

(1994) 03 BOM CK 0008

In the Bombay High Court

Case No : Arbitration Petition No. 27 of 1994 in Arbitration Petition No. 121 of 1991 in Award No. 32 of 1992

R.V. Kulkarni

APPELLANT

Vs

La Builde Corporation and others

RESPONDENT

Date of Decision : 25-03-1994

Acts Referred:

Arbitration Act, 1940 — Section 41, 5

Citation : (1994) 03 BOM CK 0008

Hon'ble Judges : N.D. Vyas, J

Bench : Single Bench

Advocate : A.Y. Gupte and Chirag Balsara instructed by L.C. Tolat and Co, for the Appellant; R.M. Kadam, Rahul Narichania for Respondent No. 1 and Saudagar for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

N.D. Vyas, J.—By the present petition, the petitioner is praying that the agreement/compromise/consent terms dated 3rd August 1993 be taken on record and a decree be passed in terms thereof in Arbitration Petition No. 121 of 1991.

2. Arbitration Petition No. 121 of 1991 is filed by the petitioners therein (who are respondent No. 1 to the present petition) for judgment and decree in terms of Award dated 6th March 1991 made by the Arbitrators. The facts giving rise to the main petition, viz., Arbitration Petition No. ,121 of 1991, and the present petition, viz., Arbitration Petition No. 27 of 1994, are as follows :

By an agreement in writing dated 18th October 1980 entered into between the 1st respondents herein and the petitioner and respondents Nos. 2 and 3 herein, the petitioner and respondents No. 2 and 3 agreed to sell to the 1st respondents immovable property situate at Pune. Certain disputes arose between the parties whereupon the 1st respondents, by their letter dated 20th May 1983, invoked the arbitration agreement contained in the said agreement dated 18th October

1980 and referred the matter to the Arbitrators. As One of the Arbitrators resigned, an arbitration petition was filed for appointment of Arbitrators. Ultimately, Mr. Girish Desai and Mr. Pravin Mehta were appointed Arbitrators. The arbitration proceedings before them culminated into an Award dated 6th March 1991. The same was declared and published by the Arbitrators on 6th March 1991 and the same was filed with the Prothonotary and Senior Master of this Court and Arbitration Petition No. 121 of 1991 was filed by the 1st respondents for decree and judgment in terms of the Award. Respondents Nos. 2 and 3 filed Arbitration Petition No. 122 of 1991 challenging the Award and the present petitioner filed Arbitration Petition No. 7 of 1992 also challenging the Award. Thus, four proceedings are pending, viz., Arbitration Petition No. 27 of 1994, Arbitration Petition No. 121 of 1991, Arbitration Petition No. 122 of 1992 and Arbitration Petition No. 7 of 1992. However, I am concerned only with Arbitration Petition No. 27 of 1994 which was fully argued before me on 15th February 1994 and orders were reserved. The matter, thereafter, was adjourned on a couple of occasions partly due to the settlement talks going on between the parties. Today, when the matter has been fixed for orders and has reached, an affidavit was sought to be tendered on behalf of the petitioner on the ground that subsequent events which have taken place after the hearing on 15th February 1994 are being placed on record. I have refused to take the said affidavit on record as this Court is not concerned with the subsequent events which do not have any bearing on the question in issue between the parties.

3. It is the petitioner's case in the Arbitration Petition No. 27 of 1994 that during the pendency of the main petition, viz., Arbitration Petition No. 121 of 1991, and the subsequent petitions challenging the Award, viz., Arbitration Petition No. 122 of 1992 and Arbitration Petition No. 7 of 1992, by a writing dated 3rd August 1993, the petitioner and the respondents, inter alia, agreed to refer the dispute in the said petitions to be decided by one Dr. Ramchand Bulchand and pursuant to the said writing dated 3rd August 1993, various meetings were held and terms for settlement of dispute involved in the said petitions between the parties were finally sorted out, the said terms have been reduced into writing and the same have been signed by the parties. The said terms, viz., purported agreement/consent terms to be filed in Arbitration Petition No. 121 of 1991 have been annexed as Exhibit A2" to the present petition. It is the petitioner's case before me that the Advocates for the 1st respondents, by their letter dated 4th September 1993, inter alia, referred to the agreement and forwarded the said consent terms to the Advocates for the Petitioner and respondents Nos. 2 and 3. By the said letter, it was, inter alia, confirmed that Rs. 5 lakhs as per the said agreement had been paid. It is further contended that by another letter dated 20th September 1993, the Advocates for the 1st respondents requested for fixation of a meeting to finalize the consent terms and by another letter dated 7th October 1993, the Advocates for the 1st respondents stated that unless the consent terms were filed, they would move in the above matters for decree in terms of the Award dated 6th March 1991. It is further stated that since 7th

