

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment pronounced on: May 02, 2013*

+ **OMP No.3/2011**

UMA KAPOOR & ANR Petitioners
Through Mr.Prem Kumar, Adv. with
Mr.Ashish Kr.Sharma & Mr.Rakesh
Kumar, Advs.

versus

KAPIL AGGARWAL Respondent
Through Mr.Pramod K.Verma, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioners, Uma Kapoor and Vivek Kapoor filed the present application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award dated 6th September, 2010.
2. These objections have been filed by the petitioners only with regard to the relief of ₹75 lacs as per the award granted in favour of the respondent as well as the grant of interest thereon @ 12% per annum from the date of the award till realization and dismissal of the counter-claim and non-awarding the cost to the petitioners.
3. Brief facts are that by way of collaboration agreement dated 4th October, 2005, the petitioners agreed to sell the suit property to the respondent builder for ₹2.1 crores. The builder was able to pay only ₹1 crore by 22nd February, 2006 which included ₹25 lac as earnest money. Respondent failed to pay the balance consideration of ₹1.10 crores.

4. In pursuant to arbitration petition No.174/2008 under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court appointed the Arbitrator to adjudicate the claim of the parties. The claim was made by the respondent seeking direction against the petitioners to hand over the vacant peaceful possession of the property, bearing No.18/78, Punjabi Bagh, New Delhi pursuant to the terms and conditions of the agreement dated 4th October, 2005 and further to execute the appropriate sale deed in favour of the respondent.

5. The learned Arbitral Tribunal dismissed the claim of the respondent for directing the petitioners herein to perform agreement to sell dated 4th October, 2005. The learned Tribunal also held that the earnest money of ₹25 lac stands forfeited on account of the fact that the respondent was in breach of the contract. However, the learned Arbitrator granted the following reliefs 'C' and 'D'. The reliefs granted are as under:

"C. The claimant is however, entitled to refund of Rs.75 lac which amount was paid by him to the respondents after 4th October, 2005. Both the respondents are jointly and severally liable to pay this amount to the claimant. The claimant is not entitled to any interest on this amount from the date of payment or pendent lite on account of the fact that the claimant had never demanded this amount from the respondents and even in the statement of claim the claimant did not raise a specific plea that the respondents should be directed to refund this amount to him. This amount, shall be paid by the respondents to the claimant within 30 days of the date of the receipt of copy of this award but in case they fail to make payment, the claimant shall be entitled to interest @ 12% per annum on this amount from the date of award till realization.

D. The counterclaim for damages in the sum of Rs.20 lac filed by the respondents stand dismissed."

6. Aggrieved by the grant of aforesaid reliefs, the petitioners have filed present objections. The main argument of Mr.Prem Kumar, learned counsel appearing on behalf of the petitioners is that the respondent is not entitled to the refund of any amount as in the claim petition, the respondent does not specifically seek refund of the amount. The respondent is also not granted the relief of specific performance of the contract. Thus, the view taken by the learned Arbitrator was not correct who has wrongly exercised his discretion by passing the impugned order in favour of the respondent only on the reason by referring the prayer of the respondent that “*the tribunal may pass any other orders as deemed fit in the circumstances of the case and in the interest of justice equity and fair play*” which as per Arbitrator covers prayer for refund.

7. The submission of the respondent is that the petitioners have filed the present objections to cover-up their own wrong acts with malafide intentions. The petitioners despite of having received ₹1,00,00,000/- (Rupees One Crore) from the respondent did not give the completion certification nor have filed an iota of evidence by showing their cooperation for getting the completion certificate and handing over the possession of the property. The petitioners are in the possession of the property. The respondent has nothing in his hands despite of paying a hefty amount to the petitioners. They are enjoying the possession as well as the money of the respondent. Now they are with dishonest intention have filed the present objections, though the respondent is entitled to get back his amount of ₹1 crore given to the petitioners.

8. Mr.Prem Kumar, learned counsel for the petitioners has argued that the respondent is not entitled to the refund of any amount as respondent did not seek any prayer for refund of amount. No evidence was led by the

respondent. The view taken by the learned Arbitrator is incorrect and against the law.

9. It is submitted by him that the grant of relief of ₹75 lacs in favour of respondent is against the express provisions of Section 22 of the Specific Relief Act, 1963. The said Section reads as under:-

“22. Power to grant relief for possession, partition, refund of earnest money, etc.

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (65 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for –

- (a) possession, or partition and separate possession, of the property, in addition to such performance; or
- (b) any other relief to which he may be entitled including the refund of any earnest money or deposit paid or (made by) him, in case this claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of subsection (1) shall be granted by the Court unless it has been specifically claimed;

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.”

10. Learned counsel submits that the plain language of Section 22(2) of the Specific Relief Act, 1963 that the claim of refund of any earnest money or deposit cannot be granted unless it has been specifically claimed. The respondent having not specifically claimed the amount, nor having sought the amendment of the statement of claim to incorporate the claim of refund,

the learned Arbitrator could not have granted the said relief of the refund of ₹75 lacs.

