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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 29.08.2016

1. **FAO-1379-2010 (O&M)**

Neeta Khanna and others
... Appellants

Versus

Kulbhushan Rai Bajaj and others
... Respondents

2. **FAO-5466-2010 (O&M)**

Neeta Khanna and others
... Appellants

Versus

Kulbhushan Rai Bajaj and another
... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Jain, Senior Advocate with
Mr. Vikas Mohan Gupta, Advocate
for the appellant(s) in both the appeals.

Mr. Aalok Jagga, Advocate
for respondent Nos.1 and 2 in both the appeals.

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

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two appeals bearing ***FAO No.1379 of 2010*** titled as ***"Neeta Khanna and others V/s Kulbhushan Rai Bajaj and others"*** and ***FAO No.5466 of 2010*** titled as ***"Neeta Khanna and others V/s Kulbhushan Rai Bajaj and another"***.

The appellant(s)-vendors are aggrieved of the dismissal of the objections under Section 34 of the Arbitration and Conciliation Act (hereinafter called 'the 1996 Act') for setting aside of the Award dated 06.06.2008.

Mr. Arun Jain, learned Senior Counsel assisted by Mr. Vikas Mohan Gupta, learned counsel appearing on behalf of the appellant(s)-vendors submits that the respondent(s)-vendee(s) instituted a claim petition before the Arbitrators in pursuance to the alleged agreement to sell dated 28.03.2007, whereby the house in dispute was allegedly agreed to be sold for a sum of Rupees One Crore Eighty Lacs and stated to have been paid ₹ 70,00,000/- as earnest money, in fact, it was a loan transaction. The Arbitrators had not entered into reference, in essence, there was no compliance of Section 21 of the 1996 Act. It was basically a document of security and in lieu thereof, cheque of ₹ 8,00,000/- was given to Jeevan Prakash Khanna-husband of the appellant, namely, Neeta Khanna one of the vendors for the payment of interest. This fact has been admitted. Though the aforementioned agreement to sell contained the resolution of dispute through two Arbitrators, namely, Sh. R.K. Singh and Sh. R.K. Sachdeva, but is not in consonance with the provisions of Section 10 of the 1996 Act. The Arbitrators alleged to have sent a notice on 29.04.2007 for 03.11.2007 and then for 13.11.2007 and 03.12.2007. On 03.12.2007, the order was that service has not been effected and therefore, fresh notice was sent. On 07.01.2008, the appellant(s)-vendors were proceeded *ex parte*. An application (Annexure A-1) for setting aside the *ex parte* proceedings was moved on 03.03.2008. Prior to that in the order dated 09.02.2008 of the Arbitrators, realized that the proceedings were not sent to the appellant(s)-vendors. Accordingly, they were sent. The matter was listed for 08.03.2008, but the application, as noticed above, was filed much before that. However, the application has been dismissed while passing of the award, whereas the zimini orders reveal that the matter was adjourned for consideration on the application.

He submits that even if, the Arbitrators were not to allow the application, they could have permitted the appellant(s)-vendors to join the proceedings from the date when the application was moved. All the orders indicate that the matter was posted for consideration on the application, but on 03.05.2008, there was no representation. The matter was adjourned to 24.05.2008, but on the said date, there was no presentation on behalf of both the parties, though, the claimant-Kulbhushan Rai Bajaj was present with the counsel and on the said date, the Arbitrators appointed Sh. S.S. Saluja as third Arbitrator, but at back, perhaps keeping in view the fact that two Arbitrators could not decide the matter. He submits that in fact the appellant(s)-vendors had never given a chance to address arguments on merits, much less, on the application seeking setting aside of the *ex parte* proceedings.

He further submits that an application under Section 13 of the 1996 Act was moved with regard to the fact that one of the Arbitrators had been the counsel of the vendee. All these factors have not been taken into consideration by the Objecting Court, in fact, the objections were squarely falling within the realm of the provisions of Section 34 of the 1996 Act.

Even a letter dated 21.04.2008 was addressed to the Arbitrators seeking clarification, but the same has erroneously been rejected, evident from the subsequent orders by observing to be a misconceived, therefore, this all shows the misconduct on the part of the Arbitrators, thus, urges this Court for setting aside the impugned order and as well as the award under challenge.

He further submits that the agreement to sell was never admitted as has been noticed by the Objecting Court as it was stated to have been a loan transaction in fact the parties never intended to treat it as agreement to sell.

