

\$~7

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

+ **O.M.P. 253/2014 and IA No. 1282/2016**

GURBIR KAUR

..... Petitioner

Through: Mr Keshav V. Hegde, Advocate.

versus

BDR BUILDERS & DEVELOPERS P. LTD.

..... Respondent

Through: Mr Sanjay Goswami, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

24.03.2017

VIBHU BAKHRU, J

1. Smt Gurbir Kaur (hereafter 'Smt Kaur') - a lady of advanced age - has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award dated 25.02.2011 (hereafter 'the impugned award') rendered by the sole arbitrator in respect of the disputes that had arisen between the parties in connection with an agreement dated 12.05.2010 captioned as "Collaboration Agreement Cum Receipt".

2. The present petition was filed on 09.02.2014 and was dismissed by an order dated 22.01.2015 for being filed beyond the period of limitation specified under Section 34(3) of the Act. An appeal was filed against the said order - being FAO(OS)173/2015. By an order dated 25.08.2015 passed in the said appeal, the order dated 22.01.2015 was set aside and the matter was remanded to the Single Judge. The Division Bench observed that

objections to the impugned award under Section 34 of the Act were first filed on 03.02.2012, *albeit*, in Ex.P.304/2011. The said matter went on for some time before it was pointed out that an independent petition under Section 34 of the Act is required to be filed; thereafter, the present petition was filed on 09.02.2014. Consequently, the Division Bench directed that the issue regarding limitation be decided considering the date of the actual filing of objections, that is, 03.02.2012.

3. The present petition is taken up on remand by the Division Bench.

4. The brief facts necessary to address the controversy are as under :-

4.1 Smt Kaur is a lady of an advanced age of 83 years and is the absolute owner of property no. A-190, New Friends Colony, New Delhi - 110065 (hereafter 'the said property'). On 12.05.2010, Smt Kaur executed a "Collaboration Agreement Cum Receipt" (hereafter 'the Agreement') with M/s BDR Builders and Developers Pvt. Ltd. (hereafter 'BDR') for the development of the said property. In terms of the Agreement, BDR was to develop the said property. Whereas the third floor along with the terrace rights would be with Smt Kaur, the balance of the built-up property would be acquired by BDR. The consideration was agreed at ₹9.5 crores out of which ₹22 lacs - ₹1 lac in cash and ₹21 lacs in cheque - was received by Smt Kaur at the time of signing of the Agreement. A further sum of ₹4.53 crores was to be paid at the time of possession and documentation in favour of BDR. The balance amount of ₹4.75 crores was to be adjusted as consideration for a residential flat at third floor of property bearing no. B-323, New Friends Colony, New Delhi (hereafter 'the B-323 property').

4.2 It is the case of BDR that Smt Kaur was required to vacate the said property by 30.05.2010, which was not done. Thereafter, BDR published a notice in a newspaper asserting its rights in the said property. BDR also sent a notice dated 08.06.2010 calling upon Smt Kaur to complete the formalities in respect of the said property. This was followed by another notice dated 09.07.2010 to a similar effect.

4.3 Upon receipt of the notice dated 08.06.2010, Smt Kaur returned ₹1 lac to BDR by remitting the same to BDR's bank account; she also returned the cheque of ₹21 lacs received as advance (BDR disputes the same but agrees that the cheque was never presented for encashment).

4.4 By letter dated 20.07.2010, BDR called upon Mr Satbir Singh Sawhney to adjudicate the disputes that had arisen between the parties in respect of the Agreement. Apart from being a witness, Mr Satbir Singh Sawhney is also named as an arbitrator in the Agreement. Thereafter, on 22.07.2010, the arbitrator, gave a notice of the filing of claims to Smt Kaur and called upon her to join in the arbitration proceedings. However, Smt Kaur disputed the existence of an arbitration agreement and did not participate in the arbitral proceedings; the same proceeded *ex parte*.

5. Before the arbitrator, BDR raised five claims. Claim no. 1 was with regard to specific performance of the Agreement. The arbitrator accepted this claim and passed the award in favour of BDR by directing Smt Kaur to execute the sale deed of basement, ground floor, first floor, second floor and terrace of the said property in favour of BDR and further to handover the possession of the entire property to BDR on receiving the sale consideration

of ₹9.5 crores less any amount received by Smt Kaur from BDR. The arbitrator also directed Smt Kaur to nominate a registered architect to be employed by BDR during the entire course of construction of the said property to ensure that the construction of the building is carried out as per building byelaws and norms under the National Building Code. BDR was directed to submit the balance sale consideration in the form of a bank draft within 15 days of receiving the impugned award.

