IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.355 OF 2022
WITH
INTERIM APPLICATION NO.3188 OF 2022
IN
ARBITRATION PETITION NO.355 OF 2022

John Peter Fernandes … Petitioner / Applicant
Vs.
Saraswati Ramchandra Ghanate since deceased
and others … Respondents

ALONG WITH
ARBITRATION PETITION (L) NO.24217 OF 2022
WITH
INTERIM APPLICATION (L) NO.24223 OF 2022
IN
ARBITRATION PETITION (L) NO.24217 OF 2022

Ramakant Ramchandra Ghanate … Petitioner / Applicant
Vs.
John Peter Fernandes and another … Respondents

Mr. Santosh Paul, Senior Advocate a/w. M. Shetty and Ms. Anjali Gupta i/. Raval Shah & Co. for Petitioner / Applicant in ARBP/355/2022 and for Respondent No.1 in ARBPL/24217/2022.

Mr. Amrut Joshi a/w. Mr. Nikhil Mishra for Respondent No.2 in ARBP/355/2022 and for Petitioner in ARBPL/24217/2022.

CORAM : MANISH PITALE, J.
DATE : MARCH 23, 2023

JUDGEMENT AND ORDER:

Both the parties to the arbitration proceedings are aggrieved by the impugned award dated 31st March, 2022. The petitioner in Arbitration Petition No.355 of 2022 is aggrieved by rejection of the prayer for grant of specific performance of agreement dated 6th October 2003, while the petitioner in Arbitration Petition (L) No.24217 of 2022, is aggrieved by the direction in the impugned award to pay amount of Rs.6,50,000/- along with interest @ 8% per annum, towards refund of amounts received from the rival party. The dispute between the parties concerns registered agreement dated 6th October 2003, clauses of which

fall for consideration in these petitions.

2. The facts in brief leading to filing of these two petitions are that John Peter Fernandes, the petitioner in Arbitration Petition No.355 of 2022 (hereinafter referred to as 'Mr. Fernandes') entered into an agreement with respondent Nos.1 and 2 in the said petition, whereby Mr. Fernandes agreed to purchase from the respondents the subject property with the intention of opening a restaurant. It is stated that Mr. Fernandes was working as a waiter and that he had arranged for part of the consideration from his relatives and the remainder in the form of a loan from a Co-operative Bank. The agreed consideration was Rs.35,00,000/. The agreement dated 6th October 2003 was registered and although it was recorded that the entire consideration had been paid, it is common ground between the parties that only part of the consideration was paid and the balance amount was due. There is dispute between the parties as to the exact amount that had changed hands between them in the context of the said agreement.

3. Be that as it may, the case of Mr. Fernandes was that after the said agreement was executed, under which the parties had respective obligations, when he returned from his village in June, 2004, he realized that the respondents were carrying on business in the subject property. In this backdrop, Mr. Fernandes filed Suit No.2412 of 2004, for grant of specific performance of the said agreement dated 6th October 2003, further seeking a declaration that the said agreement was subsisting and for a direction to the respondents to accept the balance consideration and to put Mr. Fernandes in possession of the property. A notice of motion for interim reliefs was also moved, but the same was rejected. An appeal was filed wherein the parties entered into consent terms and the appeal was disposed of by referring the disputes between the parties to arbitration.

4. On 15th July 2005, Mr. Fernandes filed his statement of claim, which was opposed by the respondents and eventually by an award dated 3rd February, 2006, the arbitral tribunal directed the respondents to pay Mr. Fernandes a sum of Rs.11,50,000/- with interest @ 18% per annum, concluding that the said amount was indeed received by the respondents in pursuance of the said agreement.

5. The respondents challenged the said award by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996. On 8th November 2006, the petition was allowed and the arbitral award was set aside. Aggrieved by the same, Mr. Fernandes filed appeal under Section 37 of the said Act and on 30th March 2017, the Division Bench remanded the matter to the Single Judge for hearing the petition afresh under Section 34 of the said Act. On 12th December 2018, the learned Single Judge constituted another arbitral tribunal, but specifically directed that reference would be limited to the entitlement of the petitioner to claim Rs.11,50,000/-. Both the parties filed review applications, which were dismissed.