Per contra, Mr. Aalok Jagga, learned counsel appearing on behalf of the respondent(s)-vendee(s) submits that the appellant(s)-vendors had been very tardy and lackadaisical in approaching the Court as they were aware of the arbitration proceedings and intentionally allowed themselves to proceed *ex parte*. Even an argument on the application for setting aside of the *ex parte* proceedings was addressed on 19.04.2008 and was concluded and the matter on 03.05.2008 was adjourned with a direction to the parties not to appear, but in case any clarification needed, the parties shall be called on the next date i.e. 24.05.2008. The appellant(s)-vendors have failed to prove on record any material to show that one of the Arbitrators, namely, Mr. R.K. Sachdeva, had been the counsel of the vendee. No sufficient ground had been given in the application for setting aside the *ex parte* proceedings and rightly so, the same has been rejected in the award. A substantial amount of ₹ 70,00,000/- (₹ Seventy Lacs) has been paid as earnest money which has been acknowledged by the appellant(s)-vendors. Jeevan Prakash Khanna-husband of the Neeta Khanna had been appearing all along with the counsel, thus, he was aware of all the arbitration proceedings. He further submits that the *ex parte* evidence has gone un-rebutted, rightly so, the Arbitrators have ordered for specific performance of the agreement to sell, thus, urges this Court dismissal of the appeals.

I have heard the learned counsel for the parties and appraised the paper book.

In order to appreciate the rival contentions of the parties, it would be apt to reproduce the following orders of the arbitration proceedings:-

> *"**Order dated 08th March 2008***
>
> *To*
>
> *Mr. Manu Jain, Advocate*
> *279, Sector – 14,*
> *Gurgaon, Haryana.*
>
> *The application of your clients (Khann's) for setting aside ex-parte order dated 07th January, 2008 has been received by the arbitrators and taken on record. The copy of the said application has been given to the claimant for their reply and objection to the application.*
>
> *Now to come up for reply and arguments on the application on 08th April 2008, 2.30 pm at C-21 (Basement) Malviya Nagar New Delhi – 110017.*
>
> *Your clients were directed to bring and submit all the necessary information and documents pertaining to your loan account with Centurian Bank of Punjab, but they have not brought and submitted the same on 08.03.2008. Kindly make sure and advise your clients to bring the said information and*

documents (pertaining to loan) on the next date of hearing viz 08th April 2008, failing which, your application will not be heard.

Order dated 08th April 2008

Venue C-21 Malviya Nagar, New Delhi

Time 2.30 PM

Present: Claimant No.1 Sh. K.R. Bajaj in person.

Also present today, Mr. Mau Jain, Counsel for the respondents with Mr. Jeevan Khanna, husband and father (respectively) of the respondents.

The respondents filed an application on 08.03.2008 for setting aside the ex parte proceedings. Strangely, the respondents through the Counsel Mr. Manu Jain also sent a legal notice to the arbitrators, which has not been considered being not maintainable and unsustainable. Howsoever, the application for setting aside the ex parte order was taken on record and the copy of the same was also supplied to the claimants on the last date. The claimants were directed to file their reply w ith advance copy to the respondents, so that arguments could be heard on 08.04.2008 for deciding the said application. The venue of arbitration was agreed to be at C-21 Malviya Nagar, New Delhi and the respondents were informed accordingly.

The claimants have already filed their reply dated 1.4.2008 and also sent an advance copy thereof to the respondents. Proof of service (postal receipt) filed. The respondents have also confirmed the receipt of the said reply.

Today the matter is fixed for arguments, but the counsel for the respondents has requested for an adjournment on medical ground. He complained of having severe backache and mild fever. A request for short date is made by the respondent's Advocate. It is specifically inquired from him that whether he has to say anything else beyond the application. On this, the counsel has submitted that he wants to address the oral *arguments and has to file few judgments in support of his contention. Considering the request of the counsel as also in the interest of justice, we are of the view that the respondents should be afforded an opportunity of being heard. It is specifically told that though the matter is fixed for deciding an application for setting aside ex parte order but the respondents may also address arguments on merits (in their defence) to falsify the claim of the claimants and to substantiate their pleas, about loan transaction in particular. It is explained that apart from arguments for setting aside ex parte order, the proper and true defence in the case (on merits) would certainly help the respondents. The respondents have also been directed once again to bring the complete (up-to-date) details of loan account and other material and/or documents in support of their claim.*

The respondents have also requested for change of venue of arbitration proceedings from Malviya Nagar New Delhi to Gurgaon (Mr. Singh's residence).

