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

+ **O.M.P. (COMM) 541/2016 & IA No.14869/2016**

RAKESH MALHOTRA

..... Petitioner

Through: Mr Dinesh Kumar Gupta and Mr
Vidit Gupta, Advocates.

Versus

SH. GURPAL SINGH

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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15.12.2016

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 23.07.2016 (hereafter 'the impugned award') made by, Mr Prem Kumar, ADJ (Retd.), the Sole Arbitrator.

2. The disputes between the parties arose in relation to an agreement to sell dated 12.12.2004 (hereafter 'the Agreement') entered into between the parties for sale of the property bearing No. 381, AGCR Enclave, Delhi - 110092 (hereafter 'the said property'). By the impugned award, the Arbitrator has rejected the petitioner's claim for specific performance of the Agreement and has further also rejected the petitioner's claim for damages made in the alternative.

3. Mr Dinesh Kumar Gupta, learned counsel appearing for the petitioner

fairly stated, at the outset, that the petitioner was not pressing its claim with regard to the specific performance of the Agreement as the same was a discretionary relief; he limited the petitioner's challenge to the rejection of the alternative claim of damages.

4. Mr. Gupta referred to paragraph 91 of the impugned award and submitted that all findings recorded therein except the finding that the petitioner had not offered to pay the conversion charges of ₹10,42,147/-, were in favour of the petitioner. He earnestly contended that the Arbitrator had found that the respondent had breached the Agreement and yet had failed to award damages for the same. He also contended that the Arbitrator's finding in relation to petitioner's offer for payment of conversion charges was contrary to the record of the case.

5. The controversy raised in the present petition arises in the following context.

6. The petitioner entered into the Agreement with the respondent, whereby the petitioner agreed to purchase and the respondent agreed to sell the said property for a total consideration of ₹1,27,00,000/-. Admittedly, the petitioner paid a sum of ₹15 lacs on 14.12.2004 - ₹10 lacs in cash and ₹5 lacs by way of cheque - to the respondent. Thereafter, the petitioner also paid a sum of ₹5 lacs to Sh. Prithi Pal Singh, the brother of the respondent, who was in possession of the said property at the material time. Thus, in all, the petitioner paid a sum of ₹20 lacs as part consideration for the purchase of the said property. The petitioner further submits that he called upon the respondent to execute and register the relevant documents for transfer of the

said property but the respondent failed to do so.

7. The petitioner claims that he subsequently became aware that the lease of the said property in favour of the respondent was determined by the Delhi Development Authority (DDA) on 25.07.1990. Further, the respondent had also filed a writ petition (W.P.(C) No. 2505/1990, titled "*Gurpal Singh v. DDA*") in this Court, *inter alia*, challenging the determination of the lease and the said petition was dismissed on 13.02.1995.

8. On becoming aware of the determination of the lease and the dismissal of the above mentioned writ petition, the petitioner filed an FIR (being FIR No. 198/2005) on 01.04.2005 with PS Anand Vihar, New Delhi. The petitioner, *inter alia*, complained that he had been dishonestly induced by the petitioner and two other persons to pay ₹20 lacs as the fact that the lease deed in favour of the respondent had been determined and the respondent was no longer competent to transfer the said property had been concealed. The petitioner further complained that he had been cheated of the aforesaid sum and, accordingly, prayed that a case under Section 423/406/420/120B of IPC be registered against the respondent and the two other persons named in the FIR.

9. In view of the fact that an FIR had been lodged by the petitioner, the respondent filed an application for grant of anticipatory bail before the Additional Sessions Judge (ASJ), Karkardooma, Delhi. The learned ASJ passed an order dated 11.04.2005 and granted the bail subject to a sum of ₹20 lacs being deposited with the investigating officer. Admittedly, this

condition was complied with. Thereafter, the petitioner filed an application for withdrawal of the sum of ₹20 lacs deposited with the investigating officer and the learned ACMM permitted the same. The respondent also did not object to the money being released to the petitioner.

