IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (L) NO. 11285 OF 2021

Nayan Arvind Shah & Ors. … Petitioners

vs.

Ashwin Laxmikant Vasavada & Ors. … Respondents

Mr. Prateek Seksaria a/w. Mr. Dharam Jumani, Mr. Nishant Chotani, Mr. Mangesh Sawant i/b. Mr. Arun Panicker for the Petitioners.

Mr. Mayur Khandeparkar a/w. Mr. Vatsal Shah i/b. V. Juris The Law Office for Respondent nos. 1 and 2.

Mr. Shanay Shah i/b. Mr. Jeet Gandhi for Respondent no. 3.

Mr. Gauraj Shah i/b. Mr. Vatsal Shah for Respondent no. 4.

CORAM : A. K. MENON, J.
DATED : 12th JULY, 2021.
[THROUGH VIDEO CONFERENCE]

P.C. :

1. This petition under Section 37 of the Arbitration and Conciliation Act seeks to assail the order passed under Section 17 by a Sole Arbitrator. The Sole Arbitrator declined to grant relief sought in the application under Section 17. By way of background, I may mention that the application under Section 17 was initially filed as a petition under Section 9 and upon appointment of the Arbitrator the application under Section 9 was converted to one under Section 17.

The brief factual background is as follows:

2. The petitioners and respondents are partners of M/s. Rajlaxmi Developers. The current Partnership Deed between the parties is dated 22nd August, 2018 and the parties to this petition continue as partners. The first petitioner holds 47% in the firm. The rest is divided between petitioner nos. 2, 3, 4 and the respondents. The petitioners collectively are entitled to 50% of the profits and losses of the firm and the respondents are collectively entitled to the remaining 50%. The petitioners and respondents are required to contribute 50% of the capital required by the firm to carry out its business. The firm is said to be the owner of a plot of land in Thane and the business of the firm is the development of the said land by putting up construction thereon and selling the units so constructed. The firm is a Special Purpose Vehicle only for the purposes of carrying out the aforesaid development work and utilising the entire FSI till the the firm sells all residential units, commercial premises and other units constructed on the firms land and complying with statutory and contractual obligations.

3. The only relief that the petitioner sought in the application under Section 17 is in terms of prayer clause (a). For ease of reference prayer clause (a) is reproduced below :

> *(a) The Respondents be directed by an order of this Hon'ble Court to contribute further funds (to the extent of the Respondents' respective shares in the Firm) as are required by the*

Firm for the purposes of meeting the Firm's obligations (including obligations towards the Bank) and for ensuring that the business of the Firm is carried on smoothly and in an uninterrupted manner.

Effectively what the prayer seeks is a direction to the respondents to specifically perform provisions of the partnership deed, in particular the obligation of the partners under clause 12.1 and 12.2 of the Supplemental Deed of the Partnership. Clause 12.1 and 12.2 read as follows :

12.1 The Continuing Partners hereto have reached a conclusion that if any further funds are required to be brought in business of the Firm (in the manner to be decided as per Clause 11 hereof), the said funds so required will be made available to the said Firm by availing of external borrowing from banks and/or financial institutions at such rate of interest and on such terms and conditions as may be stipulated by the said Bank and/or financial institution. Each of the Continuing Partners shall give their respective personal guarantees for securing such funding but shall not be obliged to create any mortgage of their respective personal residential or office premises for securing such debt/loan.

12.2 In the event if the Firm is unable to secure any debt funding for the required funds at commercially viable rates, then the Continuing Partners will bring in the necessary funds (in their

respective Sharing Ratios) from their own sources in the Firm so as to enable the Firm to carry on its business.

This Deed of Partnership dated 22nd August, 2018 was supplemental to a Deed of Partnership dated 21st December, 2010 and two Supplemental Deeds thereto dated 3rd July, 2012 and 1st July, 2013. The present Partnership Deed with which we are concerned is the third such Supplemental Partnership Deed.

