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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 01st May, 2017

Pronounced on: 08th May, 2017

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FAO(OS) (COMM) 28/2017 & CM No.4223/2017

M/S OZONE BUILDERS AND DEVELOPERS PVT LTD

..... Appellant

Through : Mr.Tanmaya Mehta and Mr.Tarun
Singla, Advs.

versus

M/S OMWAY BUILD ESTATE PRIVATE LTD & ORS

..... Respondent

Through : Mr.J.P.Sengh, Sr. Adv. with Mr.Anuj
Bhandari, Ms.Manisha Mehta and
Mr.Naveen Kr.Gautam, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The appellant is aggrieved by rejection of its petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”), by the impugned judgment of a learned Single Judge.

2. The appellant contends that in October, 2005 it had entered into an oral agreement of partnership with respondent Nos.1 and 3 (hereinafter “Omway”) for developing and marketing a township on land measuring about 100 acres in Village Belaka, Alwar (Rajasthan). It is alleged that the land for partnership project was to be purchased

in the name of Omway and that all the three partners were to share the profits/losses in equal ratio. At that time the subject land was under acquisition but the Government had not taken its possession. Despite the acquisition, the land for the project measuring 32.202 acres was purchased in the name of Omway; land measuring 3.064 acres in the name of the appellant; and land measuring 33.903 acres in the name of the fifth respondent, a Dalit allegedly working with the first two respondents as peon, though, however a Power of Attorney dated 21.6.2006 was taken from him in favour of the second respondent. It is further alleged that apart from the above, an agreement to purchase land measuring 11.555 acres was also executed in the name of Omway, the fifth respondent and the appellant.

3. The appellant urges that all the land for the project was purchased in the name of the above three partners and initially the partnership operated from 103, Hemkunt Towers, 98, Nehru Place, New Delhi but was later shifted to 3, LSC, Sharda Chamber, K-Block, Kalkaji, New Delhi. A *Havan* ceremony was performed on 30.4.2006 in which the director of the appellant also took part as a partner.

4. The appellant also alleged that between November, 2005 and July, 2007 it had contributed a sum of ₹2.05 crores (₹85 lakh through cheques and ₹120 Lakh in cash). The cheques were issued in the name of Omway. In April/May, 2006 the project was pre-launched and an amount of ₹5.38 crores was collected from public towards booking of plots. It is alleged that after such pre-launch, an amount

of ₹25 lakh was paid by Omway to the appellant on 06.05.2006 for purchase of a piece of plot measuring 3.064 acres and that again on 02.09.2006 further sum of ₹25 lakh was paid to it. It is also alleged that in its own balance sheet for the year ending on 31.3.2006 the appellant had treated the amount paid to Omway through cheques as an *investment*, though in the schedule appended to its balance sheet, this amount is shown as '*advance against plots*'. On the other hand Omway in its balance sheet for the year ending on 31.03.2006 has shown this amount as an '*advance from business associates*' and whereas in its balance sheet for the year ending on 31.3.2007 '*as an advance from customers/others*'.

5. The appellant contends that the entire land for the project was purchased from the funds contributed by it or from the money realised from initial booking of the plots and that none of the other partners viz, Omway or third respondent had contributed any money. Furthermore during continuation of such oral partnership, all of them viz, the appellant, Omway and third respondent had executed a Memorandum of Understanding (hereinafter referred to as 'MOU') on dated 2.8.2006 which was nothing but a partnership deed wherein all the partners had to contribute ₹15 lakh each and were to share the losses/profits in the same ratio. The MOU, in Clauses **13** and **14** rather defined them as partners. An escrow account, as envisaged in clause **10** of the MOU was also opened on 2.9.2006 with Punjab National Bank, Nehru Place, New Delhi. It is also alleged that vide a notice dated 15.11.2006 Omway withdrew from oral understanding on the plea that the appellant had failed to contribute ₹15 lakhs as

agreed to in the MOU whereas more than ₹1 crore of appellant's money was lying with Omway on the said date. The appellant, by its reply dated 2.1.2007 accepted dissolution of partnership and demanded its share in profits/assets of the partnership. The appellant claimed that the firm's assets included a total land measuring 80.724 acres, out of which 37.015 acres were released from acquisition and the approval to develop residential colony was obtained for 31.678 acres, (which involved 23.153 acres in the name of Omway and 8.524 acres in the name of the fifth respondent. As the appellant raised a dispute with respect to the dissolution of partnership or in the alternative to declare it as dissolved and claimed rendition of accounts; its share in profits; assets and properties of partnership, the arbitrator was thus appointed.