10. On 15.11.2005, the petitioner filed an application with Mr D.P. Joshi, the Arbitrator named in the Agreement, to enter upon reference and adjudicate the disputes arising out of that Agreement.

11. It is stated that in the meanwhile, the respondent continued to seek adjournments in the criminal proceedings on the ground that the matter regarding restoration of the lease and conversion into freehold was pending consideration before the DDA.

12. The named Arbitrator (Mr D.P. Joshi) entered upon the reference and called upon the petitioner to file his statement of claim, which was filed by the petitioner on 11.02.2007. Thereafter, the matter was taken up by Mr. Joshi on 04.03.2007, but was adjourned on several occasions thereafter for several reasons including settlement of the disputes.

13. On 01.09.2009, the learned ACMM framed charges against the respondent. The respondent preferred a criminal revision before the learned ASJ, Delhi which was allowed. The learned ASJ held that there was no *prima facie* case against the accused persons (which included the respondent) for offence under Section 420/423/34 of IPC and the complaint had been filed by the petitioner only to pressurise the respondent. The petitioner has filed a petition (Criminal Misc. (Main) No. 2345/2012) impugning the aforesaid decision, which is stated to be pending in this

Court.

14. In the meantime, the petitioner's counsel issued a public notice on 08.07.2012, *inter alia*, referring to the arbitral proceedings and further mentioning that the Arbitrator had directed that *status quo* be maintained with regard to the possession of the said property till further orders. Thereafter, on 17.07.2012, the respondent sent a letter to the named arbitrator requesting him to stop acting as the sole Arbitrator. Subsequently, the respondent also sent notices of defamation and civil damages to the petitioner and to Mr. Joshi.

15. The respondent filed an OMP No. 774/2012 under Section 14/15 of the Act praying that the mandate of the Arbitrator be terminated. By an order dated 11.12.2014, this Court terminated the mandate of Mr D.P. Joshi as an Arbitrator and appointed Mr Prem Kumar, former Additional District Judge, as the Sole Arbitrator to adjudicate the disputes between the parties.

16. The Arbitrator considered all the material on record and observed as under:-

“91 **The material facts that emerge from the aforesaid narration of facts are:-**

- i. There is agreement to sell dated 14.12.2004 between the parties.
- ii. The claimant paid Rs.20 Lacs to the respondent as part payment.
- iii. The balance payment was to be made within three months from the date of agreement to sell dated 14.12.2004.

- iv. The respondent concealed the fact that the lease deed has been cancelled way back in 1995 by the DDA.
- v. The respondent also concealed the fact that the writ petition challenging the DDA's action was dismissed by the Hon'ble High Court of Delhi.
- vi. Respondent Gural Singh wrote letter dated 08.04.2004 Ex.C13 to the Deputy Director of the DDA for restoration of the plot on the ground that the misuse has been stopped long time back and he is prepared to pay the dues if any. After writing this letter the respondent slept over the matter and did not pursue it with the DDA. The respondent did not inform the claimant at the time of entering into agreement to sell dated 12.12.2004 that he has already applied to the DDA for restoration of the lease deed and the matter is pending before the DDA.
- vii. The last payment of Rs. Five Lacs was made by the claimant on 17.12.2004. It is evidenced by a receipt of the same date.
- viii. The entire amount paid as advance was later on taken back by the claimant by taking cheques from the investigating officer of the case deposited by the respondent at the time of grant of bail to the respondent.
- ix. The notice terminating the agreement was issued by the respondent.
- x. The claimant came to know of the restoration of the lease deed and conversion of the suit property into free hold on 17.03.2011 subject to payment of Rs.10,42,147/-.
- xi. The claimant initiated arbitration proceedings in

the matter on 15.11.2005.

