

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

% **Judgment Reserved on: 23rd May, 2016**
Judgment Pronounced on: 3rd June, 2016

+ **O.M.P. (COMM) 203/2016 & I.A. No.3279/2015**

M/S KIRI ASSOCIATES (P) LTD. Petitioner
Through Ms.Priya Darshini Arora, Adv.
with Mr.Jay Kumar Bhardwaj,
Adv.

versus

PRAMOD KUMAR MITTAL & ANR. Respondents
Through Ms.Deepika V. Marwaha, Adv.
with Ms.Worthing Kasar, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed objections under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") challenging the award dated 7th November, 2014 passed by the Arbitrator Justice (Retd.) Mukul Mudgal.
2. On 20th February, 2015 the notice was issued only to the extent that the compensation could not have been awarded to the respondents in the absence of claim of compensation in terms of the provision of Section 21(5) of the Specific Relief Act. The compensation was awarded to the tune of Rs.25 lacs.
3. The compensation was awarded by the learned Arbitrator due to the following reasons:

- i) Non-disclosure of acquisition proceedings.
- ii) Non obtaining of NOC.
- iii) Non disclosure of subsequent agreement to sell and money received by the respondent.
- iv) No right to forfeit the advance amount.

4. Counsel for the respondents has fairly submitted that the facts and circumstances are so clear wherein the relief would be fair and correct in view of findings of the learned Arbitrator and cogent reason thereunder. The same is not contrary to the provision of Section 21 (5) of the Specific Relief Act as alleged by the petitioner because of peculiar facts of the present case as the petitioner has played a fraud upon the respondent at the time of execution of agreement and receiving the part consideration.

5. Admittedly, in the Agreement to Sell dated 10th December, 2009 it is stipulated categorically that the land in question which was agreed to be sold for Rs.12,99,00,000/- was free from all encumbrances, injunction, litigation, etc. Part payment was paid to the petitioner. The balance amount of Rs.11,49,00,000/ was payable on or before 15th April, 2010. It was stated in the agreement that the said amount was to be paid at the time of handing over of the possession, execution of Sale Deed in favour of the respondents or their nominee.

6. After execution of agreement, it had come to the knowledge of respondents that the said land in question was under land acquisition proceedings and notices under Sections 4 and 6 of the Land Acquisition Act, 1894 had been issued long before, i.e. in the year 1995/1997. There was also an award passed which was being

challenged in a writ petition filed by the petitioner that got finally disposed of on 4th May, 2012. But once again notices were issued by Government of NCT of Delhi and a writ petition was filed in November, 2012 challenging the said public notice.

7. The entire record was placed on record by the respondents before the Arbitral Tribunal when said situation was pointed out and confronted in the cross examination, Mr. Rajinder Kiri admitted that there is no such averment in the agreement and pretended/non-recollection of the fact, whether the same was brought to the notice to the respondents or not. In the Award, the Arbitral Tribunal observed that the seller enticed the respondents to enter the contract on fake pretences and concealed the acquisition proceedings.

8. It is apparent in view of finding that the petitioner did not disclose material facts. It was the case of the respondents before the Arbitral Tribunal that they had been approaching the petitioner between 2010-13 for execution of the Sale Deed which was being deferred by the petitioner, on the ground that the Sale Deed in that area were not being registered by the office of Sub-Registrar. The deponent/ respondents in his testimony has deposed that the respondents have not received any notice in writing from the petitioner ever for terminating or cancelling the Agreement to Sale. In cross examination of Sh.Tejinder Setia he stated that he did not deposit the balance amount as per Agreement to Sell as NOC was not forthcoming despite approaching Mr. Kiri many times for accepting the money.

9. The respondents had filed the notification of Divisional Commissioner, Delhi, Registrar Branch before the Arbitral Tribunal

which requires that in case of agricultural land the NOC in the name of buyer has to be obtained but that specific suggestions of the case of the parties, were not put in evidence, as there was an order on 17th May, 2014 in the arbitration proceedings, whereby it was agreed that the evidence should be recorded in the narrative and only specific questions be put in question answer form and the practice of putting forward of respective cases was dispensed with.