6. The arbitrator, by award dated 1.4.2013 rejected the appellant's claim as unsubstantiated, primarily, on the following grounds (a) MOU was only a preliminary document; (b) the oral partnership could not be proved; (c) the appellant failed to contribute ₹15 lakh towards capital; (d) 'advance received from business associate' could not be construed as 'capital' of the appellant; (e) the inclusion of the land in the name of the appellant or any representations made to the government for release of such land did not prove partnership; (f) the mere absence of loan agreement or the participation of the appellant's Director in religious ceremonies like *Havan* did not prove any partnership; (g) the admission of CW1 Praveen Mangla that the payment of ₹85 lakhs were shown in its accounts as loan to Omway and that he had accepted the payment of ₹50 lakh; and (h) failure of

the appellant to produce independent witnesses.

7. The appellant preferred OMP No.675/2013 under Section 34 of the Act challenging the award as also an order dated 14.05.2010 of the learned arbitrator, but the petition was dismissed by the impugned order dated 07.12.2016 against which the appellant has now filed this appeal.

8. The appellant challenges the award as also the impugned order dated 7.12.2016 passed in OMP No.675/2013 on following grounds, primarily, (a) the principles adopted to determine partnership and for construing/ interpreting MOU dated 2.8.2006 are wrong; and erroneous (b) the impugned award is contrary to the public policy of India as is contrary to the fundamental policy of Indian law and against justice and morality; (c) award is perverse and illegal; (d) the learned arbitrator ignored vital evidence; did not treat the parties equally. He adopted double standards and thus had acted arbitrarily and capriciously. It is alleged that the award is perverse and so irrational that no reasonable person would have arrived at the same. It was argued that the words used in MOU like '*having arrived at an understanding*'; '*in furtherance of such common goal*' and '*the parties have decided to record the terms and conditions and the specifications of the project*' rather clarify that MOU was executed in furtherance of a prior understanding and that such understanding was nothing but an oral partnership agreement as pleaded by the appellant. It is alleged that as the learned arbitrator misdirected himself in finding what was not agreed in the MOU, and he therefore against the

public policy of India viz., a deed had to be interpreted on the basis of what is written in it and not what should have been written in it. It was argued that the MOU was nothing but the respondent's admission of the existence of an oral partnership.

9. We have heard the arguments. We are aware of the scope of challenge related to these proceedings. The materials on record reveals that the learned arbitrator had examined and dealt with in detail each contention raised by the appellant herein. The core of the appellant's case is there was an oral partnership which infact had culminated into the MOU dated 2.8.2006. However the record is otherwise. No doubt the appellant paid an amount of ₹85 lakhs to Omway in the following manner viz., ₹5 lakhs on 30.11.2005; ₹5 lakhs on 2.1.2006; ₹32 lakhs on 24.3.2006; ₹17 lakhs on 30.3.2006 and ₹26 lakhs on 31.3.2006, but such payments were never made to any partnership account. They were made in the account of Omway. Mr. Praveen Mangla who deposed for the appellants as CW1 before the arbitral tribunal admitted in that its books of account, the above payments were shown as *loan* to Omway. The record reveals the major payments were made by the appellant in March, 2006 but by then Omway had already paid large amounts to the sellers towards earnest money, hence it cannot be said that it had no money and that the entire land was purchased with the appellant's money. Admittedly Omway's balance sheet shows the amounts received from the appellant as an '*advance from business association*' or as an '*advance from customers/others*'. It never showed such amounts as *capital* in its balance sheet and such amount admittedly was put at par

with the customers and others. If the amount of ₹85 lakhs was to be treated as a contribution from a partner in lieu of any alleged oral partnership, such clarity ought to have been reflected in the account books. None of the books of accounts – either of the appellant or of the first respondent – depict such amount as *capital* received from any alleged partner.

10. Further, concededly all steps for de-acquisition of the land were taken by Janak Goel, Omway's director and that no bank account of any oral partnership was ever opened prior to the execution of the MOU. Further no document was produced by the appellant, signed by him or by any of the directors of Omway or of third respondent to show that they all were acting as partners; the appellant rather had no knowledge as to from whom the land was purchased, the mode of payment etc. The appellant alleged that it had corresponded with the agriculturists but failed to produce any agriculturist to prove such efforts or even file a copy of earnest receipt or sale deed etc. Moreover, the rent deed of the office premises either at Nehru Place or at Kalkaji was also in the name of Omway. Hence, if there was an oral partnership in October, 2005 then why all the above acts were done only in the name of Omway Company, without any reference to the name of appellant, was a question that had to be but was not addressed. The learned arbitrator was thus justified to conclude that the mere participation in a *muhurat* ceremony or mere absence of a loan or interest agreement was of no consequence to prove the real intention/status of the parties or that if any alleged oral partnership existed amongst them. Thus the record does not support the argument

of the appellant that MOU was read in a manner not known to principles of law or against any public policy. No doubt a part of the land was purchased in the name of the fifth respondent - Ghanshyam and though it is contended that this was to circumvent the laws of land ceiling and to bypass the provisions of Section 42 of the Rajasthan Tenancy Act, 1955 (which, interalia, provide that the sale, gift or bequest by a khatedar tenant of his interest in the whole or part of his holding shall be void if such sale, gift or bequest is by member of Scheduled Caste in favour of person who is not a member of the Scheduled Caste etc.), yet no evidence was led by the appellant of any independent person to prove the status of Ghanshyam. Rather Ghanshyam was never a signatory to MOU and hence it cannot be said that his land was a part of the pool.