6. Mr. Fernandes preferred an appeal under Section 37 of the said Act and the Division Bench of this Court clarified that the arbitral tribunal now constituted would consider all contentions under the reference. In pursuance thereof, the arbitral tribunal consisting on an advocate practicing in this Court was constituted and the learned arbitrator commenced the arbitration proceedings.

7. The rival parties placed their contentions on record. The learned arbitrator passed the impugned award on 31st March 2022, rejecting the prayer of Mr. Fernandes for granting specific performance of the agreement dated 16th October 2003, but directed the respondent [petitioner in accompanying Arbitration Petition (L) No.24217 of 2022] to pay an amount of Rs.6,50,000/- with simple interest @ 8% per annum

to Mr. Fernandes. The learned arbitrator found that Mr. Fernandes had failed to prove readiness and willingness to perform his part of the contract and further that an amount of Rs.5,00,000/-, alleged to have been paid by cash to the respondents, was not proved by cogent evidence. It is for this reason that the learned arbitrator deducted the aforesaid amount of Rs.5,00,000/- from the amount of Rs.11,50,000/- and directed the respondents to pay Rs.6,50,000/- with simple interest @ 8% per annum to Mr. Fernandes. Aggrieved by the said award, the rival parties have filed these petitions before this Court. Both the petitions were taken up for final disposal with the consent of the learned counsel for the rival parties.

8. Mr. Santosh Paul, learned senior counsel appearing for Mr. Fernandes submitted that he was a person of a modest means working as a waiter in the Breach Candy Swimming Bath Trust at Mumbai and he intended to start a restaurant by the name ‘Khana Khazana’ in the subject premises. It was submitted that Mr. Fernandes, with great difficulty, arranged for certain sums of money by borrowing from his relatives and raised the amount of Rs.11,50,000/- for payment to the respondents. It was claimed that, having arranged for the said amount, Mr. Fernandes also arranged for further amount of Rs.25,00,000/- by way of loan from a Co-operative Bank. The loan was to be disbursed only on production of the registered sale deed, to be executed in pursuance of the said registered agreement dated 6th October 2003. The learned senior counsel submitted that when Mr. Fernandes had to leave Mumbai and visit his native place to attend to his ailing mother, the respondents had a change of heart and decided not to honour the said agreement.

9. On returning back from his native place, Mr. Fernandes realized the intentions of the respondents leading to filing of the aforementioned

suit and after having pursued the matter for so many years, the impugned award came to be passed. The learned senior counsel submitted that the learned arbitrator committed a grave error in disbelieving the fact that the amount of Rs.5,00,000/- was paid by cash to the respondents. It was submitted that other amounts paid by cash were believed by the learned arbitrator on the basis of receipts placed on record and only the amount of Rs.5,00,000/- paid by cash was disbelieved, for the reason that the receipt recorded that the amount was received by the respondents by way of cheque. It was submitted that Mr. Fernandes had placed sufficient material on record to explain why the receipt recorded payment by cheque while the payment was actually made by cash. It was further submitted that a letter issued by the Co-operative Bank was part of the record, which indicated that loan amount of Rs.25,00,000/- was ready for disbursal upon execution of the sale deed, and that therefore, the findings rendered on the aspect of readiness and willingness by the learned arbitrator were perverse and wholly unsustainable. In this situation, the learned senior counsel submitted, that rejecting the prayer for grant of specific performance and instead directing refund of truncated amount to Mr. Fernandes demonstrated the error committed by the learned arbitrator.

