

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.05.2017

+ **O.M.P. (COMM) 243/2017 & IA No.6275/2017**

M. M. BUILDERS

..... Petitioner

versus

S.K. BAJAJ & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Ms P. Priyadarshini with Mr Pradyot Pravash, Ashish Show, Mr Abhishek Gusain and Mr Abhinav Wogra.

For the Respondents: Mr Sanjeev Sindhwani, Senior Advocate with Mr Lalit Gupta, Mr Ankit Jain, Mr Rishta Samrat and Mr Siddharth Arora for R-1.
Mr Saumitra Sngal for R-2.
Mr Deepak Dhingra, Ms Shivangi Singh and Mr Sumit Kumar Vats for R-3 & R-4.

AND

+ **O.M.P. (COMM) 245/2017 & IA No.6322/2017**

KUMAR TRADING CORPORATION AND ANR.

..... Petitioners

versus

M.M. BUILDER & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Deepak Dhingra, Ms Shivangi Singh and Mr Sumit Kumar Vats.

For the Respondents: Ms P. Priyadarshini with Mr Pradyot Pravash, Ashish Show, Mr Abhishek Gusain and Mr Abhinav Wogra for R-1.
Mr Sanjeev Sindhwani, Senior Advocate with Mr Lalit Gupta, Mr Ankit Jain, Mr Rishta Samrat and Mr Siddharth Arora for R-2.
Mr Saumitra Singhal, Advocate for R-3.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act') impugning the arbitral award dated 30.01.2017 (hereafter the 'impugned award'). The impugned award was rendered in the context of disputes that had arisen in connection with the collaboration agreement dated 13.04.1993 (hereafter 'the Agreement') entered into by Mr Satish Kumar Bajaj (since deceased) (hereafter referred to as 'Satish'), Mr Harish Bajaj (hereafter referred to as 'Harish'), Kumar Trading Corporation (hereafter 'the Firm') and M/s M. M. Builders (hereafter 'the Builder'). The Agreement was entered into for the purposes of development of an industrial plot measuring 888 sq. yards bearing no.1/2, Industrial Area, Najafgarh Road, Kirti Nagar, New Delhi (hereafter 'the property').

2. In terms of the Agreement, the Builder was to construct a building consisting of a maximum of 5 floors at its own cost subject to sanction of building plan from the Municipal Corporation of Delhi (MCD). The said

building was to comprise of shops and office premises. In terms of the Agreement, 50% of the built-up area was to be divided between the Firm, Harish and Satish. The Firm would own 25% of the total built-up area and the balance 25% would be shared in equal proportion between Satish and Harish.

3. The Builder has filed the present petition [OMP(COMM.) 243/2017] assailing the impugned award to the limited extent that the arbitral tribunal has not allowed its claim for specific performance of the Agreement even though it is held that the Agreement was valid and Harish was in breach of his obligations. The Firm and its partner, Mr Parvesh Bajaj has also challenged the impugned award [in OMP (Comm.) 245/2017] to the extent that its counterclaims have been rejected by the arbitral tribunal and also to the extent that the arbitral tribunal has not granted specific performance of the Agreement.

4. The principal controversy to be addressed in the present matters is whether the decision of the arbitral tribunal to reject the Builder's claim for specific performance of the Agreement is perverse, patently illegal or otherwise unsustainable. The second question to be examined is whether the arbitral tribunal has grossly erred in rejecting the counterclaims raised by the Firm and Mr Parvesh Bajaj.

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

5.1 Harish, Satish (since deceased) and Mr Parvesh Bajaj (hereafter 'Parvesh') were brothers and sons of Des Raj Bajaj (since deceased) (hereafter 'the father'). The property is a piece of industrial land and was

leased by L&DO to Satish and Harish. The father and Parvesh were the constituent partners of the Firm, which was a tenant of the property. On 12.02.1993, Harish and Satish executed a General Power of Attorney (hereafter 'the GPA') in favour of the father authorizing him to negotiate with builders and developers for construction of a multi-storey building on the property and also to enter into a settlement with the Firm for handing over vacant and peaceful possession of the property for the purposes of development.