Considering the request of the respondents the matter is now fixed for 19.04.2008 (2.30 PM) at Q-3/14A, DLF Qutab Enclave, Phase-II, Gurgaon, Haryana for arguments and further proceedings. Since, both the parties are present and have been informed about the date, time and venue, no separate notices are required to be sent to them.

At this stage Counsel for the claimants Mr. Gaurav appeared and has shown his inability to attend the proceedings on 19th April, 2008. He has also shown his willingness to address arguments. Considering the request, the counsel is allowed to argue in short.

Heard arguments on behalf of the claimants and points raised by him are being noted down on the application itself.

Proceedings adjourned for 19th April, 2008.

Order dated 19th April, 2008

Present: Mr. Bajaj (Plaintiff) with counsel, Mr. Khanna for respondent along with Mr. Mannu Jain and his associate Advocate.

The respondents were asked to reveal the details of loan and to submit the documents pertaining thereto, but the counsel for the respondents as also Mr. Khanna straight away refused to divulge any such detail.

The Counsel for the respondents addressed the arguments on an application for setting aside the ex parte order dated 7.1.2008 at length. The respondents also filed one judgment in regards with jurisdiction of arbitrators, which is having no relevance. The respondents instead of justifying their deliberate and continued absence either through addressing arguments or through any judgments rather stressed on, that two arbitrators can not do arbitration. However the same is not at all relevant and helpful to the respondents. The respondents (counsel), instead of arguing on the subject (ex parte order), keeps on arguing irrelevant while it is an application for setting aside ex parte order. He did not say/plead anything specifically or bring on record any proof in support of their allegation about ignorance of proceedings. On being specifically asked what has prevented them from appearing before us or how they were totally ignorant about the arbitral proceedings, nothing addressed by the respondents. On the contrary, their conduct is apparent on the face of the record that they have intentionally not appeared and tried to mislead us. They were specifically asked, whether the respondent have not received the notices of the arbitrators or of the claimants and all other necessary documents, being sent to them, but they failed to answer the same. Surprisingly, when Mr. Jeevan Khanna was shown all the notices (sent to them) as also the proof of services, the counsel started looking at Mr. Khanna, like he was questioning him in regards with *notices or he himself was not told by Mr. Khanna that notices have been sent to them regularly. The respondent's counsel and Mr. Khanna have also been shown the letter dated 15.12.2007 of Mr. Khanna, which he dropped at first arbitrator's house, while the proceedings were going on at Malviya Nagar on that date and Mr. Khanna admitted having sent the same. On being asked to clarify the contents, he could not answer the same. It appears that Mr. Khanna tried to create false evidence in order to allege the agreement for sale as loan agreement. It is also asked that if the respondents were ignorant or not aware of the proceedings, then how he has personally visited on 15.12.2007 and dropped the said purported letter. The silence of the counsel and Mr. Khanna is self explanatory and rather an admission of service of notices. Howsoever, the respondents failed to bring any such fact or something concrete in support their allegation to the effect that they were ignorant or not aware of the arbitral proceedings. On being asked about their address, Mr. Khanna also admitted the address on record as correct. The postal receipts are also found to be correct. Not only that Mr. Khanna did not deny the receipt of notices specifically. Therefore all the notices sent to respondents are presumed to have been served validly as nothing has been pleaded by the respondents anything contrary, hence it is beyond any reasonable doubt that the respondents were well aware of the proceedings and did not appear before us intentionally. It is really unfortunate that they have given legal notices to us while the first arbitrator was nominated by them, with whom, Mr. Khanna also talked many times during the proceedings and he also tried to convince Mr. Khanna. As far as the contention of respondent's counsel as to jurisdiction is concerned that two arbitrators can not arbitrate is of no consequence and can not be considered at this stage, as the application is for setting aside ex parte* *order.*

The arguments of the Ld. Counsel for respondents are heard at length and the same are found to be similar to the grounds taken in the application. However, the matter is adjourned.

The matter is now fixed for 3rd May 2008 for consideration and/or clarification (if any) and proceedings will be held at Mr. Singh's residence at Gurgaon. Both the parties are informed orally in the proceedings and no separate notice is required to be sent. The parties are free to attend the proceedings, if they wish so.