6. However, Claim nos. 2 and 3 filed for damages and refund of ₹50 lacs paid to M/s Veera Apartments Pvt. Ltd. on behalf of Smt Kaur for the B-323 property, respectively, stood rejected.

7. Further, a sum of ₹2.5 lacs was awarded in favour of BDR in respect of Claim no. 4 as costs. Future interest at the rate of 12% p.a. was also awarded under Claim no. 5.

8. Mr Goswami, learned counsel appearing for BDR has contended that the present petition is liable to be dismissed as being barred under Section 34(3) of the Act. He referred to the order dated 25.08.2015 passed by the Division Bench of this Court in FAO(OS)173/2015 and submitted that although the date of filing the objections (in Ex.A. 155/2012) in Ex.P. 304/2011 would be considered as the date of filing the present petition, the question whether the petition was filed beyond the period as specified under Section 34(3) of the Act was kept open. He submitted that the impugned award was rendered on 25.02.2011 and, therefore, the present petition, even if it is considered that it was filed on 03.02.2012, would be barred by limitation. Insofar as the question of the existence of the arbitration

agreement is concerned, he submitted that the arbitrator was also the witness to the Agreement and, therefore, the impugned award, insofar as it accepts the existence of an arbitration agreement, cannot be disputed. On the question of the refund of the amount stated under the Agreement, Mr Goswami conceded that the entire amount of ₹22 lacs had been received back by BDR as the cheque of ₹21 lacs was not encashed and a sum of ₹1 lac, which was paid in cash had been remitted by Smt Kaur by RTGS into BDR's bank account.

9. I have heard the learned counsel for the parties.

10. Insofar as the question whether the present petition is barred by limitation is concerned, the same cannot be accepted as Smt Kaur had asserted that she never received the copy of the signed award. The arbitral records have been filed, however, the same did not contain any evidence of service of the impugned award on Smt Kaur.

11. In the absence of any evidence regarding service of the impugned award and in view of the sworn affidavit of Smt Kaur that she had not received the impugned award, the question as to whether the petition was filed in time cannot be addressed on the basis of the date of the arbitral award. Smt Kaur had asserted that she became aware of the arbitral award on becoming aware of the petition for enforcement of the impugned award (Ex.P.304/2011) and there is no material to establish otherwise. In **State of Maharashtra and Ors v Ark Builders Private Limited**: (2011) 4 SCC 616, the Supreme Court had held that provision of Section 31(5) of the Act is not a mere formality and unless the signed copy of the arbitral award is

delivered to the party, the period of limitation for filing the petition to set aside the award would not commence.

12. In view of the above, the present petition cannot be dismissed as being filed beyond the period as specified under Section 34(3) of the Act.

13. The next question to be considered is Smt Kaur's challenge to the existence of the arbitration clause. According to Smt Kaur, there was no arbitration agreement between the parties and, therefore, the impugned award would be a nullity. Mr Hegde, learned counsel appearing for Smt Kaur referred to the original of the Agreement (filed in Ex.P.304/2011). He drew the attention of this Court to the last line of the Agreement, which records Smt Kaur's agreement to refer disputes to the sole arbitration of Mr Satbir Singh. He submitted that on a plain view of the Agreement, the said line had been interpolated.

14. It is also relevant to note that the agreement is essentially a receipt and is a handwritten document. The last sentence of the Agreement reads as *"I have signed this Agreement on this 12th May, 2010 in the presence of following witnesses out of whom Sh Satbir Singh, my broker shall be the Sole Arbitrator in case of any dispute"*. On a plain view, the portion of the sentence: *"out of whom Sh. Satbir Singh, my broker shall be the Sole Arbitrator in case of any dispute"* is written in ink which is different from the ink/pen used for writing the rest of the Agreement. It is also relevant to note that the word "witnesses" as well as the signature and address of Smt Kaur at the bottom of the Agreement are in the same ink as the rest of the Agreement. Thus, *prima facie*, there is much merit in the contention that part

of the said last line has been interpolated and no arbitration agreement existed between the parties. However, a trial would be required to conclusively determine the issue; the same cannot be finally adjudicated without further evidence.