11. In this regard, learned counsel for the petitioners has relied upon the case of *Suraj Singh vs. Smt.Nathi Bai & Others*, AIR 1990 Madhya Pradesh 323. In that case also, the plaint did not contain any prayer for refund of advance money paid by the purchaser while making the agreement for purchase of house property. There was no application to include such a relief. Under the circumstances, the High Court held that the plaintiff is not entitled to the grant of decree for refund of advance money paid by him.

12. He also argued that the legal notice dated 24th March, 2008 sent by the respondent did not specifically state that the respondent would move for arbitration for refund of amount of ₹75 lacs in the event of non-compliance of the notice. The said notice cannot be viewed as a notice under Section 21 of the Specific Relief Act. Even notice dated 9th April, 2008 given by the respondent invoking arbitration did not refer this refund, nor the respondent raised such dispute of refund of the amount in question in his petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 filed before this Court. He submits that not only this, even the statement of claim filed by the respondent before the learned Arbitrator did not contain any such relief of refund of the amount in question. When there was no claim for the refund of the amount by the claimant, the learned Arbitrator could not have awarded the refund of the amount of ₹75 lacs by the impugned award. Thus, it is obvious that the respondent had not intended to refer the claim of refund of the said amount of ₹75 lacs to arbitration. The award of interest @ 12% per annum also is on the higher side and should not be more than 6% per annum simple interest.

13. It is settled law that the scope for interference by the Court with an

award passed by the arbitrator is very limited. The Court, while hearing objections against the arbitral award, is not sitting as a Court of appeal. In this context, following judgments are cited :

- (i) In ***Puri Construction Pvt. Ltd. Vs. Union of India***, AIR 1989 SC 777, the Supreme Court held that a Court while examining the objections taken to an award is not required to examine the correctness of the claim on merits and the scope is very limited.
- (ii) The Supreme Court in ***Indu Engineering Vs. DDA***, V (2001) SLT 190 para 5, 6, 7 8, has held that:
 - (a) ‘the award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts’.
 - (b) ‘The fact that the decision of arbitrator is erroneous does not make the award bad on its face so as to permit it being set aside’.
 - (c) ‘An arbitrator is a judge appointed by the parties and as such the award passed by him is not to be lightly interfered with’.
 - (d) ‘Reasonableness of the reasons given by the arbitrator in making his award cannot be challenged’.
- (iii) The Supreme Court in ***State of UP Vs. Allied Constructions***, IV (2003) SLT 873 in para 4 held that -
 - (a) ‘the Court is precluded from reappearing the evidence’.
 - (b) ‘Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering’.
- (iv) In ***Municipal Corporation of Delhi Vs. M/s. Jagan Nath Ashok Kumar***, AIR 1987 SC 2316, the Apex Court held in para 4 and 5

that -

“If the Arbitrator has acted within the terms of his submission and has not violated any rules of natural justice, Courts should be slow indeed to set aside the award. The Arbitrator is the sole judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence, the court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of an arbitrator.”

- (v) In *Hindustan Tea Co. Vs. K. Sashikant & Co.*, AIR 1987 SC 81, the Supreme Court in para 2 held as under:

“Award is not open to challenge on the ground that Arbitrator has reached a wrong conclusion or has failed to appreciate the facts. Under the law, the Arbitrator is made the final arbiter of the dispute between the parties.”

- (vi) In *Coimbatore District Podu Thozillar Samgam Vs. Ball Subramania Foundry and Others*, AIR 1987 SC 2045, the Apex Court in para 7 held as under :

“Civil Courts cannot exercise appellate powers over the decision of the Arbitrator. Wrong or right, the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the Arbitration agreement. Court cannot interfere with the award on the ground that the decision appeared to it to be erroneous. The civil courts do not exercise appellate powers over the decision of the arbitrator.”

As the dicta laid down in *Wander Ltd. v. Antox India P. Ltd.* 1990, (Supp) Supreme Court Cases 727 commends, if not commands, non-interference with. An Appellate Court cannot substitute the decision of the lower Court

by the view that it prefers, unless it finds the former to be perverse or contrary to the law.”

14. It is the admitted position in the present case that the learned Arbitrator has dealt with the same argument addressed by the petitioners while publishing the Award. In the Award, the learned Arbitrator has not passed the order for refund towards earnest money except the amount paid by the respondent to the petitioners as part consideration. The relevant extract of award are reproduced here below:

“The only issue now left to be decided is as to whether the whole amount of Rs.1 crore be liable to be forfeited or not as claimed by the respondents. In my considered view only the sum of Rs.25 lacs paid by the claimant to the respondents on 4th October, 2005, at the time of signing of the agreement Ex.C1, can be treated as earnest money. The balance of Rs.75 lacs paid by the claimant to the respondents was part payment of the agreed amount. The Law is well settled that the earnest money is that amount which is paid to ensure compliance of the contract by the person paying the earnest money and it is liable to be forfeited if he happens to be in breach of the contract. The advance payment or part payment made subsequently cannot be taken as earnest money unless it is specifically agreed by the parties that it would be treated as earnest money and would be liable to forfeiture in case of default. Ld. Counsel for the claimant has vehemently argued that in the Agreement Ex. C1, it was not at all stated that Rs.25 lacs was earnest money, and would be liable to be forfeited and as such the respondents have no right to ask for forfeiture of any amount out of Rs.one crore. In my view inspite of being there no clause under the contract for forfeiture, it can be held that the signing amount was earnest money liable to be forfeited if claimant was in breach. Ld. Counsel for the claimant has also contended that last installment of Rs.20 lacs was accepted by the respondent beyond three months period stipulated in the agreement Ex. C1 and as

such it should be held that time was not the essence of the contract. I am unable to agree to this submission for the reason that in the contract itself it had been stipulated that time was the essence of the contract and the un-rebutted evidence on record shows that the respondents were in urgent need of money and for that reason only they had entered into the agreement in question with the claimant. The mere fact that the respondents received some payment on 22nd February, 2006, does not show that time was not the essence of the contract because the said amount might have been accepted by the respondents under the bonafide belief that the claimant would soon fulfill his obligations as per the agreement and pay them the balance amount which they required desperately. Thus I have no hesitation in concluding that the respondents had rightly terminated the agreement dated 4th October, 2005 and they are entitled to forfeit the sum of Rs.25 lacs, which was paid by the claimant to them at the time of the execution of the agreement Ex.C1 because it was earnest money. However, the balance of Rs.75 lacs is liable to be refunded by the respondents to the claimant as it was not earnest money and was merely part payment which the claimant was making in terms of the agreement between the parties.

Ld. Counsel for the respondents has contended that the claims raised by the claimant are barred by time in as much as the Agreement was dated 4th October, 2005 but the reference was made on 19th April, 2008 only vide notice Ex. C11. In my view, this plea of respondents cannot be sustained firstly for the reason that the Arbitration Clause was invoked within three years of the date of the Agreement and further the cause of action in favour of the claimant arose either on 20th March, 2008 or on 28th March, 2008 when the respondents repudiated the contract. Therefore, it cannot be held that the claims filed by the claimant are barred by time.

Regarding the counterclaim filed by the respondent No.1, I find that the respondent has not proved on record any

loss suffered by her due to the breach of the contract by the claimant. Rather the Valuation Report filed by the respondents shows that the value of the property of the respondents has gone up and as such the respondents are not losers financially. They are in fact gainers because of the breach of the contract of the claimant. Moreover, the amount of Rs.25 lacs paid by the claimant, which is being forfeited is adequate compensation for the failure of the claimant to perform his part under the contract. Therefore, the counterclaim as raised by the respondent No.1 is liable to be rejected.”

15. It is also true that the respondent has not claimed the relief for grant of compensation or damage in substitution to relief of specific performance which could not have been granted in the absence of specific claim in the statement of case.

16. It is settled law that in cases where specific performance is refused, in order to render complete justice the court may direct a refund even though plaintiff has not specifically asked for it in the plaint. A Single Judge of Karnataka High Court in *Smt. Khamarunnisa versus Mudalappa*, ILR 2003 Karnataka 4535 has held as under :-

“Thus, in the ultimate analysis, I have to hold that the appellant though is not entitled for the relief of specific performance or for damages in substitution of specific performance, is certainly entitled to get back the earnest money paid by him under the agreement even in the absence of a plea in the plaint in that regard. It is trite law that no man should be allowed to gain out of his own default.”

17. In *B.R. Mulani versus A.B. Asawathanarayana*, AIR 1993 SC 1318, Apex Court, on coming to the conclusion that the specific performance of an agreement cannot be ordered as it was not agreement of sale purely, however decreed suit for repayment of monies paid. In *Mack and*

Krishnaswami Nayudu AIR 1955 Madras 591, it has been held thus “in a suit for specific performance the wide discretion a Court has in granting relief to the two parties to the contract is incapable of strict definition and must depend on facts of each case”. In the said case, suit for specific performance brought by the vendee was dismissed but Court ordered the vendor to return the amount deposited with him by the vendee, even though refund of earnest money was not claimed in the suit.

18. It is evident from the finding of learned Arbitrator that he has exercised his jurisdiction and in order to render complete justice he directed the petitioner to refund the amount even though the respondent has not specially asked for in the statement of case. The learned Arbitrator, in fact, while exercising his discretion has given the benefit to the respondent who prayed that the tribunal may pass any other orders as deemed fit in the circumstances of the case and in the interest of justice, equity and fair play.

19. This court is of the considered view that the discretion exercised by the Arbitral Tribunal is correct and reasonable in view of the facts and circumstances of the present case and the same cannot be disturbed under the scheme of the provision of Section 34 of the Act.

20. The decision in Suraj Singh’s case (supra) referred by the petitioners’ counsel are distinguishable as the facts in the present case are materially different in view of additional prayer made by the respondent.

21. In the light of the above, the objections filed by the petitioners are liable to be dismissed with costs of ₹10,000/-.

**(MANMOHAN SINGH)
JUDGE**

MAY 02, 2013