5.2 On 13.04.1993, the father (in his capacity as the constituted attorney of Satish and Harish) entered into the Agreement with the Builder for development of the property. He and Parvesh also signed the Agreement on behalf of the Firm as a "*Confirming Party*". As stated earlier, in terms of the Agreement, the Builder was to construct a building which was to be divided in equal proportion between the Builder and the Bajaj family, (Satish, Harish and the Firm constituted by the father and Parvesh). In this manner each of the four members of the Bajaj family, namely, the father, Parvesh, Harish and Satish would acquire 1/8th share of the developed property individually while the Builder would acquire half of the property. In terms of the Agreement, the Builder also agreed to pay a sum of ₹7,50,000/- to Harish, Satish and the Firm.

5.3 Admittedly, Satish, Harish, the father and Parvesh received a sum of ₹25,000/- each as the initial payment and the balance sum of ₹6,50,000/- was agreed to be paid at the time of handing over of physical possession of the property to the Builder, after deducting expenses incurred by the Builder for obtaining the necessary approvals from the concerned authorities.

5.4 In terms of the Agreement, the Builder was obliged to apply and obtain the sanction for the building plan from the MCD. However, the costs of the same were to be deducted from the amount payable by the Builder. The building was to be constructed by the Builder at its own costs.

5.5 Apparently, certain differences/disputes arose between Harish and the father and on 18.06.1996, Harish issued a legal notice to the father revoking the GPA on the ground that no steps had been taken towards construction of the multi-storey building on the property. The father responded to the same by a letter dated 29.06.1996 informing Harish that considerable progress had been made for development of the property; the necessary plans had been made and the NOC from the concerned authorities was likely to be received shortly. However, Harish issued a public notice revoking the GPA, which was published in Hindustan Times (Delhi Edition) on 12.12.1997.

5.6 In the meantime, the Builder had received NOC from the office of L&DO on 13.08.1997 and MCD had also sanctioned the development plans (although not for commercial complex but for an industrial building) by an order dated 24.02.1998.

5.7 After obtaining approval from MCD, the Builder by a letter dated 07.03.1998 called upon the father to handover the property. In response to the said letter, the father informed the Builder that he was no longer the constituted attorney of Harish as the GPA had been revoked and, therefore, the Builder had to approach Harish directly for his sanction.

5.8 In terms of the Agreement, Harish and Satish were required to send a letter to the Firm directing them to handover possession of the property to

the Builder for the purposes of development. In accordance with this term, Harish sent a letter dated 11.05.1998 to the Firm calling upon it to handover possession of the property to the Builder. However, before the Firm could act on the said letter, Harish filed a suit (suit no.1077/1998) for injunction in this Court and obtained an *ex parte* order restraining the Firm from handing over possession of the plot to the Builder.

5.9 In view of the disputes that had arisen, the Builder invoked the arbitration clause and also filed a petition under Section 9 of the Act (being OMP No.7/1998). By an order dated 07.07.2002, this Court appointed Justice R. P. Gupta (Retired) as the sole arbitrator to adjudicate the disputes that had arisen between the parties.

5.10 The Builder filed statement of claims before the arbitral tribunal seeking an award for specific performance of the Agreement. In the alternative, the Builder claimed damages quantified at ₹1,00,00,000/- and a sum of ₹11,51,765/- on account of expenses incurred along with interest.

5.11 The Firm also filed its counter claims against Harish, Satish and the Builder for a sum of ₹1,66,77,000/-. This comprised of a claim of ₹15,45,000/- for guarding, maintaining and upkeep of the property from January 1994 to July 31, 2002 (103 months); ₹51,50,000/- on account of loss of use of the property for the aforesaid period; ₹4,80,000/- as interest; ₹50,00,000/- as damages towards mental agony and harassment and ₹1,75,000/- as legal costs.

5.12 During the course of the proceedings, Satish expired and his legal heirs were brought on record.

6. On the basis of pleadings of the parties, the arbitral tribunal framed several issues. The principal dispute before the arbitral tribunal was regarding the validity of the Agreement. Harish and Satish had challenged the Agreement as the same was not signed by them. After considering the evidence and material on record, the arbitral tribunal held that the Agreement was entered into by the father for and on behalf of Satish and Harish as well as the Firm. Although, the Agreement was not signed by Satish and Harish - who were the recorded lessees of the property - the Agreement was signed by the father who was duly authorized to execute the same by virtue of the GPA executed by Satish and Harish in his favour.