10. The learned senior counsel sought to rely upon judgement of the Supreme Court in the case of *ONGC Limited Vs. Saw Pipes Limited*, **(2003) 5 SCC 705,** but, when it was put to him that post-amendment of the aforesaid Act, the position of law had changed as clarified by the Supreme Court in *Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India*, **(2019) 15 SCC 131**, the learned senior counsel fairly submitted that the award could be tested only on the basis of the position of law now clarified by the Supreme Court. It was submitted that even if the said test was to be applied to the facts of the present case, since vital evidence was ignored

and the finding was based on an unreasonable approach, the award could be said to be patently illegal. On this basis, the learned senior counsel appearing for Mr. Fernandes submitted that his petition deserves to be allowed. As regards the petition filed by the respondents, it was submitted that there was no substance in the same, as none of the parameters of law now available for setting aside an arbitral award post-amendment of the Act, could be applied for the respondents to assail direction No. II given in the impugned award. On this basis, it was submitted that Arbitration Petition No.355 of 2022 deserved to be allowed and Arbitration Petition (L) No.24217 of 2022 ought to be dismissed.

11. On the other hand, Mr. Amrut Joshi, learned counsel appearing for the original respondents in the petition filed by Mr. Fernandes and the petitioner in Arbitration Petition (L) No.24217 of 2022, submitted that the second direction given in the impugned award, to the effect that the respondents ought to pay an amount of Rs.6,50,000/- with a simple interest @ 8% per annum, was wholly unsustainable and the award deserved to be partly set aside, insofar as the said direction was concerned. It was submitted that the rest of the award deserved to be sustained. Learned counsel relied upon judgement of a Full Bench of this Court in the case of *R. S. Jiwani Vs. Ircon International Limited*, **2010 (1) Mh.L.J. 547,** to submit that the doctrine of *severability* could be applied by this Court and the second direction given in the impugned award only could be set aside.

12. It was further submitted that in the present case, the learned arbitrator, having found that there was no breach on the part of the respondents and that Mr. Fernandes on his part had failed to show readiness and willingness, could not have directed refund of money. It was submitted that the relationship between the parties was governed by

the clauses of the agreement dated 6th October 2003 and the learned arbitrator could not have gone beyond the terms of the agreement. The learned counsel placed reliance on the clauses of the agreement that pertained to the consequence to follow upon breach by either side. It was submitted that the terms were specific and that, once the learned arbitrator found that Mr. Fernandes as the purchaser was at fault, forfeiture of money was the only consequence. The direction for refund of amount was in the teeth of the terms of the contract, thereby indicating that the arbitral award fell foul of the position of law clarified by the Supreme Court in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** *(supra)*, post amendment of the said Act.

13. Learned counsel for the respondents relied upon judgement of this Court in the case of *Union of India Vs. Recon, Mumbai*, **2020 (6) Mh.L.J. 509,** to contend that the finding rendered by the learned arbitrator leading to the second direction in the impugned award was perverse and hence the award, to that extent, was rendered patently illegal. The learned counsel further relied upon judgement of this Court in the case of *Vilayati Ram Mittal Pvt. Ltd. Vs. Reserve Bank of India*, **2017 SCC OnLine Bom 8479,** to contend that by giving the impugned direction in the teeth of the specific terms of the contract, the learned arbitrator had travelled beyond his jurisdiction. Reliance was further placed on judgement of this Court in the case of *Board of Control for Cricket in India Vs. Deccan Chronicle Holdings Limited*, **2021 SCC OnLine Bom 834,** to contend that the learned arbitrator could not have invoked the principle of equity in favour of Mr. Fernandes. Reference was made to Section 28(3) of the Act, added by way of amendment in the year 2015, mandating the learned arbitrator to consider the terms of the contract and trade usages applicable to the transactions and further that under Section 28(2) of the Act, the learned arbitrator could decide

ex aequo et bono or as *amiable compositeur*, only if the parties expressly authorized him to do so. In the absence of such authority, the learned arbitrator had travelled beyond his jurisdiction. On this basis, it was submitted that while Arbitration Petition No.355 of 2022 deserved to be dismissed and Arbitration Petition (L) No.24217 of 2022 deserved to be allowed, so as to partly set aside the arbitral award.

14. Before considering of the contentions raised on behalf of the rival parties, it would be appropriate to refer to the position of law as regards the jurisdiction available to this Court under Section 34 of the said Act, while considering the challenge raised to the impugned arbitral award. It is significant that in the present case, both the parties are before this Court, challenging the impugned award.