10. While dismissing the counter claim of the petitioner and awarding compensation to the respondents, the Arbitral Tribunal had assigned reasons that the petitioner has not disclosed the true facts before the Tribunal as in respect to the same land, the petitioner had executed registered Assignment Deed in favour of "Best Buildcreations Pvt. Ltd" and the petitioner had also entered into an agreement to sell with one "Leelajay Projects Pvt. Ltd.". The said fact was not in knowledge of the respondents at the time of filing of the Claim petition and when the said knowledge was acquired through the website of this Court as per the case of the respondents, the same was disclosed in the reply to the counter claim and the orders obtained from the website of this Court were filed on record. In the said order sheets of OMP No.766/2013, it was recorded that the petitioner herein had agreed to sell the same piece of land to Leelajay Projects Pvt. Ltd. for Rs.17,75,00,000/- out of which Rs. 5 crore has been taken as advance. And the case of Leelajay was that without disclosing to it the said piece of land was transferred by the way of an Assignment Deed dated 29th May, 2013 in favour of "Best Buildcreations Pvt. Ltd." an empire Housing.

The respondent had filed an application under Order 1 Rule 10 of CPC in the above said petition being OMP No. 766/2013 which was

disposed of by order dated 15th April, 2014 and the said dispute is now pending before the same learned arbitrator with whom the claim of Leelajay is pending. In OMP 766/2013, there was an order passed on 2nd August, 2013 whereby the petitioner had been directed not to sell, transfer, alienate or create third party interest in property in dispute.

It is submitted that the written statement and counter claim in the arbitration proceedings were filed by the petitioner in August, 2013. But the factum regarding the said OMP and the fact with regard to dispute with 3 more parties, for specific performance was not disclosed by the petitioner before the Arbitral Tribunal.

11. In view of the above said situation, there is a force in the submission of counsel for the respondents that it was the act of malafide intention of the petitioner and it was done in order to mislead and misrepresent the respondents. The learned Arbitrator had noted in the Award that "the malafide of respondent is further proved from the fact that he took advances from 3 other persons for the suit property after December 2009".

12. It is not denied by the petitioner that the said money was taken by it without cancelling Agreement to Sell with the respondents and without returning their money and even before expiry of limitation of filing the claim for specific performance of the respondents.

13. As mentioned earlier, the notice in the present petition was issued on 20th February, 2015 on one of the grounds only, i.e., the compensation cannot be awarded to the respondents in a suit for specific performance unless they specifically claim the compensation

therein. Thus, the notice was issued only on the ground of challenge to the awarding of compensation and not on the ground of refund of the amount of Rs.1.5 Crore along with interest and costs. The said order dated 30th February, 2015 passed by this Court has not been challenged and thus, has attained finality.

The learned Arbitrator held that the seller would not take the plea of forfeiture, as the said plea could have been taken only if there was no malafide from its side while entering into the agreement of the first place. The seller/petitioner has also not proved that it had completed its part of the obligation. The learned Arbitrator also observed in the Award that the petitioner herein had failed to explain about the non-disclosure of the acquisition proceedings notification in the agreement to Sell or the pendency of the writ petition. As such the Court ordered the refund of the advanced amount of Rs.1.5 Crore with interest at the rate of 14% compound interest annually, and directed damages of Rs.25 lacs along with litigation cost to be paid to respondents for deceiving them.

14. It is well established law that where the discretion vested in the Court under Section 34 of the Act has been exercised by the lower Court, the Appellate Court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage, the Appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a

different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. This principle is well established; but, as has been observed by Viscount Simon, L.C., in **Charles Osenton & Co. v. Johnston** [1942 AC 130: (1941) 2 All ER 245 (HL)], AC at p. 138:

The law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case.

15. On the issue of Section 21(5) of Specific Relief Act, it is settled law that once the relief of Specific Performance is denied, the Court can grant the relief of refund of earnest money and compensation under Section 21 and 22 of Specific Relief Act as it is discretionary relief and no specific prayer is required as the Court under Order 7 Rule 7 CPC can modulate its relief as per the facts of the case. Reliance is placed on the following judgments:-

a) The Supreme Court in **Jai Narain Parasrampuriah (Dead) and Others v. Pushpa Devi Saraf and Others** (2006) 7 SCC 756 has held that taking into account escalation in value of property, respondents were directed to refund to appellants the advance money of Rs.10 lakhs with interest @ 12% per annum. Since the respondents were responsible for bringing out such a situation, they

were directed to pay Rs.50 lakhs as compensation to appellants in addition to the aforesaid amount.

b) This Court in ***Uma Kapoor & Anr v. Kapil Aggarwal***, in OMP no.3/2011, decided on 2nd May, 2013, dealt with the petition under Section 34 of the Act, in which refund along with interest had been awarded in favor of the claimant. The Court, while deciding the said petition, had therein referred to ***B.R. Mulani v. A.B. Asawathanarayana***, AIR 1993 SC 1318. In the said judgment, the Supreme Court, on coming to the conclusion held 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.