October 1993, various meetings were held between the parties and some representations were also made to Dr. Bulchand. However, the said consent terms, till date, remained unaltered. In these circumstances, the petitioner submits in the present petition that the aforesaid Arbitration Petitions Nos. 121 of 1991, 7 of 1992 and 122 of 1992 be disposed of in view of the settlement/agreement in writing arrived at on 23rd August 1993 and that the parties are bound and liable to abide by the said agreement and, further, that the said agreement is a lawful agreement or compromise in writing signed by all the parties in the said proceedings which is in respect of the whole of the matter in the said proceedings. It is specifically averred that since the 2nd and 3rd respondents are denying or deemed to have denied or refused the said agreement/compromise (Exhibit A2"), this Court be pleased to decide the said question and that neither the 1st respondents nor respondents Nos. 2 and 3 are taking any further steps to have the said agreement/compromise recorded in the aforesaid proceedings. In these circumstances, according to the petitioner, the petitioner has been compelled to file the present petition for passing of the necessary decree/orders in accordance therewith as provided under Order XXIII, Rule 2 of the Code of Civil Procedure.

4. Before me, the 1st respondents have vehemently opposed the present petition. As far as respondents Nos. 2 and 3 are concerned, who are the co-owners along with the petitioner, no one had represented them before me at the time of the hearing which was concluded on 15th February 1994. However, today Mr. Saudagar, the learned counsel, appeared for respondents Nos. 2 and 3 and submitted that respondents Nos. 2 and 3 were submitting to the orders of the Court.

5. The first objection which is raised on behalf of the 1st respondents is that the present petition is not maintainable at all in view of the provisions of section 41 of the Arbitration Act. Relying on the opening words of section 41 of the Arbitration Act, viz., -

Subject to the provisions of this Act and rules made thereunder -

it was the submission of the learned counsel appearing for the 1st respondents that the powers of the Court dealing with matters arising out of the Arbitration Act are only those which are provided for under the Indian Arbitration Act and to a limited extent the provisions of the CPC are applicable as can be seen from the provisions of section 41 of the Arbitration Act. In these circumstances, it was the submission of Mr. Kadam, the learned counsel for respondent No. 1, that the present petition is not maintainable. Reliance was placed by Mr. Kadam on a decision in the case of Prafulla Chandrra Karmakar and another vs. Panchanan Karmakar, reported in AIR 1946 Cal. 427, where it was a case of reference to arbitration in a suit and wherein it was, inter alia, held that a compromise between the parties was not mentioned in the Arbitration Act as one of the grounds on which an award could be set aside or modified and the Court declined to apply Order 23, Rule 3 of the CPC on the strength of section 41 of the

Arbitration Act. However, it was further held that if a concluded compromise in undisputed terms is placed before the Court by all the parties, whether before an Award has been made or after, the Court may grant leave to revoke the submission u/s 5 of the Arbitration Act and that where a compromise is only alleged by one party but disputed by the other, the existence of such a disputed compromise cannot be a good ground for granting leave to revoke the submission and the Court has no power to entertain the question of such a compromise or to embark upon an enquiry as to the factum and validity of the compromise. The question, which was before the Division Bench of the Calcutta High Court in the said matter, was that although the parties may be free to settle their dispute as between themselves and abandon the strife, they cannot, by reason of the special provisions of the Act, have the machinery of the Court to register the compromise and the question to be considered, therefore, was whether the Arbitration Act leaves any room for a compromise and for a decree to be obtained thereon by any possible procedure. The Court ultimately came to the conclusion that even after a reference has been made to arbitration or an award has been made therein, the parties have a right to compromise the dispute and on such a compromise being reported, the Court may, if, on considering the compromise, finds it to be valid, grant leave to revoke the submission and that the position would be far different when no admitted compromise is placed before the Court by all the parties, but there is only an allegation of a compromise by one party which is denied by the other. In such a case, not only is the dispute not at an end but to the old dispute has been added a fresh one. It was also held that it would be contrary to the whole scheme of the Arbitration Act and to several of its specific provisions if the Court were, in such a case, to launch an enquiry as to whether there had been a compromise of the suit or not.

6. However, Mr. Gupte, the learned counsel appearing for the petitioner, relied on a decision of the Supreme Court in the case of *Munshi Ram Vs. Banwari Lal*, , where the Supreme Court was dealing with a matter where all the parties had agreed by a subsequent compromise to vary the terms of an Award and, therefore, the question before the Supreme Court was whether the same could be done by the Court under the Arbitration Act. As the Calcutta decision (*ibid*) was on the revocation of the reference as the reference was made through the Court, the said decision was also considered by the Supreme Court and the Supreme Court, after considering the divergent views of the different High Courts, came to the conclusion that the Arbitration Act does not disable the parties from terminating their dispute in a different way, and if they do, it could not be intended by law that a dispute, which has been successfully terminated, should again become the subject of litigation.