15. By the amendment of the aforesaid Act, with effect from 23rd October 2015, specific changes were brought about in Section 34 of the said Act, whereby wide jurisdiction read into the said provision by the Courts was narrowed down and expressions like 'public policy of India' and 'patent illegality' were clarified, so as to restrict the scope of interference in arbitral awards. The position of law, as it obtained till the amendments were brought about in the said Act, was elaborately discussed and clarified in the judgement of the Supreme Court in the case of *Associate Builders Vs. Delhi Development Authority*, **(2015) 3 SCC 49** and post amendment, the Supreme Court clarified the position of law in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** *(supra)*. This Court in the case of **Union of India Vs. Recon, Mumbai** (*supra*), after taking into consideration the amendment in the Act and the judgement of the Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** *(supra)*, held as follows: -

"17.4 This yields the following result:

(i) A lack of a 'judicial approach', being the Western Geco expansion, is not available per se as a ground of challenge.

(ii) A violation of the principles of natural justice is a ground for challenge as one under Section 18 read with Section 34(2)(a)(iii) - that is to say, not under the 'fundamental policy' head nor the 'patent illegality' head, but distinctly under this sub-section.

(iii) A lack of reasons is a patent illegality under Section 34(2A).

(iv) In interpreting the contract, the arbitral view must be *fair-minded* and *reasonable*. If the view is one that is *not even possible*, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.

(v) '*Perversity*' as understood in Associate Builders, is now dishoused from '*fundamental policy*' (where *Western Geco* put it), and now has a home under '*patent illegality*'. This includes:

(A) a finding based on no evidence at all;

(B) an award that ignores vital evidence; and

(C) a finding based on documents taken behind the back of the parties.

I believe this is not an exhaustive listing.

Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the *Wednesbury* unreasonableness standard (introduced in *Western Geco*) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. If the *interpretation of the contract* is utterly unreasonable and totally implausible - the view taken is not even possible - a challenge lies. Therefore: an award that was impossible either in its making (by ignoring vital evidence, or being based on no evidence, etc) or in its *result* (returning a finding that is not even possible), then a challenge on the ground of 'perversity' lies under Section 34(2-A) as a dimension of 'patent illegality'.

16. Thus, the rival contentions need to be decided on the touchstone of jurisdiction clarified as above. It is also relevant to refer to the Full Bench judgement of this Court in the case of **R. S. Jiwani Vs. Ircon**

International Limited *(supra)*, for the reason that the respondents have specifically invoked the position of law clarified therein, to claim that the impugned award can be partly set aside, restricted to the second direction issued to the respondents for refunding specific amount with interest. It is submitted that the first finding or direction in the impugned award rejecting the prayer for specific performance made by Mr. Fernandes deserves to be confirmed and sustained. The Full Bench of this Court in the case of **R. S. Jiwani Vs. Ircon International Limited** *(supra)* took into consideration judgement of the Supreme Court in the case of M*cDermott International Inc. Vs. Burn Standard Company Limited and others*, **(2006) 11 SCC 181**, wherein it was laid down that a court under Section 34 of the said Act can only quash an award, leaving the parties free to begin arbitration again, if they so desire. But the Full Bench of this Court in the said Judgement found that the principle of *severability* could certainly apply to arbitral awards, so long as the objectionable part could be segregated. This Court is convinced that the respondents are justified in invoking the said principle and contending that if their contentions are accepted, the impugned award could be partially set aside. This would not amount to modification or correction of errors of the learned arbitrator. In this backdrop, the arbitral award needs to be examined in the light of the contentions raised on behalf of the rival parties.

