

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**FAO No.8629 of 2015 (O&M)
Date of decision: 22.12.2015**

Jaspal Singh and another

... Appellants

Vs.

M/s Paras Buildtech India Pvt. Ltd. & another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Ashish Aggarwal, Senior Advocate with
Mr. H.S.Saini, Advocate
for the appellants.

AMIT RAWAL J. (Oral)

The appellants-owners, in pursuance to the Collaboration Agreement dated 23.09.2009 entered into agreement between developer/respondent No.1, have approached this Court on the premise that in a petition filed by the parking contractor/respondent No.2 under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 1996 Act), certain observations in paragraph 7 of the impugned judgment have been noticed by the Court while dismissing the application which has seriously prejudiced the right and interest of the appellant/owners.

Mr. Ashish Aggarwal, learned Senior counsel assisted by Mr. H.S.Saini, Advocate submits that Additional District Judge has misinterpreted the provisions of Clause-15 (F & G) of Collaboration

Agreement dated 23.09.2009 and in this regard, he has drawn attention of this Court to the observations, which read thus:-

“F That the allocation of parking space management contract which has already been given with the consent of owner (Internal and external) to the contractor M/s Tycon Events and Promotions Pvt. Ltd., @ Rs.2,25,000/- P.M. shall be replaced with same terms and conditions on or within 01.04.2010 by contract/agreement which shall be jointly executed by owners and developers. The lease money as per the said contract/agreement shall be payable by the lessee directly to the owners and developers as per their shares, i.e., 58% to the developers and 42% to the owners. Moreover, a specific clause regarding the direct payment of lease money by the lessee to the owners and the developers shall be added/inserted in the agreement/contract.

G. That the allocation of the commercial complex cum mall cum hotel has been apportioned/allotted and demarcated with the mutual consent of the parties and have been settled amicably. Now the common area (internal and external) for the setting up of kiosk, advertisement board, electronic board, signage's antenna on roof, roof rights and rights to electronic media which shall be given to any company or individual the party No.2, i.e., developers have rights to negotiate and finalize

with them and inform the party No.1 i.e., owners and after their approval verbally/written consent a contract or agreement of lease or rent as the case may shall be executed jointly by owner as well as the developers. The lease money/rent shall be receivable by them as per the said share 42% for party No.1, owners & 58% for party No.2 i.e., developers. The said lease money/rent shall be directly payable by the lessee to the party No.1 and party No.2 as per their said share. Moreover, a clause to this effect shall be got inserted in the lease agreement/contract.

That the allocation of kiosk and antennas were given to (1) M/s HFCL Infotel Ltd. @ Rs.8,000/- per month, (2) M/s MX Foods Pvt. Ltd., @ Rs.15,000/- P.M., (3) M/s MX Foods Ventures Pvt. Ltd., @ Rs.25,000/- P.M. (4) Jindal Candy House @ Rs.21,000/- P.M. And (5) M/s Vodaphone @ Rs. 6,500/- P.M. by the developer with consent of the owner. The necessary lease/rent/contract been signed and given to them by the developer. The developer is collecting the rent/lease/contract money from them and the rent/lease contract money from them and the rent/lease/contract money from them and the rent/rent/contract lease money shall be shared as per their shares i.e., 58% for party No.2 (developers) and 52% for party No.1 (owner). And the existing

rent/contract/lease deed shall be replaced on 01.04.2010 with a new agreement having the same terms and conditions by executing a fresh agreement jointly by the owner and the developer and the owner, by the parties, as per their shares, i.e., 58% developer and 42% owner. Till that time developer will collect the same and undertake to pay the shares of owner (42%) on or before 10th day of every month. And similarly in the case of M/s ABC Trading Company who is paying rent/lease money @ Rs.90,000/- P.M. To the developer since 01.02.2009 and the same is being shared as per their shares that is 58% to developer and 42% to the owner. AND the lease/rent/contract deed shall be replaced on 01.04.2012 with escalation @ 15% with the same terms and conditions by executing a fresh agreement/lease jointly by the owner and the developers. The above said lease/contract area the only lease/contract which have been executed by the developers.

Developers have received a security deposit as mentioned in the lease/contract/agreement from the lessees. The said security deposit shall also be shared by the owners and the developers as per their said shares i.e., 58% for the developers and 42% for the owners.”

However, in a petition under Section 9 filed by the parking contractor, in paragraph 7, the Court has given the following findings

which read thus:-

“7. As far as the argument of learned counsel for the petitioner supported by counsel for respondents No.2 & 3 that respondents No.2 and 3 have not terminated the agreement between the parties and thus, the unilateral decision of respondent No.1 cannot be made binding upon the petitioner is misconceived.

Learned counsel for respondent has placed on record the collaboration agreements dated 9.6.2005 and 23.9.2009 entered between respondent No.1 and respondents No.2 and 3. Respondent No.1 is the developer and respondents No.2 and 3 are the owners.

Clause 19 of the Collaboration Agreement dated 9.6.2005 read as under:

“19 Maintenance: Maintenance service in the complex will be taken up by the Developers either themselves or through a maintenance agency for which charges, having a reasonable nexus on the cost incurred, will be payable by each commercial owners of the commercial complex and Hotel including the owners allocation whether it was occupied or not. The parties shall provide a clause to this effect in the document of sale/lease executed by the parties herein in favour of their prospective transferee/s.”

