

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.03.2017

+ **O.M.P. (COMM) 52/2016 & IA No. 2705/2016**

SHRI SANJEEV MALHOTRA & ANR

..... Petitioners

versus

B.S. PROMOTER & DEVELOPERS

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Ms Rekha Aggarwal, Advocate with
Mr Sanjeev Malhotra.

For the Respondent : Mr Akhil Mittal.

AND

+ **O.M.P. (COMM) 56/2016 & IA No. 2982/2016 & 2984/2016**

B.S. PROMOTER & DEVELOPERS

..... Petitioner

versus

SHRI SANJEEV MALHOTRA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Akhil Mittal.

For the Respondents : Ms Rekha Aggarwal, Advocate with
Mr Sanjeev Malhotra.

CORAM:

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* for setting aside the arbitral award dated 28.10.2015 (hereafter 'the impugned award')

delivered by the Arbitral Tribunal, constituted by the sole arbitrator, Justice V.K. Jain (Retd.), a former judge of this Court.

2. By the impugned award, M/s B S Promoter and Developers was awarded an amount of ₹2 crores with interest at the rate of 12 % p.a. from the date of the impugned award till the realization of the amount. The impugned award was rendered with respect to disputes arising under the Agreement dated 09.09.2003 (Property Development Agreement) entered into amongst M/s B S Promoter and Developers, Mr Sanjeev Malhotra, Smt Sudesh Kapoor and Mr Suresh Malhotra (since deceased).

Factual Background

3. Mr Sanjeev Malhotra, Smt Sudesh Kapoor (hereafter ‘petitioners’) and late Suresh Malhotra were the co-owners of the plot measuring about 4840 sq yds., bearing Khasra no. 266 in the Revenue Estate of village Tughlaqabad, now known as Chittaranjan Park, New Delhi (hereafter ‘the plot’). On 25.11.1980, the petitioners and late Suresh Malhotra entered into an agreement to sell with M/s Competent Builders (P) Ltd. (hereafter ‘Competent Builders’) for sale of the aforesaid plot. Pursuant to the said agreement, the possession of the plot was handed over to Competent Builders. However, the transaction could not materialize and petitioners filed a suit (Suit no. 938/90) in this Court. The said suit was settled and a compromise decree dated 21.03.1991 was passed. The petitioners state that in terms of the compromise decree, they were required to pay ₹11 lacs to Competent Builders to recover possession of the plot.

4. Thereafter, the petitioners and late Suresh Malhotra entered into a Property Development Agreement dated 09.09.2003 (hereafter 'the PDA') with M/s B S Promoter and Developers (hereafter 'respondent') for development of the plot in question after getting the plan sanctioned under a Group Housing Scheme from Delhi Development Authority (DDA). According to the terms of the PDA, it was agreed that all expenses till the recovery of possession of plot from Competent Builders and upto sanction of plans from DDA had to be borne by the respondent. Further, it was agreed that the respondent would be entitled to 70% of the built-up area constructed on the plot by it along with remaining undivided right in the plot underneath the superstructure for an amount of ₹3 crores to be paid to the petitioners. Accordingly, the respondent paid a sum of ₹11 lacs to the petitioners and a further sum of ₹2.89 lacs was agreed to be paid on transfer of the aforesaid interest in the plot. In addition to the above, the respondent was required to commence construction within 6 months from the date of sanction of plans by DDA and complete the same within 3 years from the said sanction.

5. In the meantime, a petition (Ex. Pet. 95/2003) was also filed against Competent Builders for recovery of the plot.

6. The petitioners claim that by communication dated 20.09.2004, the petitioners requested the respondent for a sum of ₹50 lacs to be paid to Competent Builders for restoration of possession of plot in favour of the petitioners. The said request was not acceded to. Thereafter, by a notice dated 25.10.2004, the petitioners terminated the PDA. These notices are

disputed by the respondent and were subject matter of controversy in the arbitration.

7. Competent Builders filed a Special Leave Petition (being SLP(C) 23250/2012) in the Supreme Court. The petitioners state that in those proceedings, the petitioners and Competent Builders settled their disputes by entering into a settlement deed dated 05.04.2013 (hereafter 'settlement agreement'), by virtue of which possession of the plot was to be handed back to the petitioners in lieu of ₹2 crores.

8. In the meanwhile, the respondent sent a notice dated 26.03.2013 calling upon the petitioners to perform their obligations under the PDA. Another notice, to similar effect, was sent on 25.07.2013 to similar effect and thereafter, the respondent filed a petition (Arb P no. 374/2013) under Section 11 of the Act before this Court for appointment of an arbitrator to adjudicate the disputes that had arisen in connection with the PDA. The said petition was allowed and by an order dated 23.05.2014, this Court appointed the sole arbitrator.

9. The respondent asserts that the petitioners concealed the fact of an agreement to sell dated 19.12.2006 entered into by the petitioners with one Mr Kulbir Singh with regard to the plot. It is averred that another agreement - with respect to the same plot - was also entered into with M/s Siddhartha Infrastructure Pvt. Ltd. The aforesaid facts are stated to have come to the knowledge of the respondent subsequent to the petitioners and Competent Builders settling their disputes under the settlement agreement.

