be examined, but, the petitioners had failed to make out the case for grant of unconditional stay. Accordingly, the operation and execution of the arbitration Award was stayed, subject to the aforesaid condition directing the petitioners to deposit the said amount.

7. Mr. S.P. Dharmadhikari, learned Senior Counsel appearing for the petitioners specifically made submissions on the question of limitation and the manner in which the Arbitrator had dealt with the said aspect. The other ground pertaining to the award being unstamped was not seriously pressed before this Court. In support of the contention that the initiation of arbitration proceedings on the part of the respondent No.1 was barred by limitation, the learned Senior Counsel submitted that the Arbitrator committed a grave error in applying Article 54 of the Limitation Act, 1963, to the facts of the present case. It was submitted that the aspect of specific performance was wrongly applied to the facts of the present case, thereby leading to perverse findings on the question of limitation. It was submitted that, considering the nature of claim raised by the respondent No.1, Article 47 of the Limitation Act, applied.

8. According to the petitioners, the point when limitation started to run even as per the case of respondent No.1 itself was 15.03.2012 or when the construction itself allegedly stopped in the year 2009. It was submitted that when arbitration was admittedly invoked on 02.10.2015, the same was clearly beyond the period of limitation and that therefore, a strong *prima facie* case was made out by the petitioners in their favour before the Court below. But, a perusal of the impugned order would show that the said aspect was not appreciated properly and the Court below failed to appreciate the grave error committed by the Arbitrator when it was held in the Award that trigger point for limitation was a communication dated 29.09.2015 addressed by the respondent No.2 to the counsel for respondent No.1, wherein it was indicated that the project had effectively come to a halt. On this basis, it was submitted that the impugned order deserved interference and the stay of the Award ought to be granted unconditionally in favour of the petitioners.

9. It was further submitted by the learned Senior Counsel for the petitioners that the Bombay Amendment to Order 41 Rule 1(3) of the Code of Civil Procedure (CPC) was not appreciated by the Court below, wherein it is specifically provided that the appellate Court may even dispense with deposit or security where it deems fit to do so for sufficient cause. It was submitted that no enquiry in that regard was undertaken by the Court below while passing the impugned order. On this basis, it was submitted that the writ petition deserved to be allowed, to the extent that the interim stay ought to be confirmed in favour of the petitioners by deleting the condition of deposit of amount imposed by the Court below.

10. On the other hand, Mr. Masood Sharif, learned counsel appearing for contesting respondent No.1 submitted that the Award in the present case was in the nature of a money decree and as a rule in such cases when a challenge is raised to a money decree, the judgment debtor is required to deposit the decretal amount before the appellate Court.

11. According to the learned counsel for respondent No.1, since the Award was based on detailed scrutiny of the evidence and material on record, the petitioners had failed to demonstrate an exceptional case in their favour for dispensing with the requirement of depositing the aforesaid amount as directed by the Court below, as a pre-condition for grant of stay. Since, the learned Senior counsel appearing for the petitioners had pressed only the aspect of limitation, on behalf of the respondent No.1, it was submitted that a perusal of the Award would show that the aspect of limitation was considered at the outset in detail and on the basis of material on record, it was found as a matter of fact, that limitation stood triggered much later than as claimed by the petitioners and that on the said aspect the findings were rendered in a reasonable manner. It was submitted that the rival parties, during the course of implementation of the project in question, had continuously communicated with each other till the situation reached a flash point when the respondent No.1 was constrained to invoke the arbitration clause.

Since, the documents on record were correctly appreciated by the Arbitrator while rendering findings on the question of limitation, it was submitted that the Court below *prima facie* found in favour of respondent No.1 on the said aspect, thereby correctly insisting upon the petitioners depositing the aforesaid amount as a pre-condition for grant of stay. On this basis, it was submitted that the writ petition deserved to be dismissed.

