

(2012) 04 BOM CK 0015

In the Bombay High Court

Case No : Appeal No. 606 of 2011 with Notice of Motion No. 2732 of 2011 in Arbitration Petition No. 38 of 2011 in Suit No. 3231 of 2001

Sarvajanik Shikshan Sanstha

APPELLANT

Vs

Alfred Ashtamkar, since deceased, through his heirs and legal representatives: Yehoshva Ashton and Others

RESPONDENT

Date of Decision : 17-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Income Tax Act, 1981 — Section 230A

Citation : (2012) 4 ALLMR 851 : (2012) 4 ARBLR 261 : (2012) 4 BomCR 318 : (2012) 114 BOMLR 1657 : (2012) 3 MhLj 776

Hon'ble Judges : P.B. Majmudar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : P.K. Samdani, instructed by Mr. Rajesh S. Datar, for the Appellant; Chetan Kapadia with Mr. Hemant Telkar, instructed by M/s. Haresh Mehta and Co., for respondent Nos. 1 to 4 and Mr. Dara Zaiwala , with Mr. S.K. Bilawala and Ms. Punita Shah, instructed by M/s. Bilawala and Co., for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—This appeal is directed against the order dated 22nd July, 2011 of the learned single Judge in Arbitration Petition No. 38 of 2011 in Suit No. 3231 of 2001. By the impugned order, the learned single Judge dismissed the Arbitration Petition which was filed by the appellant u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") challenging the Award dated 23rd day of June, 2010, of the learned Sole Arbitrator. The learned single Judge found that the agreement in question was regarding transfer of the running school and since the School is already closed, it is impossible to grant decree of specific performance. The learned single Judge also found that considering the limited jurisdiction conferred u/s 34 of the Act, the order of the learned Arbitrator was not required to be interfered with and accordingly the learned single Judge rejected the Arbitration Petition which was filed u/s 34 of

the Act challenging the Award of the sole Arbitrator. The appellant herein entered into an agreement with one Alfred Ashtamkar, who is no more now. As per the agreement, the appellant, which is a Public Trust registered under the provisions of the Bombay Public Trusts Act, 1950, agreed to run and manage the school viz. Sampson English High School which was run by Alfred Ashtamkar. The agreement for sale between the parties was entered into on 25th March, 1999. As per the said agreement, the appellant was to obtain power of attorney from the original owner of the school viz. Alfred Ashtamkar for the purpose of running the School and thereafter within a stipulated period the sale document was to be executed. According to the appellant, respondent failed to carry out the obligations as per the said agreement and, therefore, the appellant filed a suit being Suit No. 3231 of 2001 on the Original Side of this Court. During the pendency of the aforesaid suit, both the sides agreed that the dispute may be referred to the sole Arbitrator and accordingly a retired Judge of the Supreme Court, Mrs. Justice Sujata Manohar was appointed as the sole Arbitrator for deciding the disputes between the parties. The learned Arbitrator, after hearing both the sides and after considering the evidence on record, came to the conclusion that the appellant was never ready and willing to perform their part of the contract as they had never taken any steps to run the school by taking over the management. The learned Arbitrator also found that even subsequently the appellant was not vigilant in taking further steps to see that the agreement of sale is executed and considering the said aspect, the learned Arbitrator came to the conclusion that no specific performance can be granted. However, the learned Arbitrator directed the respondents to pay Rs. 3 lakhs along with 12 per cent interest from 25th March, 1999 till payment.

2. The appellant thereafter preferred an application u/s 34 of the Act challenging the said Award on the ground that the learned Arbitrator has not considered appropriate evidence on record and that the learned Arbitrator has committed an error in rejecting the prayer for specific performance of the agreement. The learned single Judge found that in its limited jurisdiction u/s 34 of the Act, the Award of the learned Arbitrator is not required to be interfered with as it cannot be said that the learned Arbitrator has committed any error of law or of jurisdiction which is required to be corrected by interfering the said Award in an arbitration petition u/s 34 of the Act. It is the aforesaid order of the learned single judge which is impugned at the instance of the appellant in this appeal.

3. Mr. Samdani, the learned Senior Counsel appearing for the appellant, vehemently argued that the learned Arbitrator has committed an error in coming to the conclusion that the appellant was not ready and willing to perform their part of the contract. It is submitted by Mr. Samdani that unless appropriate permissions are obtained from various authorities viz. permissions from U.L.C. Department, income tax Department etc., it was not possible for the appellant to get the sale deed executed from the respondents. It is submitted by Mr. Samdani that it was the duty on the part of the respondents to apply for permission from various authorities and since the respondent was not willing to perform his part

of the contract that ultimately after various correspondence entered into, the appellant was compelled to file a suit in which the matter was referred to the learned Arbitrator. It is submitted by Mr. Samdani that the learned Arbitrator has committed an error of law in not properly interpreting clause 14 of the agreement in question. It is submitted by Mr. Samdani that the learned single Judge has not considered the matter in its proper perspective and various aspects have not been dealt with by the learned single Judge while dismissing the Arbitration Petition.

4. The learned senior Counsel appearing for respondents have supported the order of the learned single Judge as well as the Award of the learned Arbitrator.

5. We have heard the Learned Counsel for the appellant at great length. We have gone through the Award of the learned Arbitrator, the order of the learned single Judge as well as the agreement entered into between the appellant and deceased Alfred Ashtamkar. We have also gone through various correspondence forming part of these proceedings.