7. The arbitral tribunal also accepted the Builder's claim for expenses of ₹11,51,765/- incurred towards preparation and obtaining sanction for the building plan from the concerned authorities. This included a sum of ₹10,59,209/- paid by the Builder on behalf of the owners (Satish and Harish) as damages to L&DO without which the NOC would not have been issued. The aforesaid claim also included a sum of ₹92,556/- spent by the Builder for obtaining approval from MCD.

8. The arbitral tribunal held that the GPA given to the father was irrevocable as it was granted in consideration of the Firm surrendering its tenancy rights in the property in exchange of the owners (Harish and Satish) relinquishing a quarter of their share in the property in favour of the tenant, that is, the Firm. Therefore, the notice dated 18.06.1996 and the notice published in the newspaper on 12.12.1997, revoking the GPA granted to the father was held to be of no effect.

9. The contention that the terms on which the Firm had to surrender its tenancy rights was unconscionable was also not accepted, in view of the fact that the owners (Satish & Harish) and both the partners in the Firm (the father and Parvesh) were to receive 1/8th share each in the developed property in terms of the Agreement.

10. The arbitral tribunal further accepted the Builder's stand that it was ready and willing to perform its obligations under the Agreement and found that Harish and Satish were in breach of the Agreement as they had failed to give up the possession of the property to the Builder. However, insofar as the prayer for specific performance is concerned, the arbitral tribunal concluded that it was not a fit case where directions for specific enforcement of the Agreement for raising the construction should be issued. Thus, the arbitral tribunal awarded damages in the sum of ₹5,00,000/- in favour of the Builder (as against ₹1,00,00,000/- claimed by the Builder) in addition to the specific claim for amounts made against the expenses incurred.

11. The counterclaims raised by the Firm were rejected. The arbitral tribunal observed that the Firm was claiming to be a tenant and, therefore, no expenses towards maintaining the property could be claimed. The operative part of the impugned award rendered in favour of the Builder reads as under:-

“RELIEF:

In view of my above findings, the Claimant is entitled to recover from Respondent No.1 and 2 i.e. LRs of Respondent No.1 and Respondent No.2 and Respondent No.4 (Parvesh Bajaj) the following amounts:-

- (a) Rs.50,000/- from Respondents 1 and 2 which the Claimant paid to them (Rs.25,000/- each) on the date of Agreement with interest @ 8% P.A. simple from 13.04.1993 till date of this Award which comes to Rs.95,000/-. Total amount comes to Rs.1,45,000/-
- (b) Rs.11,51,765/- from Respondents 1 and 2 who shall pay to Claimant as expenses incurred by Claimant on behalf of Respondents 1 and 2 as discussed in Issue No.3 with interest @ 8% P.A. simple from the date of breach of contract i.e. 18.06.1998 till date which comes to Rs.17,03,900/- Total comes to Rs.28,55,665/-
- (c) A sum of Rs.5 Lacs as damages to be paid to Claimant by Respondents 1 and 2 who are liable to pay jointly and severally for breach of Collaboration Agreement dated 13.4.1993 with interest @ 8% P.A. simple from 18.6.1998 till date which comes to 7,40,000/- Total payable Rs.5,00,000/- + Rs.7,40,000/- = 12,40,000/-.
- (d) A Sum of Rs.50,000/- to be recovered by Claimant from Respondent No.4 towards the amount paid to Respondent No.3 and 4 i.e. Rs.25,000/- each by the Claimant from the date of Agreement with simple interest @ 8% P.A. irrespective of facts whether Respondent No.3 and 4 did not take any steps to breach of the Agreement which comes to Rs.95,000/- Total comes to Rs.50,000/- + 95,000/- = Rs.1,45,000/-

The above amounts are directed to be paid to the Claimant within four months, by the respective Respondents 1 and 2 (items (a), (b) & (c)) and by Respondent No.4 for item No.(d) from the date of this Award.