4. Mr. Seksaria learned counsel appearing on behalf of the petitioner submitted that the order passed by the learned Arbitrator was bad in law and on facts and prayed that the order be set aside and the relief prayed for be granted. According to him the obligation under clause 11 was absolute. He invited my attention to Exhibit B to the petition which is letter dated 22nd August, 2018. This is a letter providing for an "Understanding for expenses". The contents of the letter are to be found in single paragraph and reads as follows :

Understanding for expenses :

"It is agreed by and between the partners that hereinafter all the future project expenses including expenses pertaining to obtaining any approvals and related to title of the firm to the project land will be shared in the respective Profit Sharing Ratio".

According to Mr. Seksaria this letter at Exhibit-B further emphasises the obligation for further funding under clause 12.2.

5. Referring to the profit sharing ratio agreed between the parties Mr. Seksaria submitted that the respondents were bound and liable to contribute their share of amounts required for carrying out the business of the firm. The firm upon reconstitution had drawn up accounts as of 22nd August, 2018 and same had been finalised by all parties. The liabilities of the firm are to be discharged by the parties in accordance with the agreement between them and neither of the parties were interested in dissolving the firm since the only business of the firm was development of the land at Thane. This is emphasized by referring to Clause 4 of the Partnership Deed which specifies the duration of the partnership between the Continuing Partners to be "till the completion of the entire development work" on the Firm's land by utilizing the entire FSI and till the said firm sells all the residential flats, commercial premises and other units constructed on the Firm's Land and till the said Firm complies with all statutory and contractual obligations.

6. The gravamen of the dispute is the refusal / reluctance of the respondents to contribute their share to the partnership business. Mr. Seksaria in the course of submission also pointed out that Clause 10 of the Partnership Deed clearly provides that the partnership firm will not be dissolved till the completion of the entire project development on the Firm's Land.

7. Mr. Seksaria further submitted that the payments due to the bank were made regularly till March, 2020, but thereafter the respondents discontinued

contributions and the petitioners were thus being prejudiced by the non-co-operation of the respondents in complying with the obligations under the Partnership Deed. He submitted that the respondents are bound to continue contributing funds in terms of the agreement between parties and therefore it became necessary to seek relief under Section 17.

8. According to Mr. Seksaria a very strong and compelling case has been made out for grant of reliefs. He submitted that if the contributions are not continued and resumed the firm would most likely be classified as a non performing asset and the bank would thereafter take coercive steps including under SARFAESI. He submitted that the application was only in order to ensure that the respondents contributed their share. Nothing sought was extraordinary. It was all within the confines of the contract between the parties and and an obligation that respondents have not fulfilled. In continuing the partnership it was obvious that the terms of the partnership would have to govern and that included the obligation to contribute funds.

9. The further funding was also reiterated in the letter dated 22nd August, 2018 at Exhibit-B styled as "Understanding for Expenses". This read with Clause 12.2 was reiterated by Mr. Seksaria. He submitted that the learned Arbitrator had erroneously concluded that the relief could not be granted at the present stage. That a fair reading of Clauses 11.1, 11.2, 12.1, 12.2 and 12.3 would clearly entail an order in terms of prayer clause (a) that was

sought. The Arbitrator had misconstrued the provisions and observed that Clause 12.2 was an alternative to Clause 12.1 and that Clause 12.2 does not come into play at all. He further contended that in importing the contents of Clause 12.4 the learned Arbitrator had completely lost sight of the principal obligation of the respondent to contribute under Clause 12.2. Mr. Seksaria therefore submitted that the impugned order be set aside and the relief prayed for under Section 17 application be granted.