Order dated 27th April 2008

To

Mr. Manu Jain,

279, Sector-14

Gurgaon-122002

Sir,

We have received your letter dated 21.04.2008 on 26.04.2008 on the subject "Request for confirmation of the time of the hearing to be held on 3.5.2008".

Your above referred letter is highly misconceived and is being sent only in order to bring on record new and after thought averments as part of delay tactic.

It is hereby clarified that the matter was fixed on 19.4.2008 at 2.30 PM at Mr. R.K. Singh's residence for arguments on an application for setting aside the ex parte proceedings/order dated 7.1.2008. Accordingly, you along with your associate Advocate and Mr. Jeevan Khanna have appeared before the arbitrators at 2.30 PM on 19.04.2008 and addressed the arguments. The arguments were heard at length and in support thereof you also filed two judgments for the perusal/consideration. It was also inquired from the claimant Mr. Bajaj that whether he has to address he arguments but he said that he has already filed his reply to the application, the *advance copy whereof has already been sent to the respondents. The respondents also confirm having received the said reply.*

The arbitration proceedings lasted/continued for about 1.30 hrs and the matter was posted/fixed for 3rd May, 2008 at same time and place. Since, the arguments have already been finished and concluded, the matter was kept for consideration and order on the said application for setting aside the ex parte order. It was specifically intimated to you that since, the matter is now fixed for consideration and order, it is upto you to attend the next date or not.

It is really surprising and ununderstable that you have referred one purported application under Section 13 of the Act in your above letter and also alleged to have filed the same before the arbitrators, while no such application has ever been filed by your clients at any point of time. The copy of the so called application sent by you along with the above letter has been seen first time. Not only that, question of filing such frivolous application at this point of time is neither allowed nor permissible under law. However, no further application can be filed or entertained till the disposal of the application for setting aside the ex parte order, as your clients have already been proceeded ex parte.

It is therefore advised that you are free to attend the proceedings on 3.5.2008 but the same will be confined to consideration/order on your previous application for setting aside the ex parte order. Any further allegation in the form of application or otherwise could only be addressed and/or considered only after disposal of the said application for setting aside ex parte order.

Order dated 3rd May 2008

Present: None.

On 26.04.2008, we received a letter dated 21.04.2008 from Mr.

Manu Jain, Advocate on behalf of the respondents, the subject of which was "Request for confirmation of the time of the hearing to be held on 3.5.2008". The letter is found to be misconceived and an attempt to bring it on record in order to show that the matter is still going on, while it has already been over and fixed for consideration today. Both the parties have been specifically asked on 19.4.2008 that they would only be called, in case of any clarification. The date 3.5.2008 was fixed only for consideration of application and case of the parties and date and venue have also been intimated in the previous proceedings.

It is really surprising to see the conduct of the respondents as they have not only sent the aforesaid false letter but have also alleged and referred on purported application under Section 13 of the Act and also allegedly shown to have been filed the same before us, while no such application has ever been filed and sent by the respondents at any point of time. The copy of the so called application sent by them which has been seen by us first time, is self explanatory and sufficient to make us understand the motive. The reference of such an application would not have been given, in case the respondents have filed it. However, the respondents have already been informed about their intentions and conduct by way of reciprocal letter dated 27.4.2008. They were told that no such letter has ever been sent and also informed that otherwise also, no such letter has ever been sent and also informed that otherwise also, no such application will be entertained till the disposal of the application for setting aside the ex parte order. They were also advised that they could attend the proceedings on 3.5.2008 on their own but the same will be confined to consideration/order on the application for setting aside the ex parte order.

Today, on 3.5.2008, we, the second arbitrator called up Mr.

Manu Jain, Advocate on his mobile phone No.98110 16915 to inquire, whether the respondents have made up their mind for amicable settlement and if not, whether they would like to come and attend the proceedings, as the date is fixed for consideration and the presence of parties is not necessary. But it has been informed to us (the second arbitrator) that Mr. Khanna has gone out of Delhi, and he (Ld. Advocate) did not have any instructions. In such a situation, we (the second arbitrator) thought it expedient not to hold the proceedings on 3.5.2008 and adjourn the matter to explore the possibility of the settlement (if any). Accordingly, it has been conveyed to the res. Advocate that the respondents may come at any time for the settlement (if they desire to do so) but before 24th May 2008 so that matter could be proceeded further. Hence, the matter is adjourned with no further order.

