

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

% Order delivered on: 20<sup>th</sup> January, 2016

+ **O.M.P. 504/2015**

AVR INDIA PRIVATE LIMITED ..... Petitioner  
Through: Mr. Sarat Chandra, Adv.

versus

DEEPAK NARANG & ANR. .... Respondents  
Through: Ms. Manmeet Arora, Adv. with  
Mr. Tarang Gupta, Adv.

**CORAM:**  
**HON'BLE MR.JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J. (Oral)**

1. The petitioner filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for setting aside the award dated 29<sup>th</sup> June, 2015 passed by the sole Arbitrator.

2. The facts of the case are that the parties entered into an agreement to sell dated 12<sup>th</sup> March, 2014 with regard to a property bearing No. Villa/ Residential Unit constructed on Plot No. N-176, Mayfield Gardens, Sector-51, Gurgaon, Haryana admeasuring 299 sq. yds. plot area with built up area of 2270 sq. ft. (approx). It is submitted that the respondents agreed to sell the aforementioned property to the petitioner for a total sum of Rs.3,00,00,000/- and at the time of entering into the agreement, a sum of Rs.45,00,000/- was paid by the petitioner to the respondents. The balance payment was

to be made in the manner i.e. Rs. 1,05,00,000/- which was to be paid within 5 days from the date of agreement dated 12<sup>th</sup> March, 2014 and the balance payment of Rs. 1,50,00,000/- was to be made within 10 days from the date of agreement. The petitioner submits that the sale deed was to be executed in favour of the petitioner at the time of receipt of balance sale consideration.

3. It is the case of the petitioner that it agreed to make the payment within a period of 10 days as it was said to receive a huge sum as compensation from the Haryana Urban Development Authority (HUDA) at any point and it was more than enough to pay the balance sale price to the respondent. However, owing to certain reasons, the said compensation though was clear and was said to be released at any point of time, could not be released by HUDA to the petitioner and was delayed for some reason or the other, which reasons were not attributable to the petitioner.

4. It is stated that the respondents vide communication dated 19<sup>th</sup> March, 2014, reminded the petitioner for release of the balance payment. However, considering the delay in release of the compensation, the petitioner requested the respondents to extend the time for making of the balance payment.

5. The petitioner submits that the respondents impressed upon the petitioner that they were in dire need of the money and it is for this reason that they had agreed to sell the property at a discount but considering the fact that the entire payment was to be paid within 10 days of the agreement i.e. on or before 21<sup>st</sup> March, 2014, the respondents extended the time till the expiry of period of 10 days

from the date of agreement and emphasized upon the petitioner to make the balance payment within the extended period of time. The respondents further impressed that no further time would be extended.

6. On the expiry of the period as provided in the agreement, the petitioner was still unable to receive the compensation from HUDA owing to certain internal delays at HUDA and therefore made a request to the respondents to extend the time for a further period vide its letter dated 27<sup>th</sup> March, 2014. The respondents declined the said request for extension and proceeded to cancel the agreement vide their notice dated 29<sup>th</sup> March, 2014 and also forfeited the entire amount of Rs.45,00,000/- paid as advance money.

7. The petitioner submits that it duly protested the action of the respondents and requested them to refer the matter to the arbitration since the respondents refused to withdraw their notice and were enjoying money of the petitioner. The arbitration clause in the agreement was invoked and with the consent of the parties, Mr. S.S. Jain, Advocate was appointed as sole Arbitrator to adjudicate upon the disputes between the parties. The sole Arbitrator passed the Award on 29<sup>th</sup> June, 2015 dismissing the claims preferred by the petitioner and further held that the forfeiture of the earnest money and cancellation of the agreement were proper and in accordance with law.

8. Aggrieved by the aforesaid award dated 29<sup>th</sup> June, 2015 the petitioner filed the present petition to challenge the award on the following grounds:

- a) The said award suffers from various illegalities and errors apparent on the face of record.
- b) The learned Arbitrator failed to appreciate that time was never the essence of the contract.
- c) The learned Arbitrator failed to consider the unnecessary haste of the respondents in cancelling the agreement and illegally forfeiting the Earnest Money inasmuch as the agreement was cancelled within the period of about 15 days.
- d) The learned Arbitrator failed to consider that there was no willful default on the part of the petitioner and though it had arranged for the funds but was unable to pay the balance amount owing to the delay as caused by HUDA.
- e) Because the learned Arbitrator failed to consider that it was not disputed that the petitioner was to receive compensation and in fact records of compensation were also produced and therefore the termination of the agreement ought to have been set aside.
- f) Because the learned Arbitrator failed to enquire that no loss was suffered by the respondents and as such the question of forfeiture does not and could not arise.

9. The following issues were framed:

- i. Whether the claimant was ready and willing to perform its part under the agreement to sell dated 12.03.2014 ?
- ii. Whether the cancellation of the agreement to sell dated 12.03.2014 and forfeiture of the Advance Money is fraudulent or illegal ?

- iii. Whether the claimant is entitled to specific performance of agreement to sell dated 12.03.2014 ?
- iv. Whether the claimant is entitled to seek refund of Advance Money as paid by it ?
- v. Relief.