10. The petition is being opposed by Mr.Khandeparkar on behalf of the respondents. He has taken me through the various provisions of the Partnership Deed between the parties and in particular the provisions for further funding inter alia pointing of that Clause 12.2 would only be an alternative as held by the Arbitrator. That essentially the firm was required to avail of external borrowings as contemplated in Clause 12.1 and contributions of the partners under Clause 12.2 would only be a consequence of Clause 12.1 not being performed. He further submitted that reference placed to Exhibit B – letter dated 22nd August, 2018 is incorrect since it was not even signed by all partners. It was evidently signed only by four partners and therefore he submitted that the Understanding for Expenses is not as between the partners in the partnership firm. He submitted that no strength could be drawn from the said document merely because the parties to the documents had agreed to fund the future projects in the same ratio as the profit sharing ratio. It is pertinent to note that this document is seen to be

executed on the same day as the Supplementary Deed. Several references have been made to the business plan agreed between the parties one which form parts of Annexure 9. The reason for the side letter to be executed is not very evident at this stage, probably it will during the trial before the Arbitral Tribunal.

11. Mr. Khandeparkar submitted that the petitioners were part of a group known as "Mayfair Housing Private Limited" who are the owners and proprietors of brand name Mayfair Housing and Mayfair Housing had granted licence to the firm Rajlaxmi Developers to use the name for the project and on terms and conditions set out in a Brand Usage Licence Agreement also dated 22nd August, 2018. He submitted that Mayfair Housing being an established brand was required to contribute substantial amounts and had in fact failed to so contribute. As on date the contribution of the petitioners had fallen short of the required amounts and despite that the petitioners were insisting that the respondents bring in further contributions. This he submitted was not at all in contemplation between the parties and therefore cannot be specifically enforced in view of the disputes between the parties.

12. It is in this background that I have had occasion to consider the order impugned in this appeal. I have gone through the order as well as considered the submissions of both sides I find no reason to interfere. At the outset I may

mention that parties have not contended that the order does not record the facts as they transpired or the submissions made before the Arbitral Tribunal. I have therefore proceeded to consider the findings of the Tribunal on the basis of these positions that the parties have taken up before the Tribunal.

13. The Sole Arbitrator has recorded the fact that the dispute did not arise out of dissolution of the firm. On the other hand both the contesting groups of partners had contended that the firm cannot be dissolved in view of an express provision to that effect in the Partnership Deed. What I find unusual in the present case is that the Arbitral Tribunal did not have a statement of claim before it. In my view the Tribunal rightly came to the conclusion that it is not possible to imagine what kind of final relief would be sought in the present case. In my view the application before the Sole Arbitrator was in the nature of a request to specifically enforce the obligations of the parties. The Sole Arbitrator was being called upon to pass a mandatory order calling upon respondents to contribute funds as contemplated under Clause 12.2. What the petitioners appear to have overlooked is a fact that Clause 12.2 is obviously subject to failure of the provisions of Clause 12.1.

14. A fair reading of Clause 12.1 will reveal that the principal source of funding for the project was to be borrowings. I have had occasion to consider the scheme of Clause 12 which provides for further funding and I am of the view that the funds required for the project was to be made

available to the firm by availing of borrowings from banks or financial institutions which they initially did. In fact the firm having borrowed from the bank is now said to be on the verge of committing default. It is therefore clear that the funding was to be external, through borrowings and that would have to be repaid from the income generated by the firm. Each of the partners were required to give personal guarantees and there is no dispute of the fact that these guarantees were in fact given. Clause 12.1 also clarifies that none of the partners would be obliged to mortgage their respective personal properties to secure such a debt. Thus the debt had to be serviced and had to be repaid from the income generated by the business of the firm.

15. Clause 12.2. as we have seen clearly comes into effect only if the firm is unable to secure borrowings at commercially viable rates. If that were to be the case the continuing partners were obliged to bring in funds from their own sources in order to continue business. In the present case the petitioners have not established as on date before the Tribunal that the firm was unable to secure any borrowings. Unless that was done there was no occasion for the petitioners to call upon the respondents to contribute in terms of Clause 12.2. One wonders why the letter dated 22nd August, 2018 was executed on the same day as the supplementary agreement. This is an aspect that the Tribunal will consider during the trial.