10. It is the submission of the respondent that the petitioners did not disclose about the execution of the agreement to sell dated 19.12.2006

before the Arbitral Tribunal in the first instance, however, its execution was later affirmed on an application made by the respondent for production of documents.

11. Before the Arbitral Tribunal, the respondent prayed for specific performance of the PDA and sought handing over of vacant possession of the plot to it along with execution of sale deed transferring rights in respect of 70% of the constructed area of the plot in its favour. In the alternative, the respondent claimed damages quantified at ₹10 crores.

12. The petitioners contested the claims made by the respondent and alleged that the respondent was in breach of the PDA as it had failed to provide a sum of ₹50 lacs when called upon to do so for payment to be made to Competent Builders. The petitioners further claimed that as the respondent had failed to fulfil its obligations under the PDA, they were constrained to enter into an agreement dated 07.05.2013 with M/s Siddhartha Land Traders and Promoters Pvt. Ltd wherein for an amount of ₹2 crores - to be paid to Competent Builders under the settlement agreement - the possession of the plot was handed over to the said company. It was also alleged that since the respondent did not pay ₹50 lacs to the petitioners in 2004, the possession of the plot could not be recovered at the material time; resulting in the petitioners paying a larger sum of ₹2 crores in the year 2013 to Competent Builders for recovery of its plot.

The impugned award

13. In the impugned award, the Arbitral Tribunal found that the PDA did not provide any details or mechanism *inter alia* with regard to the design and specifications of the flats which were envisaged on the plot, basis of the

division of the flats between the parties, consequences of non-sanction of plan by DDA or non-commencement of construction, etc. The Arbitral Tribunal rejected the claim of the respondent for specific performance of the PDA on the basis that Section 14(3)(c) of the Specific Relief Act, 1963 only deals with cases wherein the possession of the land has been obtained by the defendant and the work is sufficiently described in the contract.

14. However, the contention as to the respondent being not ready to perform its part of the obligations under the PDA was dismissed as it was held that the respondent was not required to prove from the date on which the PDA was executed that it had the capacity to make payment of ₹2.89 crores since it had three years from the date of sanction of plans by the DDA for making the said payment to the petitioners. The Arbitral Tribunal held that unlike in an agreement to sell, in the present case, there was no correlation between the date on which the PDA was executed and the date on which the payment of ₹2.89 crores had to be made.

15. Further, the Arbitral Tribunal rejected the petitioners' claim that the respondent was in breach of the PDA; the Arbitral Tribunal found that there was no documentary evidence regarding Competent Builders agreeing to deliver the possession of the plot on payment of ₹50 lacs and held that there was no occasion for the petitioners to demand the aforesaid amount from the respondent, thereafter, followed by termination of the PDA. The petitioners' claim that they had served a notice demanding the sum of ₹50 lacs and on failure of the same served a notice terminating the PDA was rejected and the Arbitral Tribunal accepted the assertion of the respondent that it had not received the notices dated 20.09.2004 and 25.10.2004 as claimed to have

been sent by the petitioners. Although certain postal receipts claimed as evidence of service of the said notices were produced, the Arbitral Tribunal held that the same only led to a rebuttable presumption of service of notices and in the facts of the case, the said presumption was rebutted. The Arbitral Tribunal reasoned that the respondent would not have refrained from taking any legal action for nine years to safeguard its interest under the PDA or for refund of the amount paid to the petitioners, in case it had been aware of the aforesaid notices.

16. The Arbitral Tribunal also held that the petitioners had breached the PDA and even though the PDA was not specifically enforceable, the respondent would nonetheless, be entitled to damages. However, the respondent's claim for ₹10 crores as damages on account of loss of profits was rejected as the Arbitral Tribunal found that the respondent had failed to establish the same.

17. The Arbitral Tribunal assessed the quantum of damages on the basis of increase in value of land in and around the area of Chittaranjan Park between 2007 to 2015 and imputing such rate of increase in value for the period 2003 to 2007. The Arbitral Tribunal awarded a sum of ₹2 crores as compensation (including the amount of ₹11 lacs) with interest at the rate of 12% p.a. from the date of the impugned award till the realization of the amount.

Submissions

18. The learned counsel for the petitioners has challenged the impugned award mainly on the grounds that: (i) the respondent did not possess the

financial capability to perform the PDA as it did not own a bank account before 2003; (ii) the Arbitral Tribunal could not have granted compensation to the respondent after concluding that the PDA was not capable of being enforced; and (iii) compensation ought not have been granted as the respondent did not furnish any sale deed for any plot of land situated in Chittaranjan Park between the period 2003 to 2007.

19. On the other hand, the learned counsel for the respondent canvassed that the impugned award was palpably erroneous as the Arbitral Tribunal had failed to award damages on account of loss of profits. The learned counsel contended that the Arbitral Tribunal had granted compensation only with respect to the investment made by it, whereas the loss of profits the respondent would have suffered was not assessed. He submitted that the loss of profit suffered by the respondent amounted to about ₹50-60 crores on account of breach of the PDA by the petitioners and the respondent had established the same by producing relevant material as to the cost as well as the sale value of built-up residential space in the area. He contended that the Arbitral Tribunal erred in rejecting the same.