12. This Court has considered the rival contentions, in the backdrop of the material placed on record. In the present case, a perusal of the Award dated 24.12.2019, would show that the Arbitrator took into consideration the claims made by the rival parties and framed various issues for consideration, including the issue of limitation. The said issue was taken up for consideration at the outset by the Arbitrator. The Award shows that before the Arbitrator the petitioners themselves invoked Article 54 of the Limitation Act to contend that the invocation of arbitration was beyond the period of limitation. It was contended on behalf the petitioners that the nature of dispute between the parties and the documents executed during the implementation of the said project, demonstrated that the respondent No.1 was essentially seeking specific performance of contract. In fact, the Arbitrator recorded that both parties were not at all at dispute that Article 54 of the Limitation Act was applicable and rival contentions were raised on the said basis.

13. The Arbitrator analyzed the oral and documentary evidence on record to reach a finding that the right accrued to the respondent No.1 to take appropriate legal action for refund of the aforesaid amount when reply dated 29.09.2015 was received from respondent No.2. It was found that the trigger point of limitation was receipt of the said communication and since, the arbitration clause was admittedly invoked by the respondent No.1 on 02.10.2015, it was clear that the question of limitation had to be answered in favour of respondent No.1. The manner in which the submissions were made on behalf of the petitioners would show that according to the petitioners since the agreement between the parties specified the time limit within which the number of units were to be constructed and handed over to the respondent No.1, the point of limitation for respondent No.1 to take appropriate action in terms of the agreement between the parties started when such specific time limit was over. According to the petitioners, the same was very much within the knowledge of the respondent No.1 and yet he chose to invoke the arbitration clause much later on 02.10.2015.

14. Even in the impugned order passed by the Court below, it is found that the aspect of limitation was highlighted and it was claimed that the findings rendered by the Arbitrator were wholly unsustainable, thereby justifying the prayer on the part of the petitioners for grant of unconditional stay. Even before the Court below, the nature of submissions raised on behalf of the petitioners were similar to those raised before the Arbitrator on the aspect of the limitation. At the stage of deciding the application for stay at Exhibit 5, the Court below was expected to only examine the *prima facie* case sought to be made out by the petitioners. This Court is of the opinion that the Court below proceeded to reach *prima facie* conclusions on the basis of the nature of contentions raised on behalf of the petitioners.

15. It is before this Court that the petitioners have come up with the case that considering the material on record, it was Article 47 of the Limitation Act which applied because, it was the case of the respondent No.1 that he was entitled to recover money paid for an existing consideration, which afterwards had failed. According to the petitioners, under the said

Article, the period of limitation of three years stood triggered on the date of such failure. By referring to the documents on record, it was submitted that even as per the case of respondent No.1, the date of failure could be taken as 15.03.2012 and the arbitration being invoked on 02.10.2015, was clearly barred by limitation. It was submitted that once the period of limitation started to run, it would run continuously till it expired when the period of three years expired. According to the petitioners, this aspect was not appreciated by the Court below while refusing the prayer of the petitioners for grant of unconditional stay.

16. This Court has perused the material on record to examine whether the petitioners have made out such a strong *prima facie* case and that the opinion of the Court below can be said to be so gravely erroneous that interference in the impugned order can be justified.

17. It was the case of respondent No.1 that the petitioners kept him in dark about the fate of the aforesaid “First City Project”. The respondent No.1 claimed to have been pursuing the matter with the petitioners as regards implementation of the project in terms of the agreement between the parties, under which the petitioners were supposed to handover specific number of units to the respondent No.1 for the amount that was invested in the project. It was when the project started languishing that the respondent No.1 claimed to have made inquiries and ultimately, he communicated with the owner of the land on which the project was to be implemented i.e. the respondent No.2. On a letter dated 27.08.2015, sent by the respondent No.1 to the respondent No.2, the aforesaid communication dated 29.09.2015 was sent by the respondent No.2 to the respondent No.1. It is this communication which has been treated by the Arbitrator as the trigger point for limitation. A perusal of the documents shows that the respondent No.2 informed the respondent No.1 and that since no development activities were being undertaken on the aforesaid land allocated for development of “Fist City Project”, the respondent No.2 had been constrained to terminate the agreements with the petitioners and that even the power of attorney executed in favour of the petitioners had been cancelled. It was further stated that as regards the specific units booked by the respondent No.1 in the said project, no such information was available with the respondent No.2 and hence, there was no question of including the name of respondent No.1 as allottee for the said specific number of units. It was further stated in the said communication that the petitioner No.1 had never furnished an authenticated list of all the allottees in the said project to the respondent No.2.

