

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.435 OF 2009

Yogesh Mehta Petitioner
vs
M/s. S. A. Contractor & Co. Respondent

Mr. S. C. Naidu with Mr.Sean Wassoodew for the petitioner.

Mr. D. H. Mehta with Mr.Ketan Parikh with Ms.Kunjali Sanghavi for the
respondent.

CORAM: ANOOP V. MOHTA, J.

DATE : 4th November, 2009

JUDGMENT:

Heard finally by consent of the parties.

2 The petitioner has invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act") and thereby challenged the Award dated 11.02.2009 passed by the sole Arbitrator and thereby directed the respondent to refund the amount of Rs.12,50,000/- together with interest at 15% p.a. from 01.10.2002 till payment and the counter claim of the petitioner was dismissed.

3 The petitioner/original claimant is doing the business as builders and developers. The respondent is doing business as a broker/dealer in Transferable Development Rights (TDR). By an Agreement dated 3rd July, 2002, the petitioner

entered into an agreement with the respondent for sale of 650 sq.mts. Of TDR to be generated from the Slum Rehabilitation Project of M/s. S. B. Developers. Under the agreement, a sum of Rs.12,50,000/- was advanced to the respondent. The further payment schedule was also fixed as the TDR could not be supplied within the stipulated time on or before 31.08.2002. Breaches of clauses 3 and 6 of the Agreement were committed and, therefore, the claim of refund of the said advanced money.

4 In Summary Suit No.797/2005, pursuance to order dated 20.10.2006, all the disputes and differences between the parties had been referred to the sole Arbitrator. The parties appeared before the Arbitrator; filed their claims, written statements, and counter claim and after hearing both the parties, by giving full opportunity, the Arbitrator has passed the impugned Award. The Arbitrator has rightly observed as under:

“9 The said agreement clearly provides that the procurement of the T.D.R. by the Respondent should be made on or before 31-8-2002. It also clearly provides that the said amount taken as an advance has to be refunded by the Respondent to the Claimant with interest at the rate of 15% per annum. Thus, here is also a specific contract for payment of interest beyond 30th Sept. 2002. The said agreement also provides for a grace period of 1 month and thus, the obtaining of the D.R.C. Was on or before 30.8.2002. On the other hand, the documents produced by the Respondent clearly shows that the said T.D.R. Was procured by the Respondent on 10th Oct. 2003 i.e. almost a year after the expiry of the time provided under the said agreement. It would be noted that in the cross examination dated 20th November, 2008 the Respondent in terms, has also admitted the execution and contents of the said agreement. The said fact of procuring the T.D.R. In the month of October, 2003 for the Claimant is admitted by the Respondent in his cross examination dated 20.11.2008 at page 4 thereof. Thus, the agreement being self operative about the time as to when it has to come to an end and in view of the fact of the Respondent's own admission, the said T.D.R. Was obtained on 10.10.2003 establishes the breach of the said agreement. The Respondent would be liable to refund the said sum of Rs.12,50,000/- in terms of the said

agreement dated 3.7.2002.

10 One more important contention which is being taken by the Respondent is that there were other business transactions apart from the agreement transaction and since he has procured the T.D.R. only for the claimant (much after the expiry under the agreement) he is entitled to co-relate the other transaction with the present agreement transaction. However, this contention of the Respondent also does not hold good as in the cross examination dated 20.11.2008, the Respondent himself admits that since he was aware of the requirement of the T.D.R. Of Claimants he himself sold to Claimants 190 sq. meters of T.D.R. Under agreement dated 8.11.2002 and also acted as an agent/helped the claimant to obtain another 450 sq.meters of T.D.R. On or about 17.12.2003 in which he acted as an agent and has signed the said agreement as a witness. He also further admits that the transaction of 190 sq.meters and 450 sq.meters of T.D.R. Are concluded transaction and he helped the Claimants in these 2 transactions, one by directly selling to them and an other by acting as a middleman for procuring the T.D.R. And signing as a witness to the said agreement, because of the agreement dated 3.7.2002. Thus, the Respondent's own admission about the concluded transaction of procuring T.D.R. For the Claimants and getting the payment thereof, is itself sufficient to negative the contentions of the Respondent. Thus, on this count also, the contentions of the Respondent cannot be accepted on his own admission.

11 In view of the said delay and the Respondents own admission, the contention taken by the Respondent in the written arguments of novation of contract and extension of time cannot be accepted. The admissions of the Claimants as contended by the Respondent cannot be taken into account as the Respondent himself is denying the receipt of the said letter and the evidence of Claimant cannot be read in isolation without reference to the context and against the admitted document on record.”

5 Admittedly, and considering the averments made in the petition, the petitioner could not obtain the D.R.C. Before 31.08.2002. Thus, the default on his part is accepted. The said agreement was never extended thereafter and/or at least there is no material in writing to support the same. Having failed to perform his part of the obligation within the stipulated time, the submission with regard to putting blame on the respondent of not paying the subsequent amount

has no force. The reasoning so recorded and the Award so passed cannot be said to be perverse and/or contrary to the law and/or record.

6 In view of observation, there is no question of granting any counter claim as raised for respondent's own default and for want of substantial material to support the same.

7 With regard to the submission of principle of natural justice, as sought to be contended, has also no force. Having given the opportunity, the petitioner failed to place this additional material on record at proper stage even before the commencement of cross-examination of the respondent. The documents which the respondent wanted to be taken on record are after closing/completion of the cross-examination of the respondent. Those documents were neither on record nor relied in the pleadings. Those documents were pertaining to the transactions between two other persons not concerned with the parties. The Arbitrator, after considering the document of the respondent and the fact that various opportunities were given to the respondent to put his case, but he was delaying the proceedings by one way or the other and still considering those aspects passed the reasoned order by rejecting the contention based upon even on those unadmitted documents. The observation so recorded and considering the conduct of the petitioner, I see there is no breach of principle of natural justice. The party who wants to delay the arbitration proceeding by one way or the other and at such belated stage try to put on record some documents unrelated with the parties transaction and specific agreements, the rejection of those documents cannot be said to be unequal treatment and/or in conflict with the public policy of India as sought to be contended by the petitioner.

8 The aspect of oral understanding or oral extension of agreement, in the absence of any contra and supporting material cannot be read over the written agreement between the parties. The submission made by the learned counsel appearing for the petitioner, based upon the evidence on record is also not acceptable. The learned Arbitrator has appreciated the said material/evidence and passed the reasoned Award. The evidence so recorded and as appreciated cannot be said to be perverse or illegal. The view so taken by the learned Arbitrator by evaluating and appreciating the material on record need no interference under Section 34 of the Arbitration Act.

9 As there is no denial to the agreement and, therefore, also no much dispute with regard to the 15% rate of interest as awarded, the interest so awarded is well within the frame work of the law and the record.

10 Resultantly, the Petition is dismissed. No costs.

(ANOOP V. MOHTA, J.)

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Publisher has only added the Page para for convenience in referencing.

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