Order dated 24th May 2008

Time: 2 PM

Place: Gurgaon

Present: Mr. Kulbhushan Raj Bajaj with Counsel.
None for Respondents.

Today the matter is fixed for consideration and disposal of application dated 3/3/2006 for setting aside the ex parte order dated 7th January 2008. The application could not have been disposed of earlier (on previous date) as the respondents through Mr. Jeeva Khanna offered to compromise the matter. Though we were quite sure that it was only an attempt to gain time and to play mischief, but still in the interest of justice we preferred to adjourn the matter till today, it was made clear that if the respondents did not come on or before 24th May, the matter would be decided on merits, as both the parties have already completed their arguments.

The respondents did not come to us for any such settlement till today. Since the parties could not settle the matter amicably, *we are of the opinion that we should proceed further in order to decide the matter.*

We have have gone through the application filed by the respondents. In the said application, the respondents have not given any reason for non-appearance. Though the application runs into five pages but except para 1 thereof, nothing pertained to or in regards with the ex parte proceedings and/or for setting aside the same. The respondents have alleged in para 1 of their application, "that they have come to know that some arbitration proceedings are pending before the arbitrators from the contents of alleged proceedings of the matter sent by us. They further alleged that they are not aware of any such proceedings since Mr. Kulbhushan Rai Bajaj and another never informed the applicants/respondents regarding initiation of any arbitration proceedings against them, nor did they inform them that they want to start any arbitration proceedings. It was also stated therein by them that as per law, the claimants are liable to first inform the other party regarding their desire to start arbitration proceedings. The applicants have never received any such request at any point of time. The respondents also stated that the whole proceedings initiated by us till today are null and void and are liable to be set aside".

All the said allegations of the respondents are found incorrect, false, misconceived, untenable and contrary to the records and proceedings and the respondents instead of giving any reason of their ignorance or non-appearance have alleged false and irrelevant. However, other allegations in the said application are also required to be seen.

In para 2 of the application, the respondents submitted that the intention of the parties was not to treat the agreement dated 28.03.2007 as an agreement to sell which is apparent from the fact that the names of both the arbitrators were mentioned in *the said agreement, while as per Section 10 of the A ct even number of arbitrators can not be appointed, hence the Ld. Arbitrators have no jurisdiction. Though the said allegation/plea is irrelevant and has nothing to do at the stage of deciding an application for setting aside ex parte proceedings, but since the allegation is serious being question to our jurisdiction, it would be appropriate, if we go through the Act and arbitration agreement.*

Although the Act provides that the number of arbitrators should not be even but the logic behind is that a decision should be given by majority and there should not be any conflict. In the present case, both the parties have nominated their own and respective arbitrator of their own choice and it is also stipulated in the arbitration agreement that both the arbitrators may decide the matter or can refer the same for decision to the third arbitrator. It is really surprising that the respondents themselves choose the first arbitrator as their nominee arbitrator and asked the claimants to nominate their own arbitrator, but now challenging the jurisdiction of the arbitrators. However we do not find the same as a vlid ground for not treating the agreement dated 28.3.2007 as an agreement to sell for the sale of the property in dispute an/or otherwise invalid.

Para 3 of the application, the language of para 3 is insulting, humiliating, insulting and clearly shows disrespect for arbitrators, besides being amazing an ambiguous. The respondents have alleged that they have come to know that we have entered into arbitrator proceedings concerning the property (in dispute) on the basis of bogus and sham document dated 28.03.2007 which was never initiated to be used as agreement to sell. They have also alleged, "you are aware that Mr. Jeevan Khanna had obtained a loan of ₹ 70 Lacs". The language used by the respondents is not only mischievous *but also ununderstanable. The respondents have intentionally made these types of allegations in order to misled and confuse us and to create false pleas.*

At the time of hearing arguments, we asked Mr. Jeevan Khanna and counsel for the respondents questions in regards to the above allegations (para 3 of the application) as they have failed to substantiate the first allegation. Mr. Jeevan Khanna and Mr. Counsel were put to a question that how and why the agreement to sell dated 28.3.2007 is a loan agreement, but no explanation or proof has been given to su except repetition of the same allegation. We then inquired the reason for writing such words, "You are aware', but again there was no answer to it. However, we discussed it and understood the intention as Mr. Khanna has also tried to use this type of language (in regards to some payment) in his letter dated 15.12.2007. The intention and motive behind the same was to raise false frivolous, sham and moon shine pleas at appropriate time.