In case of their failure to pay within the prescribed period, the above awarded amounts

(Rs.1,45,000/- + 28,55,665/- + 12,40,000/-) will be recoverable with interest @ 8% simple from the date of Award, till realization from Respondents 1 and 2 and Rs.1,45,000/- from Respondent No.4 with interest @ 8% P.A. from date of Award till Realization.

- (e) Apart from the above, the Claimant is entitled to recover from Yogi Bajaj, Mrs Manisha Pahwa and Poonam Bajaj cost of present proceedings paid by Claimant on their behalf by way of Fee of Arbitrator and Secretarial Charges for a total 172 hearing including the Secretarial Charges for writing the Award which comes to Rs.4,17,250/- after taking into consideration the fact that Yogi Bajaj paid himself a sum of Rs.30,600/-. This will carry interest @ 8% P.A. simple from the date of this Award till realization, if not paid within 4 months of this Award.
- (f) The Claimant is also entitled to recover all the costs of present proceedings which they incurred as Arbitration Fee and Secretarial Charges of their own share from Respondent 1 and 2 who alone contested their claim before this Tribunal which comes to Rs.4,47,850/-.

Respondents will bear their own costs of the present proceedings.”

12. Although, the arbitral tribunal had returned findings in favour of the Builder, it declined to direct specific performance for several reasons that can be discerned from the impugned award. First of all, the arbitral tribunal held that in terms of the Agreement, the building to be constructed was to comprise of shops and offices but the plans sanctioned by the MCD were for an industrial building. The arbitral tribunal held that in absence of the necessary sanctioned plans, no commercial building could be raised. The arbitral tribunal also noticed that the Builder had not applied for sanction

for construction of a commercial building. The Builder's contention that in view of Master Plan 2021, it could now draw up a plan including shops and offices, was rejected.

13. This Court finds no infirmity with the aforesaid view. More than twenty-three years have already passed since the signing of the Agreement; thus, the arbitral tribunal has rightly exercised its discretion to not to award specific performance of the Agreement. It is also well settled that the court will not direct specific performance where it is not feasible for the court to supervise the performance. Specific enforcement of a collaboration agreement for construction of a multi-storeyed building, such as the Agreement in the present case, has the propensity to throw up multiple issues such as the quality of material to be used, issues as to design, etc. which would render it impractical/ impossible for the court to enforce the performance.

14. In *Vinod Seth v. Devinder Bajaj & Anr*: 2010 (8) SCC 1, the Supreme Court made the following observations in the context of a collaboration agreement :-

"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 to 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."

15. In *Davender Kumar Sharma v. Mohinder Singh & Ors.*: ILR (2013) 1 Del 409, this Court, while declining the relief to grant an *ad*

interim injunction, had also observed that it was not possible for the court or even the court commissioner to supervise the construction; and thus expressed its *prima facie* view that a collaboration agreement for development of a property may not be specifically enforceable. A similar view was also taken by this Court in ***Prem Kumar Bansal v. Ambrish Garg*: 230 (2016) DLT 360**. It is thus, seen that the courts in several cases declined to accept that a collaboration agreement (such as the one in this case) can be specifically enforced. Thus, the decision of the arbitral tribunal to decline the relief of specific performance while accepting that Harish and Satish were in breach of the Agreement cannot by any stretch be held to be perverse or patently illegal.

16. The Builder has also made a grievance of the fact that the arbitral tribunal had disallowed its application for amendment of the alternate prayer to seek enhanced damages (from ₹1,00,00,000/- to ₹10,00,00,000/-). It is seen that notwithstanding such rejection, the Builder has also been unable to establish the damages claimed initially. Thus, no ground for interference with the impugned award is warranted.

17. This Court also does not find any infirmity with the decision of the arbitral tribunal to reject the counterclaims raised by the Firm. Although, the learned counsel for the Firm/Parvesh earnestly contended that the arbitral tribunal ought to have awarded specific performance of the Agreement, no such claim was preferred before the arbitral tribunal by the Firm/Parvesh. Thus, the Firm and Parvesh can have no grievance with the impugned award in this regard.

18. In view of the above, the petitions are dismissed. All pending applications are also disposed of.

19. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 30, 2017
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