- xii. The claimant filed claim petition dated 04.02.2007.
- xiii. The present arbitration proceedings are continuation of the said arbitration proceedings.
- xiv. Claimant writes to the Lt. Governor, Delhi vide letter dated 10.10.2008 that he has withdrawn the amount from the Court but has reserved his right under the agreement dated 12.12.2004;
- xv. Claimant does not make offer in terms of the agreement dated 12.12.2004 that he was prepared to pay the conversion charges.
- xvi. Claimant was duly replied by the Deputy Director, (CS) of DDA vide letter dated 01.01.2009 that he had no right or interest in the property.
- xvii. Claimant further writes letter dated 28.01.2009 Ex.RW3/3 to the Deputy Director, DDA that he was still interested to purchase the property. At the same time he was prosecuting the criminal case. In this letter also claimant does not show his willingness to pay conversion charges.
- xviii. Even when the claimant comes to know from legal notice dated 17.07.2012 that the suit property has been declared freehold by the DDA and that a conveyance deed dated 17.03.2011 has been executed, claimant still does not offer to pay the conversion charges of Rs.10,42,147/- to the respondent. This was the obligation of the claimant under Clause 6 of the Agreement to sell dated 12.12.2004.
- xix. Claimant insisted for refund of his amount and accepted the cheques deposited by the respondent in the court at the time of grant of bail vide order

dated 11.04.2005 and thus received back his total amount as earnest money in the year 2005.

- xx. The claimant sought amendment of his claim petition vide his application dated 05.01.2015 on the ground that the subsequent events have taken place. Moreover, the claimant is entitled to compensation also. This application was allowed vide order dated 04.02.2015.
- xxi. Claimant has placed absolutely no details of his financial capacity on the record of this Tribunal except to say in the claim petition that the claimant was always ready and is still ready and willing to perform his obligation within 15 days the respondent produced the conveyance deed and repeated this in his affidavit by way of evidence dated 13.04.2015.
- xxii. Claimant claimed that he was income tax assessee but he did not produce any record of income tax of the last 12 years. He even did not produce his bank record.
- xxiii. There is only bald statement of the claimant on record that he had not kept any cash with him in 2005 and some cash was lying with his relative and with his bank and that he would arrange the cash from his relatives and would have withdrawn the money from the bank. He even does not remember how much money was lying in his bank account at that time.”

17. After considering the relevant facts and the relevant material on record, the learned Arbitrator concluded that the conduct of the petitioner did not entitle the petitioner to seek performance of the Agreement as he had failed to offer the agreed consideration for the said property and had also

withdrawn the advance money paid to the respondent. The Arbitrator held that in terms of the Agreement, the petitioner was obliged to pay the conversion charges. However, even after becoming aware of the fact that the said property has to be converted from leasehold to freehold, the petitioner had failed to offer to pay the charges for the same. The Arbitrator further held that the petitioner had not established that he was ready and willing to perform the Agreement and further his conduct showed that he did not have the capacity to pay the consideration nor the willingness to perform the Agreement. The relevant extract of the impugned award is set out below:-

“112. In the present case the claimant has failed to prove that he was always ready and willing to perform his part of the contract. His conduct shows that he neither had the capacity to pay the consideration amount nor had the willingness to perform his contract and that he was more interested in creating a situation in which the respondent gets into trouble and in the process acts under his pressure. This would be evident from the conduct summed up as under;-

- i. The claimant on finding that the lease deed is already cancelled started criminal action against the respondent.
- ii. In its reply dated 15.12.2005 to the claimant's notice dated 23.11.2005 the respondent reminds the claimant of his legal obligation to bear the expenses for declaring the property free hold from DDA as agreed by Clause 6 of the Agreement dated 12.12.2004. The claimant has not only failed to fulfil his commitment but even has gone to the extent of receiving back the earned money.
- iii. The claimant takes back the amount of Rs.20 Lacs paid to the respondent by taking the two cheques

from the IO of the criminal case deposited with him by the respondent on the direction of the Ld. ASJ on 11.04.2005 at the time of grant of bail to the respondent.