17. On the question of readiness and willingness of Mr. Fernandes, in the backdrop of his prayer for grant of specific performance of the registered agreement dated 6th October 2003, the learned arbitrator found that Mr. Fernandes was not justified in claiming that amount of Rs.11,50,000/- was paid to the respondents. While reaching the said finding, the learned arbitrator appreciated the evidence on record, including the receipts placed on record and found that amount of

Rs.6,50,000/- had been paid; Rs.1,50,000/- by way of cheque and the remainder by way of cash on various dates. Learned arbitrator specifically found that the receipt pertaining to amount of Rs.5,00,000/- recorded that it was paid by way of a cheque drawn on Bank of India, bearing a specific number. The learned arbitrator also appreciated the evidence on record and found that Mr. Fernandes had admitted that the said receipt at Exhibit - I4 was in respect of a cheque issued, which was never encashed by respondent No.2. The learned arbitrator also found that Mr. Fernandes in cross-examination admitted that other than his word, there was no evidence on record to prove or establish payment of Rs.5,00,000/- by cash to the respondents. In fact, the learned arbitrator found that the evidence on record showed an admission on the part of Mr. Fernandes that he was not in a position to pay the balance consideration at the stage of recording of evidence also.

18. In such a situation, the findings rendered by the learned arbitrator against Mr. Fernandes cannot be said to be giving rise to any ground for interference either on the touchstone of the test of ‘public policy of India’ or ‘patent illegality’, as elucidated by the Supreme Court in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** *(supra)* and this Court in the case of **Union of India Vs. Recon, Mumbai** (*supra*).

19. In fact, the tenor of findings of the learned arbitrator is to the effect that Mr. Fernandes defaulted. This Court finds no reason to interfere with the said finding and hence the first direction / conclusion in the operative portion of the award, rejecting specific performance of the registered agreement dated 6th October 2003 at the behest of Mr. Fernandes, cannot be interfered with.

20. As regards the petition filed by the respondent, specifically

seeking setting aside of the second direction in the operative portion of the impugned award, the very same tests enumerated by the Supreme Court and this Court are to be applied. A perusal of the impugned award shows that the learned arbitrator, having found that Mr. Fernandes had defaulted and did not deserve specific performance of the said agreement, could not have granted the direction for refunding the said amount. The said direction could have been granted only within the four corners of the clauses of the agreement dated 6th October 2003. The relevant clauses of the agreement read as follows: -

> "If the sale be not completed due to any willful default on the part of the Vendor the Purchaser shall be entitled (a) to require specific performance by the vendor of this Agreement or (b) to payment by the Vendor of interest on the said earnest money or deposit at the rate of 18% per annum and all costs, charges and expenses incurred and all loss and damages sustained by the Purchaser in addition to the return by the vendor of the said earnest money or deposit and other amount.
>
> If the Purchaser be not completed due to any willful default on the part of Purchaser, the Vendor shall be entitled (a) to require specific performance of this Agreement by the Purchaser and to claim all costs charges and expenses incurred by the Vendor or (b) to forfeit the earnest money or deposit and claim all loss and damages suffered and to the payment of all costs incurred by the Vendor."

21. The second clause, amongst the two clauses quoted hereinabove, specifically provides that if the purchaser i.e. Mr. Fernandes is at default, and the transaction is not completed, the respondents could either seek specific performance of the agreement or the amount towards earnest money or deposit would stand forfeited. The learned arbitrator in the impugned award has completely ignored the said specific term in the agreement dated 6th October 2003. It is clear from the above quoted clauses that if the respondents were at fault, Mr. Fernandes could have either sought specific performance of the agreement or repayment of the amount of earnest money or deposit with interest @18% p.a.

22. In the present case, the learned arbitrator found that Mr. Fernandes was at default and yet ended up granting a direction of refund and on the question of interest, he referred to the rate of 18% p.a. contained in the clause, which pertained to a situation where the respondents were found in default. Thus, the approach of the learned arbitrator was in the teeth of the two clauses of the agreement quoted hereinabove. The learned arbitrator also erred in holding against the respondents on the ground that they claimed that no amount had been paid, but the evidence indicated that some amount was paid to them. The learned arbitrator was required to proceed strictly as per terms of the agreement and in the backdrop of his own finding that Mr. Fernandes had committed default. As per the test elucidated by the Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** *(supra)* and this Court in **Union of India Vs. Recon, Mumbai** *(supra)*, such an approach gives rise to a ground to hold that the impugned award suffers from patent illegality. Even if the narrowed down scope of jurisdiction, post amendment of the Act is to be taken into consideration, in the present case, the respondents have been able to make out the ground of patent illegality for interference with the second direction given in the operative portion of the impugned award.