7. As far as the decision of the Supreme Court (*ibid*) is concerned, it is very clear that after the Award was passed, there was further settlement talks and parties agreed on fresh terms and stated that they were prepared to have a decree passed on the terms accepted by them. This was not the case before the

Calcutta High Court in AIR 1946 Cal 427 (ibid) nor it is the case before me. Although it is contended by the petitioner before me that there has been a concluded agreement subsequent to the filing of the Award in this Court and subsequent to the filing of the Arbitration Petitions Nos. 121 of 1991, 122 of 1992 and 7 of 1992, the same is vehemently denied by the 1st respondents. It is the contention of the 1st respondents that the alleged agreement recorded in the said consent terms was subject to the petitioner and the 2nd and 3rd respondents obtaining a cancellation of the agreement for sale dated 9th November 1989 entered into between them and Messrs. Porwal Builders, Pune, and in view of the failure on the part of the petitioner and 2nd and 3rd respondents to obtain such a cancellation, the petitioner and respondents Nos. 2 and 3 failed to fulfill the above obligation which was a condition precedent and, therefore, the agreement recorded in the said consent terms never came into force/being and that the petition was misconceived. Mr. Kadam took me through the correspondence which had ensued between the parties over and above the letters annexed to the affidavit-in-reply. The said correspondence clearly shows that there was no concluded agreement between the parties. By letter dated 14th October 1993 addressed by the then Advocate for respondents Nos. 2 and 3 to the 1st respondents' Advocates, it was, inter alia, stated that there were some differences between Mr. Porwal and the petitioner which need to be resolved. By a further letter dated 29th October 1993 addressed by the petitioner himself to Dr. Bulchand, the petitioner himself, inter alia, stated that respondent No. 3 had nothing to do with the property and that it was he who accepted the responsibility of Porwal's settlement with Rs. 5 lakhs and failed and the petitioner himself suggested that by a supplementary Award the 3rd respondent should be asked to schedule the responsibility of settling Porwal by use of the excess Rs. 4 lakhs. It is the admitted position that although consent terms were signed between the parties as per Dr. Bulchand's directions and decision, the said consent terms were never sought to be tendered in Court. That would itself show that there is some substance in Mr. Kadam's submissions. By another letter dated 23rd November 1993 addressed by Dr. Bulchand to parties before me, it was, inter alia, stated that the consent decree can "now" be filed with the "changes" suggested in the said letter. It is further mentioned in the said letter Rs. 2 lakhs each be paid to each of the respondents simultaneously with the "signing" of the said consent decree. This correspondence substantially supports the contentions of Mr. Kadam.

8. It was alternatively submitted on behalf of the 1st respondents that assuming that there was an agreement as pleaded by the petitioner before the Court, the said agreement was modified and or superseded by a further writing dated 23rd November 1993 by Dr. Bulchand. I have, hereinabove, referred to the said writing. Again, I see considerable force in the above submission. The said writing dated 23rd November 1993 does make modifications to the earlier writing as can be seen from what is stated above regarding the said writing.

9. Mr. Kadam submitted that settlement with Porwal Builders was a basic,

fundamental and integral part of the consent terms and this aspect was a condition precedent for the settlement between the parties to the consent terms. It is the admitted position that till date differences between Porwal Builders and petitioner and respondents Nos. 2 and 3, who are the co-owners, are not resolved. In the result, the property cannot be transferred to the respondent No. 1 free from all encumbrances.

10. In these circumstances, when, before me there is an agreement/consent terms signed by parties, however, admittedly all the parties are not agreeable to the same being taken on record and suitable orders being passed. The situation is almost identical with the situation with which the Division Bench of the Calcutta High Court in AIR 1946 Cal 427 (ibid) was dealing with except that in that case there was a reference to arbitration in a pending suit. Although I cannot possibly have any quarrel with the decision of the Supreme Court (ibid), the situation is not like the one with which the Supreme Court was dealing where all the parties were agreeable. It stands to reason that when all parties are agreeable the Court can certainly act on such a compromise under Order 23, Rule 3 of the Code of Civil Procedure. It can legitimately be argued that once the Court has power to take a compromise on record and pass appropriate orders, the Court has to investigate and satisfy itself whether there has been, in fact, a compromise and whether the same is lawful. In the present case, from the material placed before me and discussed above, I am of the opinion that there is no concluded compromise as alleged by the petitioner.

11. In the result, I do not see any substance in the petition inasmuch as parties are not at all ad idem nor are agreeing with each other to the Court taking the agreement/compromise/consent terms on the record. The petition, therefore, has to be dismissed. Petition, therefore, dismissed with costs.

12. Thus, I have disposed of Arbitration Petition No. 27 of 1994 which was fully argued before me. As far as the other three petitions are concerned, they may come up in the regular course before the regular Bench.

13. Certified copy expedited.