6. At this stage, reference is required to be made to various clauses in the agreement dated 25th March, 1999. At the time of executing the document, the deceased-Alfred Ashtamkar, was running a school viz. Sampson English High School. In view of his old age and since he was unable to manage the said school and since he wanted to leave India, as he was a citizen of Israel, he decided to transfer the entire school in favour of the appellant trust. The appellant trust is running various educational institutions and, therefore, the said Alfred Ashtamkar with the hope that the appellant will continue to run the school ultimately decided to sell the same to the present appellant. The agreement to sale is at Exhibit-B (at page 59 of the paper book) to the appeal memo. By the said agreement, the seller/vendor agreed to sell all that pieces and parcels of land and premises together with the building and the school run thereon with furniture, fixture, books, stationery, etc. Clauses 5, 8, 14 and 15 read thus:

5. As the Vendor due to old age or otherwise is not interested in running the said school viz. Sampson English High School, he has agreed to give possession of the said school property along with General Power of Attorney to the Purchasers simultaneously on execution of these presents, to run, manage, conduct the said Sampson English High School with immediate effect and agrees that he the Vendor shall not interfere or give any instructions hereafter to and/or the management of the said Sampson English High School.

8. The Vendor shall obtain necessary permission from Competent Authority under the Urban Land (Ceiling and Holding) Act as well as a certificate u/s 230A of the Income Tax Act of 1981 before the completion of the sale.

14. The Vendor shall deliver possession of the said school property along with fixtures, furniture, books, stationery etc. to the purchasers together with any portion of the said property which is or are vacant at the time of completion of the sale.

15. The vendor shall pay all assessment, rent, rates, taxes and outgoings in respect of the said school property previous to the day of completion of sale and the same if necessary shall be apportioned between the vendor and purchasers.

7. As pointed out earlier, since the Vendor was not in a position to run the school which was running at the relevant time, as per clause 5 of the said agreement, he had agreed to give possession of the said property along with general power of attorney to the purchasers simultaneously on execution of those presents to run, manage, conduct the said Sampson English High School with immediate effect. It is not in dispute that the appellant did not take away the management immediately as per clause 5 of the said agreement. Mr. Samdani, however, tried to justify the said aspect by stating that even for running the management, permission from the Dy. Director of Education was made available after considerable time. It is also argued by Mr. Samdani that even the permission from the Charity Commissioner was also obtained after considerable time. The said clause has been interpreted by the learned Arbitrator and the learned Arbitrator found that since the appellant has not taken any steps to run the management immediately, it can be said that the appellant was not ready and willing to perform their part of the contract. So far as taking over the management is concerned, in our view, it was a time bound requirement though regarding sale of premises is concerned, since it is an immovable property, one may not consider time as an essence of contract but so far as taking away of the management is concerned, in view of the circumstances stated above, regarding the old age of the person and since he was not willing to manage the same, he entered into an agreement by incorporating the clause that he will give power of attorney to the purchasers as per clause 5. It is not in dispute that the appellants did not take away the management or start running the school immediately. In the meanwhile with the permission of the State Government especially when since nobody was looking after the management of the school, the school was allowed to be closed. It is also pointed out that the school was allowed to be closed as the school building was collapsed. Since it is not in dispute that the school was already closed in the year 2005 and as per various clauses of the agreement it is clear that the vendor wanted to sell the running school for the purpose of running the same, there was no question of transfer of the school now for running of the said institution. Mr. Samdani, however, argued that though it is true that since now the School is no longer functioning and it is already closed since 2005, at least the purchaser is entitled to purchase the land and building. Considering the nature of the agreement, it has rightly been found by the learned Arbitrator that as per clause 5, the appellant was required to run the running school so that the students may not suffer. Considering the totality of the evidence and the conduct of the appellant, the learned Arbitrator found that the appellant was not ready and willing to perform their part of the contract. Considering the said aspect, the learned single Judge has rightly not interfered with the award of the learned Arbitrator in his limited jurisdiction u/s 34 of the Act.

8. While considering an application u/s 34 of the Act, this Court is not required to consider the matter as if this Court is hearing the regular appeal against the order of the learned Arbitrator. On the basis of the evidence on record and on the basis of interpretation of various clauses which we have incorporated above, the learned Arbitrator has come to the conclusion that specific performance is not required to be granted and has directed the respondent to pay back the amount which the appellant has paid with interest.

9. It is required to be noted that the deceased wanted to transfer the school for the purpose of running the school which object could not be fulfilled as the appellant did not take the management immediately and subsequently the school was required to be closed. Even otherwise no specific performance could have been granted for running the school as it was already closed since long. It is an admitted fact that at the time when the Arbitrator decided the dispute, the school was not in existence as it was not a running school. Considering the aforesaid aspect, it cannot be said that the Award of the learned Arbitrator is contrary to law. Whether a particular person is ready and willing to perform his part of the contract is always a finding of fact. In a limited jurisdiction u/s 34 of the Act, the learned single Judge came to the conclusion that the said Award is not required to be interfered with. The learned Arbitrator has decided the dispute as per the agreement between the parties and given her finding on the issue by holding that the appellant was not ready and willing to perform their part of the contract. Considering the aforesaid aspects, in our view, no interference of this Court is called for in this appeal. Since the matter was argued at length, we have considered various clauses of the agreement which we have incorporated above. It is conceded by Mr. Samdani that since now there is no question of taking away the running school as the school is not in existence, the land can be handed over to the appellant by virtue of the agreement. The agreement in question cannot be read in such an isolation as the main subject matter of the agreement i.e. running the school is not in existence and it is pointed out by the Learned Counsel for the respondents that the building itself has fallen down. Considering the aforesaid aspect, in our view, the appeal is absolutely without any substance and the same is dismissed at the admission stage itself. In view of the dismissal of the appeal, no orders are required to be passed in the Notice of Motion and the same is also accordingly disposed of.