- iv. The claimant succeeded to get his amount back and entire amount of Rs.20 Lacs was duly credited in claimant's bank a/c on 23.09.2005. However, the claimant continued to pursue the criminal complaint till framing of the charge by the Ld. ACMM, Karkardooma Court, Delhi with assistance of an Advocate with a view to assuage his greed and has even filed a Crl. M. C. petition No.2345/12 U/S 482 Cr.P.C. against the order of discharged dated 19.03.2012 passed by Sh. K.S. Paul, Ld. ASJ, KKD, Delhi and the said criminal Misc. proceeding is still pending before the Hon'ble High Court of Delhi for final hearing.
- v. Claimant also approached DDA vide letter dated 10.10.2008 addressed to Hon'ble Lt. Governor of the Delhi as Chairman of the DDA stating therein that the respondent is misleading the DDA, the Ld. Arbitrator and the Court of the Ld. ACMM and that the respondent has been falsely representing that he has relinquished his rights under the agreement dated 12.12.2004 and that even though he has withdrawn the amount from the court, he reserves his rights both civil and criminal. Such a letter was not warranted. Not only this, the claimant is also guilty of denying the reply dated 01.01.2009 sent by the Deputy Director, DDA on the ground that claimant has no right or authority to approach DDA.
- vi. The claimant makes no attempt to call upon the respondent to offer charges of more than Rupees Ten Lacs paid by the respondent to the DDA for

conversion of the property from leasehold to freehold on 17.03.2011.

- vii. The claimant does not make any offer to the respondent to receive the amount payable under the agreement to sell after the lease deed was restored and the suit property was converted from leasehold to freehold.
- viii. The claimant places absolutely nothing on record neither bank record nor income tax record nor any other record to show that since 2005 he had and still has the financial capacity to pay the consideration amount under the agreement to show his readiness to perform the contract and keeps silence even after getting information through legal notice that the property has been converted into free hold and conveyance deed has been executed."

18. The Arbitrator found that by his conduct, the petitioner had opted to reject the Agreement and had also claimed refund of the amount paid as advance. In addition, the petitioner had also failed to offer the conversion charges as was required under clause 6 of the Agreement. The Arbitrator rejected the petitioner's claim for damages in the following words:

"Thus considering the totality of the circumstances and the conduct of the claimant I feel that in the facts and circumstances of this case the claimant is not entitled to the relief of specific performance of agreement to sell dated 12.12.2004. Not only this, the claimant is also not entitled to any amount by way of compensation for the amount equivalent to the difference between agreed sale consideration and market value of property prevailing as on today. The alternate relief sought by the claimant is absolutely without any basis and is thus declined."

19. The Arbitrator also rejected the counter claim made by the respondent.

20. Mr Gupta's contention that the impugned award is liable to be set aside as the Arbitrator had grossly erred in not allowing the petitioner's alternative relief of damages is, in my view, unmerited. The Arbitrator had found that the petitioner was not ready and willing to conclude the Agreement and had effectively rejected the Agreement. The aforesaid finding is a finding of fact and unless it is found to be perverse, is not amenable to judicial review in proceedings under Section 34 of the Act.

21. The learned counsel had contended that the petitioner had withdrawn a sum of ₹20 lacs without prejudice to any rights and contentions. However, he fairly conceded that the order passed by the learned ACMM did not reserve any such rights in favour of the petitioner. In the circumstances, the Arbitrator had concluded that the petitioner had rejected the Agreement and had elected to seek refund of the money advanced to the respondent.

22. Mr Gupta was pointedly asked as to whether the petitioner had led any evidence as to the quantum of damages suffered by him and he fairly responded in the negative. He, however, submitted that the Arbitrator should have made enquiries as to the damages suffered by the petitioner and awarded the same. In my view, the said contention is also not persuasive. Since the petitioner has not led any evidence to establish the quantum of damages suffered by him, the conclusion of the Arbitrator that the alternative relief sought by the petitioner is without any basis cannot be faulted.

23. The petition is, accordingly, dismissed. The pending application also stands disposed of. No order as to costs.

VIBHU BAKHRU, J

DECEMBER 15, 2016
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