10. On issues No.1 to 4, the learned Arbitrator has come to the following conclusion:

- i) "Issue No.1 - The agreement to sell was executed on 12.03.2014 and under the terms of the agreement, a very short time of 10 days was agreed between the parties and it was further a term of the agreement that time is the essence. The property is freehold property and the respondents, in the correspondence and also from their conduct, has clearly shown the urgency for the money and it is not hard to presume that they were in urgent requirement of the money. The respondents, however, have not produced any evidence to show that they agreed to sell the property at a discount. During the continuance of the arbitration proceedings, the claimant has not been able to show that it has received the money from HUDA towards compensation and even if so received, the same is offered to the respondents towards the balance sale consideration. It is note worthy in the present case that the parties agreed for a very short time frame for due performance of their respective obligations and in case

the claimant has not made any arrangement except for reliance upon the compensation to be received from HUDA, the same is a calculated risk taken by it. It is common knowledge that the Government files move at a snail's pace and unless the claimant has in its possession a voucher for due payment, the same cannot be anything except a calculated risk. The claimant though had produced on record certain records towards compensation amount which shows that it was entitled to some compensation amount and that it might have been sufficient to pay the balance sale consideration to the respondents, but the same cannot, by any means, be equated as readiness and willingness on the part of the claimant. The claimant while agreeing on a very short time frame for making the balance payment ought to have made alternate arrangements in case of non-receipt of the compensation. Even till date, the claimant has not offered any money to the respondents. Thus, I do not find any merit in the argument raised by the claimant that it was prevented by a cause and that there was no default on its part and the delay, if any, occurred to reasons which was beyond its control or unforeseen. The claimant is involved in Real Estate business and is well aware about the time taken by Govt agencies to release the compensation amount and in case it was solely dependent upon the compensation amount, it ought not to have agreed to a very short duration for due performance

of the obligations and looked at alternate properties with longer payment options. Thus, I do not find this issue in favour of the claimant and hold that the claimant was not ready and willing to perform its part of the agreement. This issue as such is decided against the claimant and in favour of the respondent.

- ii) Issue No.2 - Since the time duration provided under the agreement was only 10 days from the date of its execution and time was specifically made essence of the agreement by the parties and further the respondents, though not obligated, extended time by another period of 5 days considering the position of the claimant, no fault can be put on the respondents in cancelling the agreement and forfeiting the amounts as paid by the claimant, I hold this issue in favour of the respondent and against the claimant.
- iii) Issue Nos. 3 &4 - Since I have decided the Issues No. 1&2 in favour of the respondent and against the claimant, therefore, these issues are also decided in favour of the respondent and against the claimant on the basis of the reasoning as already given above.”

11. It is admitted position that time is the essence of the Agreement. The petitioner did not perform its part of the Agreement and on its failure to perform its part of the Agreement, the respondents exercised their option as made available to them under

the Agreement itself and thereby cancelled the Agreement and forfeited the Earnest Money as paid by the petitioner. The said action cannot be faulted with by the petitioner. Reliance is placed on **Satish Batra v. Sudhir Rawal**, (2013) 1 SCC 345).

12. The relief sought is discretionary under Section 20 of The Specific Relief Act. There is force in the submission of learned counsel for the respondents that the petitioner deals in the properties. The petitioner is fully aware about the consequences of the contract that in case the terms are not complied with, the advance money can be forfeited by the other party. Thus despite of knowing the consequences of non-compliance of the terms of the contract, now the petitioner cannot say that the amount is wrongly forfeited by the respondents.

13. I have gone through the pleadings before the Arbitrator as well as the award passed thereon. This Court is not inclined to interfere with the award passed by the sole Arbitrator.

14. The scope of Section 34 of the Arbitration and Conciliation Act, 1996 is limited to the stipulations contained in Section 34(2) of the Act. The jurisdiction of the Court to interfere with an Award of the Arbitrator is always statutory. Section 34 is of mandatory nature, and an Award can be set aside only on the Court finding the existence of the grounds enumerated therein and in no other way. The words in Section 34(2) that “*An Arbitral Award may be set aside by the Court only if*” are imperative and take away the jurisdiction of the Court to set aside an Award on any ground other than those specified in the Section. The Court is not expected to sit in appeal over the findings of

the Arbitral Tribunal or to re-appreciate evidence as an appellate court. A recent observation of the Supreme Court in the case of ***P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited And Others*** reported in (2012) 1 SCC 594 is apposite in this regard and the relevant portion, contained in paragraph 21 of the said judgment is reproduced as under:

“21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at”.

15. The petitioner has challenged the arbitral award on the grounds as set out in the petition and there is not even a whisper in the said grounds as to how it falls under the limited and narrow mandate of Section 34 of the Arbitration and Conciliation Act, 1996. Even if the additional grounds under Section 34, as laid down by the Supreme Court in the case of ***ONGC v. Saw Pipes Ltd.***, AIR 2003 SC 2629 are considered, which are patent illegality arising from statutory provisions or contractual provisions or that the Award shocks the conscience of the Court, no such facts are narrated in the present petition. The endeavour of the petitioner is thus to convert the challenge to the arbitral award into an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and which endeavour as per the consistent dicta of the Supreme Court is impermissible in law.

16. It is settled law that the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct.

17. The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. The Supreme Court has expounded on the principle as to the sanctity of the decision of the Arbitrator in the case of **Markfed Vanaspati and Allied Industries v. Union of India, (2007) 7 SCC 679**, where in paragraph 17 of the said judgment it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honor and support the award as far as possible”.

18. After having gone through the award passed by the learned sole Arbitrator, I find that there is no error therein. The learned Arbitrator has given its correct findings of the facts and circumstances of the present case, as the said findings are in consonance with the contract between the parties. The objections of the petitioner are thus without any merit. The same are accordingly dismissed. No costs.

**MANMOHAN SINGH, J.**

**JANUARY 20, 2016**