15. The contention that since the arbitrator was a witness, therefore, his decision as to the existence of arbitration agreement must be accepted, is fundamentally flawed. It is settled law that the substratal policy of the Act is one of non-interference and the extent of judicial review under Section 34 of the Act is limited to the grounds as specified in Section 34(2) of the Act. However, if a question is raised as to the existence of the arbitration agreement or as to any issue that strikes at the inherent jurisdiction of the arbitrator, the said issue would have to be examined and adjudicated afresh notwithstanding the view expressed by the arbitrator. This is so because if a party assailing the arbitral award is correct that the arbitrator did not have the jurisdiction to pass the award under challenge, the decision of the arbitrator would be a nullity; thus, plainly, the arbitrator's decision cannot be determinative of the question regarding his jurisdiction.

16. Having stated the above, this Court does not think that this is a case where it is necessary to address the issue as to the existence of the arbitration clause since the award is also liable to be set aside on other ground as discussed hereinafter.

17. The Agreement is on a plain paper which reads as under:-

“Received a sum of Rs:2200000/- (Rs. Twenty Two Lacs only) from M/S BDR Builders & Developers (I) Ltd. through

its Director S. Rajesh Gupta having its office at C-43, Jangpura Extension, New Delhi Rs:100000/- in cash & 21,00000/- vide cheque 212421 dated 12-5-10 drawn on HDFC Bank Ltd. J/Extn., New Delhi, as advance for collaboration of my property No.A-190, New Friends Colony, New Delhi measuring 499.3 Sq. Yds. The Builder will give Third Floor with terrace to me and rest of building will be retained by him. The total consideration is 9.50 crore out of which Rs:4.75 Crore will adjust against the flat at third floor of property No.B-323 New Friends Colony, N D. The balance amount of Rs:4.53 Crore will be paid at the time of possession & documentation in favour of the builder. I have signed this Agreement on this 12th May, 2010 in the presence of the following witnesses.

Witnesses

1. Satbir Singh
S/o Sh. Jaswant Singh
R/O 216, Double Storey
New Rajinder Nagar
New Delhi – 110060”

Gurbir Kaur
D/O Late Sh. Kharak Singh
A-190, New Friends Colony
New Delhi

18. As noted above, the Agreement reads as a receipt acknowledging a receipt of a sum of ₹22 lacs from BDR. It is not disputed by BDR that in terms of the Agreement, BDR was to construct the building and give third floor with terrace to Smt Kaur and retain the balance. The total consideration was indicated at ₹9.5 crores out of which ₹4.75 crores was to be discharged by providing another flat at third floor of the B-323 property and only ₹4.53 crores (being the balance remaining after taking into account the receipt of ₹22 lacs) was to be paid at the time of possession and documentation in favour of BDR. As the heading of the Agreement indicates, the arrangement/ understanding between the parties was one of collaboration and not merely of sale and purchase of the said property. Thus, the question of Smt Kaur

executing the sale deed for the entire property in favour of BDR is plainly contrary to the express terms of the Agreement. She was entitled to the third floor of the said property along with terrace and the question of any sale would only arise at the time of possession as indicated in the Agreement.

19. Further, transfer of a flat at the third floor of the B-323 property at a consideration of ₹4.75 crores was an integral part of the consideration for the Agreement. The arbitrator has completely disregarded the transfer of the flat at the third floor of the B-323 property while directing specific performance of the Agreement. If the Agreement was to be specifically performed, then the transfer of flat at the B-323 property, would have been an integral part of such performance.

20. The arbitrator had directed Smt Kaur to execute the sale deed in respect of the basement, ground floor, first floor, second floor and terrace of the said property in favour of BDR. Admittedly, the construction has not commenced, therefore, the direction to execute a sale deed of the building which is not constructed as yet is difficult to sustain.

21. It is also not understood as to how the arbitrator could possibly direct transfer of the terrace of the said property to BDR as conceded in terms of the Agreement, the third floor and terrace of the building that was to be built was to be retained by Smt Kaur. This is palpably erroneous and is reason enough for the impugned award to be set aside.

22. The impugned award is likely to be set aside for the aforesaid reasons. More importantly, it is also liable to be set aside as the Agreement is not specifically enforceable.