We also find other allegations (in remaining paras of the application) of the respondents as incorrect, false, frivolous and absurd in the absence of any proof. The respondents could not substantiate their allegations with single or iota of proof. The respondents were required to bring on record at least some material to prima facie make us understand or convince that they could establish and/or prove their allegations. But since, t here is nothing such to substantiate the false and irrelevant pleas, except bald, vague and moon shine pleas and delay tactics. Not only that, the respondents did not even contend anything to establish and prove its allegations.

Now we have to examine the reply of claimant as also our won records. The claimants have contended in their reply that the allegations made and pleas raised by the respondents are *false, wrong, incorrect, unsustainable and untenable. The claimants have stated that the plea of the respondents, that they have come to know that some arbitration proceedings are pending before the arbitrators only from the proceedings sent to them, can not be even looked into or considered being concocted falsity and contrary to facts and record. It is stated that not only the notices with complete intimation of date, time and venue of each and every proceeding but also the copy of each and every arbitral proceedings have always been sent to the respondents and properly served upon them validly by way of registered/speed post. The claimants also stated that the records of arbitral proceedings are self explanatory and would go on to show that the respondents were duly served for each and every date and were also made aware of the proceedings. The claimants have also sent few notices to the respondents such as raising dispute and invoking the arbitration and reference to the arbitrators, as per the direction of the arbitral tribunal. The statement of claim was also sent to them. Though the claimants had not invoked the arbitration before coming to the arbitrators and it was also observed by us, but on our direction the claimants raised dispute and sent to the respondents. It has also been contended that when the respondent (Mr. Jeevan Khanna) was shown the notices and proof of service, he did not deny. When Mr. Jeevan Khanna appeared alone on one date and thereafter with counsel then by no stretch of imagination can it be said that notices were not served properly. Not only that when it has become apparently crystal clear that the respondents are intentionally avoiding the proceedings, they were even informed of the consequences and ex parte proceedings. But the respondents never bothered to appear and keep on watching the proceedings. The respondents are well aware of the proceedings and have been constantly keeping track thereof.*

The respondents have intentionally not appeared/joined the proceeding and always avoided the same. It is also submitted that the respondent were even served telegraphically. Attending few proceedings and remaining absent on most of the dates is self sufficient and self explanatory that the respondents have made a mockery of arbitral proceedings.

It is also stated by the claimants that by no stretch of imagination it can be said that the respondents were not aware of the proceedings, as Mr. Jeevan Khanna (husband of R-1 and father of R-2&3) himself visited the house of arbitrator on 15.12.2007 and delivered a letter. Though the contents of the said letter were not clear but there was a request in it for granting an opportunity till 31.01.2008. The said request of Mr. Khanna was acceded to by the arbitrators and the respondents were directed to appear on 7.1.2008, but they neglected to appear and respond to the said order. The claimants also submitted that the respondents have made mockery of the arbitral proceedings. In fact, they (respondents) were waiting for the ex parte proceedings so that they could come with the frivolous application/plea at the nick of time with the sole purpose of delaying the matter. Despite objections raised by the claimant on each and every date, the respondents have been afforded numerous opportunities but they have misused the process of law and natural justice. Hence, the application of the respondents is without any merits and basis and liable to be rejected out rightly.

The claimants further submitted that the plea of the respondents that dispute had not been raised by the claimants, nor did the claimants invoke the arbitration is totally wrong, baseless and denied. The claimants have submitted that they have properly invoked the arbitration (after order of arbitral tribunal) after raising the dispute and the reference was also made to the arbitrators in accordance with law. The claimants *submitted that the arbitral proceedings dated 3.11.2007 are self sufficient to rebut the said false plea of the respondents. They stated that raising of dispute, invocation of arbitration clause and reference to arbitrators as well as statement of claim and documents were all sent to the respondents on various dates as per direction of the arbitral tribunal and otherwise. They further states that the notice and proceedings of all dates have also been sent through post by the arbitral tribunal.*

The claimants also submitted that the respondents have taken the tribunal for a ride. They have not only leveled false and frivolous allegations against the claimants but also blamed the arbitrators, who have been appointed by them vide a valid arbitration agreement. The respondents have passed defamatory and derogatory remarks against the arbitrators. They have no right to say that the whole proceedings initiated by the arbitrators till today are null and void without any rhyme or reason. In fact the respondents are using delay and pressure tactics and misleading the arbitrators.