23. Learned counsel for the respondents is also justified in referring to Section 28(2) and (3) of the said Act. The learned arbitrator, while discussing the reasons as to why direction for refund could be granted in favour of Mr. Fernandes, adopted an approach consistent with the principles of equity. But, in the teeth of the above quoted terms of the agreement dated 6th October 2003, there was no scope for applying the principles of equity, more so when the parties had not expressly authorized the learned arbitrator to decide the matter *ex aequo et bono* or as *amiable compositeur* under Section 28(2) of the said Act. In this

context, learned counsel for the respondents is justified in relying upon the judgement of this Court in the case of **Board of Control for Cricket in India Vs. Deccan Chronicle Holdings Limited** *(supra)*, the relevant portion of which reads as follows: -

> "232. Mr Mehta points out that the terms ex aequo et bono and *amiable* compositeur have a specific legal connotation. The first means 'according to what is equitable (or just) and good'. A decision-maker (especially in international law) who is authorized to decide *ex aequo et bono* is not bound by legal rules and may instead follow equitable principles. An *amiable compositeur* in arbitration law is an arbitrator empowered by consensus of parties to settle a dispute on the basis of what is 'equitable and good'.
>
> 233. Given the wording of the Arbitration Act, a longer examination of the antecedents of these concepts is unnecessary. The statute itself is clear and unambiguous; and in Associate Builders, the Supreme Court in paragraph 42.3 extracted Section 28 and said that a contravention of it is a sub-head of patent illegality. Ssangyong Engineering does not change this position. Given this now-settled position in law, it is unnecessary to examine the additional authorities on which Mr. Mehta relies, all to the same effect. They also say this: commercial arbitrators are not entitled to settle a dispute by applying what they conceive is 'fair and reasonable,' absent specific authorization in an arbitration agreement. Section 28(3) also mandates the arbitral tribunal to take into account the terms of the contract while making and deciding the award. Section 28 is applicable to all stages of proceedings before the arbitral tribunal and not merely to the making of the award. Under Section 28(2), the Arbitral Tribunal is required to decide *ex aequo et bono* or as *amiable compositeur* only if the parties expressly authorize it to do so. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide based on his notions of equity and fairness, unless the contract permits it."

24. Learned counsel for the respondents is also justified in relying upon the judgement of this Court in the case of **Vilayati Ram Mittal Pvt. Ltd. Vs. Reserve Bank of India** *(supra)*, wherein this Court held that if a clause of an agreement mandates a specific consequence and if the arbitrator issues a direction in the teeth of the same, he travels

beyond his jurisdiction, for the reason that the learned arbitrator is a creature of the contract between the parties and he cannot ignore specific terms contained therein. This Court is convinced that in the present case, the learned arbitrator did transgress the jurisdiction, which he derived as per the terms of the agreement dated 6th October 2003 executed between the parties. Therefore, the respondents are justified in seeking setting aside of the second direction given in the impugned award.

25. As noted hereinabove, partial setting aside of the award is justified when the doctrine of *severability* can be applied. This Court is of the opinion that applying the said doctrine, the impugned award deserves to be partly set aside, insofar as direction No. II is concerned, while sustaining the remainder of the award.

26. In view of the above, Arbitration Petition No.355 of 2022 is dismissed and direction No. I, rejecting the prayer for grant of specific performance, is sustained and confirmed. Arbitration Petition (L) No.24217 of 2022, filed by the respondents is allowed and the impugned award is partly set aside, only to the extent of direction No. II, whereby the respondents were directed to pay amount of Rs.6,50,000/- with interest @ 8% per annum to Mr. Fernandes.

27. In view of disposal of the petitions, pending applications, if any, stand disposed of. There shall be no order as to costs.

(MANISH PITALE, J.)

Minal Parab