While disposing of the said OMP No. 3/2011, this Court held as under:

"It is evident from the finding of the 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".

c) In ***Mack and Krishnaswami Nayudu*** AIR 1995 Madras 591, it was held that "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.

d) Again this Court in, **Ashok Kumar Arora v. D.S. Sodhi & Anr.** 199 (2013) DLT 627 has held that *"Decline of relief- Earnest money ordered to be refunded by way of money decree not barred- damages and compensation as envisaged under section 21 of Act cannot be equated with earnest money while determining rights of purchaser seeks for its return - In cases where specific performance is refused, in order to render complete justice Court may direct refund even though plaintiff has not specifically asked for it in plaint"*.

e) In **Balwant Singh v. Ram Charan** 190 (2012) DLT 589 the Court held that *"Forfeiture of amount on account of breach of contract-Justification- As per provisions of Order VII Rule 7 CPC, Court can modulate the relief which can be given, though relief is not specifically asked for- As specific performance was not granted to appellant/ plaintiff, respondent/ defendant cannot have unjust enrichment by retaining the amount."*

f) In **Janardhan Prasad v. Ramdas** (2007) 15 SCC 174 it was held that *"Performance of contract may be dependent upon several factors -Conduct of the parties in this behalf is also relevant - Parties by their conduct or otherwise may also extend the time for performance of contract from time to time. Specific Relief Act, 1963 - Ss. 20 and 21. In the case of Specific performance for balancing the equities in a given case, compensation can be awarded in lieu of grant of decree of specific performance of contract. It was held that it was a fit case where discretionary jurisdiction of the Court under*

S. 20 should not have been exercised and, instead monetary compensation could be granted.”

16. In normal cases where the issues of mis-representation, non-disclosure of facts and concealment are not involved, the contention of the petitioner could have been accepted, in view of statutory provision of Section 21(5) of the Specific Relief Act but the facts in the present case are different. No doubt, the respondents did not claim for compensation. But after examining the material placed on record and conduct of the petitioner, the learned Arbitrator has come to the conclusion that the conduct was not fair and the petitioner is guilty of mis-representation and concealment of other deals of the same property in dispute. Therefore, compensation in the nature of punitive damage was granted. There is no requirement of pleadings and evidence while granting the punitive damages. It is settled law that the punitive damages are in the nature of penalties for mis-representation of party and deception, whereby the court suo moto grant the punitive damages in the nature of compensation. Therefore, in the present case, after having considered the material available on record, I am of the considered view that the award published does not suffer from any infirmity and cannot be interfered *inter alia* on the following main reasons:

a) The Government of NCT of Delhi (Land and Building Department) issued Notification under Section 4 of the Land Acquisition Act, 1894, with respect to the land in question. On 27th April, 1996 the Government of NCT of Delhi (Land and Building Department) issued Declaration under Section 6 of the Land Acquisition Act, 1894, with respect to the land in question on 10th January 1997 and 3rd March, 1997.

b) The petitioner challenged the Notification under Section 4 of the Land Acquisition Act, 1894, before this Court in Writ Petition bearing WP(c) No.6213/1998.

c) The petitioner on 10th December, 2009 in full knowledge of the pending land acquisition proceedings and the pendency of Writ Petition with respect to the subject land, entered into an Agreement to Sell dated 10th December, 2009 with the respondents. The respondents paid Rs.1,50,00,000/- in advance to the petitioner at the time of execution of the Agreement to Sell. The balance amount was to be paid at the time of execution of Sale Deed. It was specifically mentioned in the Agreement to Sell that the land was free from all sort of encumbrances, mortgages, Court injunctions etc. The Agreement to Sell contained the indemnity clause i.e. Clause 7, wherein the petitioner undertook to indemnify the respondents and make good any losses suffered by the respondents in protecting the titles of the subject land.

d) The respondents in November, 2012 learnt through the Secretary of Vasant Kunj Enclave Housing Welfare Society that the petitioner had invoked the writ jurisdiction of this Court against the acquisition proceedings with respect to the subject land.

17. Therefore, the Award has rightly been passed by the Tribunal in the said circumstances, which is not contrary to law. The relief of Specific performance was disallowed but seeing the misconduct, misrepresentation and non-disclosure of material fact as well as hiding and concealing the crucial facts and information, the Tribunal had ordered the refund of the advance paid with compound interest and also awarded compensation and the cost of the litigation. Thus,

the Award is liable to be upheld as the same does not suffer from any infirmity.

18. The objections of the petitioner are dismissed.

19. No costs.

(MANMOHAN SINGH)
JUDGE

JUNE 03, 2016