We perused the records once again to find out the veracity of the submissions of the claimants and found them in order and correct and contrary to the allegations of the respondents. Though there had been no different of opinion or any conflict between us, the two arbitrators but still we thought it necessary and expedient to refer the matter/dispute to some third/presiding arbitrator who should have sufficient knowledge and experience in arbitration matter. But we both have decided to give our own finding in the matter before the third/presiding arbitrator should pass a n award irrespective of any conflict or different finding of the third/presiding arbitrator.

After discussion, we both the arbitrators are of the opinion, approve and so agree that Mr. S.S. Saluja, of B-2/10, Janak

> *Puri, New Delhi, is a right person to be appointed as Umpire and/or Third/Presiding Arbitrator. Therefore, we refer the matter to him with his due consent. Though the next date is fixed as 6th June, 2008, but in case it is required to be changed, the same would be changed with our (both the arbitrators) consent. As discussed , we both the arbitrators are of the firm opinion that respondents deserve no leniency and/or further opportunity and the claimants are entitled for the claim. However, it is made clear to the third arbitrator and he has been also requested, not to be influenced with our findings and pass an award which would be appropriate and legal.*
>
> *Mr. Saluja has requested us that apart from complete file (containing documents and proceedings), we should send him a summary of facts, pleadings, evidence, proceedings and orders as well as our own findings which would form part of the award as well as our own findings and conflict (if any). Be prepared.".*

On conjoint reading of the aforementioned orders, it reveals that the arguments on the application seeking setting aside of the *ex parte* proceedings were addressed on 19.04.2008, but the matter was adjourned for consideration/orders. The expression consideration would lead to an irresistible conclusion that the arguments on the application for setting aside the *ex parte* proceedings were yet to be addressed. I am in agreement with the contentions of Mr. Arun Jain, that appellant(s)-vendors were never given a chance to join the arbitration proceedings and addressed the arguments on merits and it *prima facie* proves that the party had not intended to enter into agreement to sell, much less, seeking specific performance. According to Mr. Arun Jain, it was a security document, though, apparently denied by Mr. Aalok Jagga. Be that as it may, I would be not delve upon the factum of loan transaction and agreement to sell, but the fact remains as to whether the appellant(s)-vendors had been given effective opportunities to contest the case or not. The *ex parte* evidence is a self-serving statement of the respondent(s)-vendee(s), the witnesses of the agreement have also not been brought on record. Even the arbitral proceedings do not envisage the compliance of Section 12 of the 1996 Act, much less, charging of fees by the Arbitrators. Though, in one of the orders, it has been noted that the application pointed out the provisions of Section 13 of the 1996 Act, though, it was not accompanied by material. The payment of ₹ 8,00,000/- by way of cheque is an admitted fact, in essence, it has not been denied by the respondent(s)-vendee(s).

I would be further refraining myself to comment upon the act and conduct of the parties viz-a-viz the terms and conditions of the agreement to sell or not, much less, the payment of ₹ 8,00,000/- as, in my view, the Arbitrators did not conduct the proceedings in fair and transparent manner. The appellant(s)-vendors have been prevented from presenting their case. The Arbitrators could have accepted the application and given two effective opportunities to the parties to lead the evidence and thereafter, should proceed to decide the controversy, perhaps there would have been no scope of interference, but having not followed such procedure, I am of the view that the proceedings of the Arbitrators, much less, of the Objecting Court are not sustainable in law and the same are hereby set aside.

At this stage, this Court called upon the parties whether they would be willing to seek the appointment of an Arbitrator in order to save the cost of litigation and time, though the appellant(s)-vendors have given their consent, but the vendees refused, therefore, I refrain myself from proceeding further and for the foregoing reasons, the appeal baring FAO No.1379 of 2010 is allowed.

However, since, the appellant(s)-vendors had been very tardy and lackadaisical in approaching the Court, I deem it appropriate to impose a cost of ₹ 50,000/- upon the appellant(s)-vendors for dragging the other side to the Court.

FAO-5466-2010 (O&M)

In view of the fact that in the main case, the award has been set aside, no cause of action survives in the present appeal and the same is ordered to be dismissed as infructuous.

(AMIT RAWAL)
JUDGE

29.08.2016
yogesh

✓
Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**