11. Now it was always the appellant's case that it had paid an amount of ₹2.05 crores prior to the execution of the MOU but admittedly failed to place any evidence to prove payments of ₹1.20 crores in cash. Rather it gave up its reliance on its own document Ex.CW1/5A, a photocopy of an alleged statement of account dated 15.7.2006 bearing signatures of Janak Goel, the Director of Omway. It was so proved to be a forged document. The learned arbitrator observed the signatures of Janak Goel on the document Ex.CW1/5A seems to have been traced from MOU. The Omway even produced expert evidence to prove such. These findings significantly were not disputed before the Single Judge. The forgery and manipulation in fact could be characterised as perjury. It was on the failure to prove cash investment of ₹120 Lakhs coupled with other facts, that the

appellant was held to be a creditor than a partner. The learned arbitrator notes the appellant after having granted a loan to respondent No.1 expressed his intention to be a partner and probably it led to the entering of MOU dated 02.08.2016, but as the appellant failed to fulfil its condition precedent of bringing ₹15 lakhs in the pool, the MOU never took off.

12. The appellants conduct listed above accords with Omway's submissions that when in August, 2006 the UIT submitted before the appropriate authority to reject the NOC in favour of Omway on the ground that land was acquired for Rohini Nagar Scheme, the appellant refused to contribute ₹15 lakhs despite requests and it led to the termination of MOU on account of breach of clause 3. The arbitrator recorded that after this dispute the appellant tried to sabotage Omway's project, which led to the latter's withdrawing from the MOU. The award further noted that stray circumstances, upon which the appellant relied, were insufficient to discharge the onus placed upon it to prove prior oral partnership among the parties. Rather, the MOU was silent about existence of any prior oral partnership or of any investments towards capital allegedly made by the appellant and the MOU. It noted that parties "*after deliberations across the table, have arrived at an understanding to carry a project in the name and style of M/s Royal City, Alwar to float and carry on the proposed project.*" The language used reveals that the understanding for the MOU was arrived at only on 02.08.2006, across the table. Hence, but for the isolated circumstances, the appellant could not prove any admission of respondents qua any oral

partnership which could be clear, unambiguous and specific.

13. Thus, the contention that the learned arbitrator failed to apply established legal principles for determining existence of partnership viz an agreement to share profit and loss and that the business may be carried by all or any of them acting for all, is misconceived as the appellant could not prove either by its conduct or by any documentary evidence the existence of any such prior oral partnership amongst three of them. The argument that contribution towards 'capital' could never be a criteria to determine the partnership appears to be misplaced in a scenario where such contribution was a pre-condition to initiate a relation amongst them.

14. On the perusal of the entire documents, exhibits as also the record of the learned arbitrator, we are of the opinion that the learned Single Judge was justified in not interfering under Section 34 of the Act on the grounds that: **a)** as the appellant failed to dislodge the factual finding of the learned arbitrator and **b)** considering the scope of interference under Section 34 of the Act, being limited, as discussed in *National Highways Authority of India vs. Oriental Structural Engineers Pvt Ltd Gammon India Ltd* (2013) 2 Arb. LR 264 (Delhi) (DB) where it was held that if the factual findings are based on voluminous evidence then such findings are not to be interfered with under Section 34 of the Act. It was further held that the Court dealing with the objections is not an appellate forum and unless there is a plain perversity appearing on the face of the award, there is hardly any scope of interference. In *Associate Builders v.*

Delhi Development Authority (2015) 3 SCC 49 it was held that it is not every illegality that would attract the scrutiny and interference on the part of the Civil Court but one that is so unreasonable and contrary to notions of justice as embodied in some salient features of positive law, that it would require judicial intervention.

15. The existence of a contrary view cannot mean that the Court should re-appreciate the evidence. The appellant failed to prove the award was so perverse that it shocked the judicial conscience and was liable to be set aside. We are also not inclined to interfere with the order dated 14.5.2010 of the learned arbitrator of his refusal to take on record and prove a CD containing voice recording of the first respondent on the ground that such CD was produced by the appellant after the entire evidence was complete and allowing it after two years would rather have violated the concept of fair procedure. More so, when the mobile used for recording was not available and even the manner in which the contents were recorded on the disc were disputed.

16. Thus, the appeal and pending application, being devoid of merit, are dismissed.

YOGESH KHANNA, J

S. RAVINDRA BHAT, J

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