20. He submitted that evidence was produced to establish that the petitioners had entered into multiple agreements to sell with third parties for usurping of the earnest money without any intention to perform their obligations under the PDA. Further, despite the finding that the PDA has not been terminated, the Arbitral Tribunal failed to handover the possession of the plot to it.

Reasoning and Conclusion

21. The contention of the petitioners that compensation/damages for breach of an agreement, which is not specifically enforceable, cannot be granted, is unmerited. On the contrary, agreements, the breach of which can be adequately compensated by damages, are not to be specifically enforced. The Arbitral Tribunal had found that the PDA could not be specifically enforced as the development of the plot involved construction of building, the particulars of which were not specified in sufficient detail. However, the Arbitral Tribunal also concluded that the petitioners were in breach of PDA and, therefore, held - and in view of this Court, rightly so - that the respondent would be entitled to be compensated by award of damages for such breach.

22. The contention as to the merits of the disputes and whether the petitioners were in breach of the PDA, cannot be entertained in these proceedings. The finding that the petitioners were in breach of their obligations is neither perverse nor patently illegal.

23. It is settled law that the arbitrator is the final adjudicatory authority for determining questions of fact and the said findings even though may be erroneous, are not amenable to judicial review unless it is established that the findings are perverse or patently illegal. The said principle has been clearly explained in the following oft-quoted passage from the decision of the decision of the Supreme Court in **Associate Builders v. Delhi Development Authority**: (2015) 3 SCC 49, in the following words:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

24. In view of the aforesaid, the only aspect that needs to be examined is whether the quantum of damages assessed by the Arbitral Tribunal is fundamentally flawed. Whereas, according to the petitioners, the Arbitral Tribunal could have reasonably compensated the investment made by the respondent by awarding interest; the respondent claims that it is not only entitled to damages in respect of the investment made but also on account of loss of profits that it would have earned.

25. Insofar as the petitioners' contention regarding assessment of damages is concerned, this Court is unable to accept that the decision of the Arbitral Tribunal is perverse and not informed by reason. It should be understood that this Court cannot reassess the damages as the scope of judicial review under Section 34 of the Act is limited. Thus, unless any of the grounds as listed in Section 34(2) of the Act are established, no interference would be warranted with the award. An arbitral award can be set aside on the ground of public policy only if the same is perverse, patently illegal or contrary to the fundamental policy of Indian law.

26. The Arbitral Tribunal proceeded to assess the damages keeping in view the nature of investment made by the respondent. Admittedly, the investment made by the respondent was for acquiring and developing real estate. Keeping this in mind, the Arbitral Tribunal has assessed the current value of the amount invested to compensate the respondent as to the accretion in the value of the real estate from the time when the investment was made till the date of the award. The Arbitral Tribunal has assessed the current value of ₹11 lacs invested in the real estate in the year 2003 to be about ₹2 crores.

27. The assessment of damages is also based on material brought on record and, therefore, cannot be stated to be arbitrary or whimsical as was sought to be contended on behalf of the petitioners.

28. According to the Arbitral Tribunal, the award of the said amount would adequately compensate the respondent for the investment made and the petitioners' breach of the PDA. The Arbitral Tribunal did not consider it apposite to award the value of 70% of the plot as the respondent had not made the necessary investment to acquire the same.

29. The contention advanced on behalf of the respondent that the Arbitral Tribunal has not awarded loss of profits in respect of 70% of the plot and rather considered the investment of ₹11 lacs is also a matter which is plainly in the realm of assessment of damages. The respondent was to not only pay the balance ₹2.89 crores to the petitioners but was also obliged to develop the same as per mutual agreement. The question of any profits would only arise subject to the said investment and efforts having been deployed which admittedly were not done. The Arbitral Tribunal has considered the question

as to the compensation to be awarded keeping in view several factors including that the respondent had not made the full investment - both in terms of money and effort - required to earn the profits in order to acquire 70% of the value of the plot in question.

30. It is possible to contend that since the petitioners had breached the PDA, the respondent was deprived of the opportunity to make further investment and develop the plot. Thus, having held that the petitioners had breached the PDA, the Arbitral Tribunal ought to have assessed the loss of profits on the basis of the entire project. However, the Arbitral Tribunal found that the respondent had failed to establish, with any reasonable certainty, the quantum of profits that it may have made and therefore rejected the same. The Arbitral Tribunal appears to have tempered the assessment of damages on equitable considerations.

31. Was the Arbitral Tribunal's assessment of damages erroneous: may be. But, does this warrants re-appreciation of evidence and review in these proceedings under section 34 of the Act: plainly, not. This is so because the grounds for judicial review are limited and in this case, the impugned award cannot be held as falling foul of the public policy of India.

32. The petitions and the pending applications are, accordingly, dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MARCH 27, 2017
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