

06.05.2024

Sl. No18

ss

C.O. 3798 of 2023

Dinesh Kumar Shrivastva & anr.
Vs.
Ganapati Mansion Private Limited

Mr. Bibek Jyoti Basu
Mr. Swandeep Prasad Shaw
Mr. Raju Baroi
Mr. Aman Kumar Singh
... for the Petitioners.

1. The order dated September 20, 2023 passed by the learned Additional District Judge, Fast Track 3rd Court at Barasat North 24-Parganas, is under challenge. The court rejected a prayer for unconditional stay of the proceeding arising out of an arbitration award, in terms of the proviso to Section 36(3) of the Arbitration and Conciliation Act, 1996.
2. Misc. Case No.138 of 2019 had been filed by the petitioners, seeking setting aside of the arbitral award.
3. Mr. Bibek Jyoti Basu, learned Advocate appearing on behalf of the award-debtors/petitioners submits that unless the execution proceedings are stayed, the petitioners would lose their valuable right under Section 34 of the Arbitration and Conciliation Act. It is specifically contended that the arbitration agreement was vitiated by fraud and so was the entire proceeding.

The award could not be executed as the same was a nullity, being a product of fraud. Fraud vitiated all. On such ground alone, the learned Court should stay the execution proceedings, unconditionally.

4. Learned Advocate for the petitioners relies on the application filed under Section 151 of the Code of Civil Procedure as also the application under Section 36(3) of the Arbitration and Conciliation Act. In the application under Section 151 of the Code of Civil Procedure the prayer is as follows:-

“Hence prayed that the Award dated 27th February 2019 passed by the Learned Arbitral Tribunal be set aside for the contributing factors as stated hereinbefore.”

Thus, the said application is at best an application under Section 34 of the said Act, in which prayers have been made for setting aside the arbitration award on the ground that the same was vitiated by fraud. Sum and substance of the allegations are that the agreement was entered into between the parties, but no money had passed between them. The signatures on the receipts did not belong to the petitioners. They were forged and fabricated. The hand-writing expert had also expressed a similar view. Thus, the claim on the basis of such receipts, could to be entertained.

5. In connection with the said proceeding, an application under Section 36(3) of the said Act was filed with the following submissions and prayers :-

- “1. The petitioners have filed an application under Section 151 of the Code of Civil Procedure, 1908 on the grounds of inducement effected by fraud in the making of the Award as well as the arbitration agreement which is the basis of the Award and have sought for setting aside of the said Award by this Learned Court.*
- 2. The petitioners have also filed relevant documents and statements which clearly portray the element of fraud, misrepresentation and suppression of facts and under such circumstances, unless the Award dated 27th February, 2019 passed by the Learned Arbitral Tribunal is stayed during the pendency of the present Misc. Case No.138 of 2019, the petitioners shall suffer irreparable loss, injury and prejudice.*
- 3. This application is made bona-fide and for the ends of justice, equity and fair play.*

It is, therefore, humbly prayed that the Award dated 27th February, 2019 passed by the Learned Arbitral Tribunal be stayed pending the final hearing and disposal of Misc. Case No.138 of 2019 and the application under Section 151 of the Code of Civil Procedure, 1908

filed on 07.01.2023 and/or to pass necessary order.”

6. The question is whether the application under Section 36(3) of the said Act dated January 7, 2023 was rightly dismissed or not.

7. The learned Court was of the view that there was no ground for granting an unconditional stay in terms of the provisions of law. There is no quarrel with the proposition of Mr. Basu that in a fit case, the second proviso to Section 36(3) could be made applicable. The Court had to be, prima facie, be satisfied that either the arbitration agreement or the contract or the making of the award, were all vitiated by fraud. On such satisfaction, execution could be stayed unconditionally. There is also a counter proposition inbuilt in Section 36. Executing Court can stay the arbitration award subject to such terms and conditions directing payment of the entire awarded amount. Judicial precedents have clarified such position of law.

8. Now, the question is whether in the facts of the case the learned Court had rightly rejected the application under Section 36(3) of the said Act upon holding that in this case, the proviso would not be applicable. As has already been quoted before, the petitioners only stated that documents and statements had been filed to show the element of

fraud. Thus, the award should be stayed unconditionally.

9. In the said application, no elaboration with regard to the nature of fraud, extent of fraud, findings of the learned Arbitral Tribunal with regard to fraud, have been discussed. A vague and omnibus mention of fraud would not suffice. Fraud has to be pleaded and proved. Even at the stage of stay, a prima facie, pleading and proof with regard to allegation of fraud should be available. The award and the proceedings should palpably appear to be vitiated by fraud.

10. I do not find any reason to interfere with the order impugned. Mr. Basu relies on the application under Section 151 of the Code of Civil Procedure. The prayer under Section 151 of the Code has already been quoted above. The said application has been filed for setting aside the award.

11. With regard to the prima facie case as has been urged by Mr. Basu, this the Court has taken note of the award. At internal pages 10 to 13 of the award, the learned Arbitrator had carefully examined the evidence and the contentions of the parties with regard to allegation of fraud. The Arbitrator was of the opinion that no cogent documentary evidence had been produced to show that any complaint with regard to the allegation that

signatures had been forged, had been filed before the police. The Arbitrator also opined that neither any handwriting expert had been examined nor any report of a handwriting expert had been brought on record by way of evidence to prove that the signatures on the money receipts were forged. The Arbitrator held that the burden was upon the judgement-debtor to prove fraud and forgery. The Arbitrator also held that one document of the handwriting expert had been examined by the claimant and the said document was marked as exhibit 7 at the instance of the claimant. The said expert was cross-examined at length by the petitioners. The expert (PW 2) opined that the signatures were of the same person. Learned Court also recorded that one of the petitioners had submitted before the that no criminal proceeding had been initiated as the petitioners were of the view that the disputes would be resolved amicably, out of Court.

12. Under such circumstances, it appears to this Court, *prima facie*, that the allegation of fraud was considered by the learned Arbitrator and disbelieved.

13. Under such circumstances, even though the learned Trial Judge did not discuss the *prima facie* case in detail, I have supplied the reasons to hold that the order impugned does not suffer from perversity. The element of fraud was not proved in

the manner prescribed by the judicial precedents. The learned Arbitrator considered the issue in great detail and held that fraud could not be proved. The petitioners could demonstrate the element of fraud from the records.

14. These observations are restricted to the adjudication of this application. The observations made herein, will not affect the merits of the application for setting aside the arbitral award. Stay can be granted in this case, upon imposition of conditions as per law.

15. With the above observations, this revisional application stands disposed of.

16. The learned Court shall dispose of the proceeding expeditiously.

17. There shall be no order as to costs.

18. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)