23. As discussed hereinbefore, the Agreement is one for collaboration and includes construction of the said property. However, the parties have not agreed to any plans for construction or indicated any parameters as to how the said property would be developed. There are varied materials of numerous qualities that can be used in construction. The flooring of a building can vary from ordinary cement to opulent stone; there are various types of doors both wooden and of other material. A residential house is not a standardised commodity and there could be countless aspects that would require a consensus between the parties. Merely directing that Smt Kaur would select an architect - which is also not a part of the Agreement - who would be hired by BDR is plainly insufficient to address the issues that would arise in case of lack of consensus as to the details of the building to be constructed.

24. It is well settled that the Court would not enforce specific performance of an agreement, which involves construction of a building and other works unless the building to be constructed is described in sufficient details which can be specifically enforced. In the present case, there is no mention as to any particulars of the building to be constructed and it would be impossible for the Court to determine the numerous issues that could crop up in performance of such a contract.

25. In **Vinod Seth v. Devinder Bajaj & Anr**: 2010 (8) SCC 1, the Supreme Court considered the case where builder had sought for specific performance of an oral collaboration agreement pursuant to which it was claimed that defendant no. 1 had also executed a receipt for ₹51,000/- mentioning that the sum received was against collaboration of a property.

The Single Judge of this Court directed the plaintiff/ builder to file an undertaking to pay a sum of ₹25 lacs as damages in the event the plaintiff/ builder failed in the suit. The same was also upheld by the Division Bench of this Court. The Supreme Court on an appeal observed as under:-

"11. We are broadly in agreement with the High Court that on the material presently on record, the likelihood of the appellant succeeding in the suit or securing any interim relief against the defendants is remote. We may briefly set out the reasons therefor.

12. It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in Sections 14(1)(b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order XXI Rule 32(5) of the Code of Civil Procedure ("the Code", for short).

13. The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the authority concerned for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant-plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000. The performance of these obligations by the appellant is dependant upon his personal qualifications and volition.

14. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 5 above) and direct specific performance of the "collaboration agreement" by the respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have been agreed between the parties and the respondents are not agreeable for any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant?

15. The alleged agreement being vague and incomplete, requires consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under Section 21 of the Specific Relief Act."

26. A similar case was also considered by this Court in **Davender Kumar Sharma v. Mohinder Singh & Ors.**; ILR (2013) 1 Del 409. In that case, the owners of an immovable property had agreed to sale the ground floor of the property for a consideration of ₹95 lacs. It was agreed that the builder would

demolish the ground floor and construct a four-storeyed building out of which the ground floor and the third floor would go to the share of the plaintiff/ builder, whereas the first and second floor would be shared by the defendant nos. 1 and 2. The defendant nos. 3 to 10 were to receive the entire consideration of ₹95 lacs. The plaintiff/ builder also paid a sum of ₹66,16,666/- to defendant nos. 3 to 10. However, defendant nos. 3 to 10 failed to surrender their share of the property in question to defendant nos. 1 and 2 and further also failed to handover possession of the property to the plaintiff/ builder. In the aforesaid context, the plaintiff/ builder filed a suit for specific performance of the agreement to sell for execution of sale deed in his favour.

27. While considering the application for interim injunction, this Court observed as under:-

"There is no agreement between the parties as regards the specifications of the proposed construction on the suit property. The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA, as the case may be. The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction. No mechanism has been agreed between the parties for joint supervision and quality control during construction. There is no agreement that the specifications of the construction will be unilaterally decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants. There is no provision in the agreement with respect to supervision of the construction. The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants. The learned counsel for the parties concede that no time has been fixed in the agreement for completion of the proposed new construction. The agreement is

silent as to what happens if the plaintiff does not complete the construction or even does not commence it at all after taking possession from the defendants. It is not possible for the Court or even a Court Commissioner to supervise the construction. In these circumstances, it is difficult to dispute that the agreement between the parties is in agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act. If this is so, the contract is not specifically enforceable. Therefore, prima facie, the plaintiff has failed to make out a case with respect to enforceability of the agreements set up by him. Hence, he is not entitled to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like."

28. A similar view was also re-affirmed by this Court in **Prem Kumar Bansal v. Ambrish Garg: 230 (2016) DLT 360.**

29. In view of the above, the impugned award is flawed and is, accordingly, set aside. Accordingly, the petition is allowed. Pending application is also disposed of. The parties are left to bear their own costs.

MARCH 24, 2017
RK

VIBHU BAKHRU, J