Clause 10 of the Collaboration Agreement dated 23.9.2009 read as under:

“10. Maintenance: Maintenance service in the complex will be taken up by the developers either themselves or through a maintenance agency for which charges, having a reasonable nexus on the cost incurred, will be payable by each commercial owners of the commercial complex and hotel. The owners are not liable to pay any maintenance charges till the allocated portion to them is leased out or maximum by two years from the date of allocation and after the lease, the same shall be paid by the lessee not the owners. The parties shall provide a clause to this effect the document of sale/lease executed by the parties herein favour of their prospective transferee/s. However, it is made clear that if the maintenance agency is failed to maintain the commercial complex upto the standard and if any lapse is found in maintaining the complex, the owners have got right to give notice in writing to the developers to get the said maintenance agency warned and take necessary action to rectify the defects within 3 months. In case, no action is taken in this regard and the defects remains as it is then final notice shall be given to the maintenance agency to remove the defects in 01 month, by the developer. Thereafter, if the said defects still remains then developer will replaces the agency by terminating without any further notice. The developer shall bound to keep the owners inform in writing regarding the aforesaid efforts being made by the developers in this regard. However, the maintenance charges of the office of the owners shall not be paid by the owners either to the developers or to the maintenance agency

(excluding actual electricity and air conditioning charges). If any, damage is caused to the commercial complex, multiplex or hotel due to the lapse of maintenance agency or due to some accident then all the damages/claims so incurred shall be borne by the developers. However, the developers have right to claims damages from maintenance agency.”

The perusal of the aforesaid clauses of the Collaboration agreements would reveal that the primary responsibility to maintain the complex is with developers only. In case of any lapse is found, the owners have right to give notice in writing to the developer (respondent No.1).

Clause -15(F&G) of the Collaboration Agreement dated 23.9.2009 further provides only regarding the right of the owners to their share in lease money. All the rights to negotiate and finalize the terms of the contract or agreement of lease or rent exclusively vest with respondent No.1 and respondents No.2 & 3 are only required to be informed about the same. Thus, prima facie no right vest with respondents No.2 and 3 to enter into contract or to terminate any contract qua the maintenance including the parking rights. Once such right is not vest, there arises no question of the contract having not been terminated by respondents No.2 & 3 and petitioner can not take any benefit from such assertion.”

I have gone through the findings and as well as, provisions of clauses (supra) and am of the view that the Additional District Judge has misinterpreted the provisions of Clause 15 (F) and (G) by holding that all the rights were negotiated and finalized as per the terms and conditions of the contract or the agreement of lease or rent exclusively vested with the developer, i.e., respondent No.1 and respondents No.2 & 3 are owners, who only required to be informed about the same, whereas, Clause 15 of the collaboration agreement (supra) would show that allocation of parking space, as well as, setting up of kiosk, Advertisement board, electronic board, signage's antenna on roof and right to electronic media and shall be given to any company, with the consent of the owners and agreement shall be jointly executed by the owners and developers. Thus, in essence, it has to be a tripartite agreement. This Court vide order dated 02.12.2015, passed in FAO No.8047 of 2015 filed by the parking contractors, has disposed of the appeal with a liberty to the appellant to seek interim relief by invoking the provisions of Section 17 of 1996 Act and appointed Shri Arvind Kumar Goel, Retired Judge, of this Court as an Arbitrator. Copy of the order dated 2.12.2015 is annexed as Annexure A-6. The relevant portion of the same reads thus:-

“During the course of the hearing of the matter, I called upon the parties as to whether they are willing to seek appointment of an independent Arbitrator de hors of the fact that the respondents had already appointed Shri J.P.Sharma, Additional District & Sessions Judge (Retd.).

Both the parties did not show any aversion to the aforementioned proposal and agreed that in case any retired Judge of this Court is appointed, they will be subject to his jurisdiction by filing the claim/counter claim, if any.

Without commenting upon the merits and de-merits of the matter, since the contract envisages a resolution of dispute between the parties by an arbitration and the appellant would be at liberty to seek interim relief by invoking the provisions of Section 17 of 1996 Act, I deem it appropriate to appoint Shri Arvind Kumar Goel, Retired Judge of this Court as an Arbitrator subject to his giving nod/acceptance for being appointed as Arbitrator.

Let Registry send a communication to Mr.Arvind Kumar Goel, retired Judge of this Court to seek his permission as Arbitrator. On receipt of the same, the Arbitrator, so appointed, shall enter into a reference by calling upon the parties to the lis through registered post.

It is made clear that the Arbitrator would be free to fix the seat of the arbitration and as well as his remuneration subject to the conciliation of the parties.

Mr.Rohit Kapoor submits that since the parties would be submitting to the jurisdiction of the arbitration, he would not press his contempt petition, stated to have been filed.

Keeping in view of the aforementioned facts, the appeal

stands disposed of.”

Mr. Aggarwal submits that his clients are not averse in submitting their claim before the Arbitrator upon his entering into reference, but are only aggrieved with the findings rendered by the Additional District Judge. In essence, Arbitrator should not be influenced with the aforementioned finding while rendering the Award. The apprehension shown in the aforementioned argument is just and enough.

Keeping in view the aforementioned observations rendered by the objecting Court, in paragraph No.7, noticed above (supra) shall not come in the way of the appellants in seeking their claim or any other proceedings between the parties. In essence, the Arbitrator shall render the Award uninfluenced based upon the evidence, both oral and documentary.

With the aforementioned observations, the appeal stands disposed of.

(AMIT RAWAL)
JUDGE

December 22, 2015
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