IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION No. 119 of 2022

Agastya Corporate Advisory Private Limited thru its Director Mr.Rajkumar Dixit .. Petitioner

Versus

M/s.Landmark Real Estate Developers Limited, thu its Director Shri Vali Mohd Ismile Merchant .. Respondents

…

Mr.S.V. Wakankar with Mr.P.B. Gujar for the petitioner.
Mr. Ankur Shah with Mr.Akshay B. Udeshi for the respondents.

CORAM: BHARATI DANGRE, J.
DATED : 1st FEBRUARY, 2024

P.C:-

1 The agreement entered between the petitioner and respondent in form of "regarding assignment for arranging loan", as the respondent appointed the petitioner as an 'Arranger' for providing the services contemplated in relation to the "Proposed transaction ("Services"). The transaction referred to was arrangement of loan/fund required by the respondent for its project.

The arrangement dated 17/4/2019 clearly set out the scope of the services, which the petitioner was to offer in connection with the transaction and in lieu thereof, provided for 'Fees and Expenses', for the Professional Advisory Services. The agreement also contemplated a 'Termination' clause as well as a clause providing the mode of settlement of the disputes arising out of the engagement. The relevant clause reads thus:-

> ***"Termination***
>
> *The Arranger and The company shall have the right to withdraw from this engagement by giving 30 days' notice in writing. Provided that the provisions of indemnification and governing law shall survive such termination"*

2 The disputes arose between the parties as regards the point of time, when the success fee shall be payable as it is the contention of the respondent that the said fee of 9% of the disbursed amount, shall be payable by the Company to the Arranger on disbursement of the loan amount, whereas it is the contention of the petitioner that this fee is liable to be paid at the time of handing over the sanction letter.

It is not in dispute that pursuant to the Arranger assisting the transaction, the Malkapur Urban Co-operative Bank Ltd, issued two sanction letters on 6/5/2019, in the sum of Rs.Nine Crores each. It is the case of the respondent that pursuant thereto, it mortgaged its land at Karjat and its office premises in favour of the Bank, but the Bank disbursed the loan of Rs.Nine Crores only and the learned counsel for the respondent has vehemently asserted that in fact, he did not receive a single penny of this loan, but it was directly paid to SBI, towards the outstanding loan.

Based on this, the learned counsel would argue that since no loan amount actually came to him, he is not liable to make the payment and particularly, based upon the clause in the agreement that the fee of 9% shall be payable only on the disbursement of the entire amount.

3 My attention is invited to two distinct agreements which are placed on record, being the agreement at page 64 (Exhibit-B) and another agreement at page 68 (Exhibit-C), which in the clause of 'fees and expenses' contain diametrically opposite versions, as regards when the fees shall be payable.

Admittedly, with the intervention of the arranger i.e. the petitioner, the Malkapur Bank sanctioned and disbursed the loan of Rs.Nine crores, though it did not release the balance amount of Rs.Nine Crores, on the pretext that it is short of money.

4 In any case, in whatever proportion, the fees payable to the petitioner has become due, as there is a clear refusal of the Bank to disburse the further amount and now the disbursement has to be construed to be only of Rs.Nine crores. The contention that the respondent did not actually avail the loan amount and it was directly paid to the SBI, is no ground to escape this liability.

5 The above disputes have therefore arisen between the parties and though the learned counsel would harp on the aspect of fraud, to regal out of the process of arbitration by relying upon the decision of the Apex Court in case of *Sushma Shivkumar Daga and Anr Vs. Madhurkumar Ramkrishnaji Bajaj and ors,*[1] the position of law is well settled to the effect, that when the plea of fraud permeates the entire contract, then the arbitration agreement itself is void and reference cannot be made to the Arbitrator.

The decision of the Apex Court in case of N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others,[2] has categorically dealt with this aspect and in particular, in paragraph nos.45 and 50, which reads thus:-

> *"45 The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. Another category of cases is where the substantive contract is "expressly declared to be void" under Section 10 of the Contract Act, 1872 where the agreement is entered into by a minor (without following the procedure prescribed under the Guardians and Wards Act, 1890) or a lunatic, which would be with a party incompetent to enter into a contract.*
>
> *50 The ground on which fraud was held to be non-arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, Arbitral*

1 2023 SCC Online SC 1683

2 (2021) 4 SCC 379

> *Tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in a realm of public law."*

6 Since the learned counsel for the respondent has clearly conceded that he has signed Exhibit-B as well as Exhibit-C, which amongst the two was to be acted upon, and which is the bone of contention between the parties, this dispute must necessarily go to Arbitration, since the relevant clause in the agreement contemplate that any dispute arising out of the engagement shall be referred for arbitration.

In the wake of the existence of the arbitration agreement and its invocation by the petitioner, the dispute being an arbitrable one, should be resolved through arbitration.

In the wake of the above, Advocate Vaibhav Anant Sugdare, is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent. The details of the Arbitrator are as under :-

<u>Office address</u>

(i) 28/2, 2nd floor, Building No.32,
Rajabhadur Mansion, Ambalal
Doshi Marg, Fort,
Mumbai 400001.

(ii) 902, Smit CHS,
Kamdhenu Plot no.12,
Sector 30, Vashi,
Navi Mumbai.
Mobile No. 9892040944/ 8369190913
gmail vasugdare@gmail.com

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record.

The Arbitrator, shall after entering the reference fix the date of first hearing and issue further directions as are necessary.

The Sole Arbitrator shall be entitled for the fees as per Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

All rights and contentions of the parties are kept open.

(SMT. BHARATI DANGRE, J.)