18. The respondent No.1 claims that upon receipt of the said communication, it came to light that the basic agreement executed between the petitioners and respondent No.2 itself had been cancelled and that the petitioners had kept the respondent No.1 in dark about the same. According to the respondent No.1, upon gaining knowledge about the said developments, cause of action accrued to the respondent No.1 for taking remedial action as regards recovery of the amount invested in the said project. This is the manner in which the Arbitrator appreciated the material on record, particularly the said communication dated 29.09.2015, addressed by the respondent No.2 to the respondent No.1.

19. Even if the contentions regarding trigger point of limitation now sought to be raised on behalf of the petitioners is to be considered, the impact of the material on record, particularly the aforesaid communication dated 29.09.2015, would have to be examined on merits by the Court below to render a finding on the question of limitation. It cannot be said that the findings rendered by the Arbitrator in the Award are so gravely erroneous and unsustainable that the invocation of arbitration proceedings on the part of the respondent No.1 could be said to be stillborn, thereby *prima facie* indicating that the Award passed by the Arbitrator was vitiated. This Court is not convinced on a *prima facie* appreciation of the material on record and the contents of the Award, to hold that the petitioners were entitled for unconditional stay of the award. Therefore, it cannot be said that the Court below committed an error in granting stay, subject to deposit of the said amount.

20. Since, no other point was pressed on behalf of the petitioners, this Court is of the opinion that only on the issue of limitation raised on behalf of the petitioners, this Court is unable to reach a conclusion that the Award can be said to be unsustainable as the invocation of arbitration on the part of respondent No.1, could be said to be *prima facie* barred by limitation. This finding is being rendered by this Court only on *prima facie* appreciation of the material on record and it is made clear that the issue of limitation would still be at large before the Court below in the challenge raised on behalf of the petitioners to the arbitral Award under Section 34 of the aforesaid Act. Nonetheless, this Court is not convinced that the issue of limitation is so strongly in favour of the petitioners that unconditional stay could be granted in their favour.

21. There can be no quarrel with the proposition of law that as per the Bombay Amendment to Order 41 Rule 1(3) of the CPC, the Court concerned may even dispense with the necessity of depositing or providing security when a question of grant of stay is involved, provided sufficient cause is demonstrated. But, this Court is of the opinion that on the basis of the material on record, it cannot be said that the petitioners have indeed made out sufficient cause for dispensing with the said requirement.

22. At this stage, the learned Senior Counsel for the petitioners submitted on instructions, that the petitioners are ready to provide security instead of depositing the amount, by providing Bank guarantee for the said amount before the Court below, as a condition for grant of stay. Although, the said submission was strongly opposed on behalf of respondent No.1, this Court is of the opinion that when Order 41 Rule 1(3) of the CPC provides that even security can be furnished when such a challenge to a money decree or an Award is raised, this aspect could have been adverted to and appreciated by the Court below, while passing the impugned order. To that extent, the impugned order deserves to be modified.

23. In view of the above, the writ petition is partly allowed.

24. The application for stay filed by the petitioners before the Court below is disposed of by directing that the operation and execution of the arbitral Award dated 24.12.2019, shall remain stayed during the pendency of the application under Section 34 of the aforesaid Act, subject to the petitioners furnishing by way of security, a Bank guarantee to the satisfaction of the Court below for an amount of ₹ 2,47,50,000/-, which shall be kept alive throughout the aforesaid proceedings before the Court below.

25. The writ petition stands disposed of in the above terms. No costs.

JUDGE