16. Although both learned counsel have taken me through the agreements between the parties, the business plan and the manner in which the factual aspects developed leading up to the dispute, I do not find it necessary to consider these areas since the challenge in the present petition is to an order that speaks for itself. Having considered the order I am of the opinion that in a case where the statement of claim had not even been filed, let alone the defence, the issues between the parties were not clearly decipherable even before reaching such a stage when the Tribunal could appreciate the scope of the reference, the petitioners have sought a mandatory order effectively seeking performance of the funding obligations.

17. On a first reading of Clause 12, I am of the view that the Arbitrator had adopted the correct approach, inasmuch as on a plain reading of the provisions of Clause 12 there is no doubt that the first option for funding was borrowing. There is no unconditional obligation on the part of the partners to keep contributing funds unless the firm was unable to obtain funding from external sources such as banks and financial institutions. This is an aspect that would have to be established during the trial. It is not a case where respondents have agreed that no external funding was possible and yet declined to honour their commitment.

18. The disputes between the parties would be crystallized only after filing the statement of claim and the defence. At this prima facie stage the

approach of the Tribunal cannot be faulted. In my view the course adopted by the tribunal is a perfectly reasonable one. It is not implausible. The conclusions are straightforward and no exception can be taken to the reasoning for having come to the conclusion that relief must be denied. The Tribunal has in my view analysed the provisions of Clauses 11.1, 11.2, 12.1 and 12.2 and the stage at which Clauses 12.3 and 12.4 would come into play. In the ultimate analysis Clause 12.4 provides for the firm to repay in priority the amounts contributed by the partners and also pay interest there on from the available surplus funds. The dispute as to whether the petitioners have short funded the firms operation and whether the respondents are bound to now fund any shortfall on their side is an aspect that can be gone only at the hearing of the reference. Merely because non payment of the banks dues may result in coercive action by the bank is no reason to grant mandatory relief at this prima facie stage. The Arbitral Tribunal has been conscious of the fact that the petitioners could very well contribute any shortfall to avoid coercive action and that the petitioners would be entitled to interest on that. The case of the applicant that they would suffer a irretrievable loss or injury has not been believed by the tribunal, and rightly so.

19. In *M/s. Best Sellers Retail(I) P.Ltd vs M/S Aditya Birla Nuvo Ltd.& Ors*[2] the Supreme Court had occasion to observe that even where a prima facie case is made out by the plaintiff a Court would refuse temporary injunction,

2 (2012) 6 SCC 792.

if the injury suffered by the plaintiff on account of refusal of the temporary injunction was not irreparable. In the present case the issue is whether refusal to grant mandatory relief would cause irreparable harm, loss or injury to the firm or the partners and in my view the Tribunal has correctly observed that no irretrievable injustice would be caused and there would be obviously no irreparable harm, loss or injury. If one partner fails to contribute rightly or wrongly, the others can always make good the shortfall and it is for this purpose that Clause 12.4 has been provided in the agreement between the parties so as to compensate the partner who has lent a helping hand beyond his obligations under the agreement.

20. Furthermore we must bear in mind that the Arbitral Tribunal has exercised its discretion under Section 17 which need not been interfered with unless there was something so perverse or infirm that the Court must interfere and correct the view of the Arbitral Tribunal. In my view under Section 37 it is not open for this Court to re-assess all the material that has been placed before the Tribunal and to adopt a different reasoning merely because such an alternative was possible. As far as the facts at hand are concerned the Sole Arbitrator has taken a view I have already found is a reasonable one. It cannot be assailed as an impossible view or an implausible one. It will always been open for the Tribunal to consider all factual aspects after pleadings are complete. Thus there being nothing perverse or illegal about the order, the same cannot be faulted. In these circumstances I am of

the view that there is no case for interfering with the impugned order and accordingly the appeal must fail. For all the aforesaid reasons I pass the following order :

(i) Petition is dismissed.

(ii) No orders as to costs.

(A. K. MENON, J.)