

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

Reserved on: 12.05.2017
Pronounced on: 03.07.2017

+ **FAO(OS)(COMM) 87/2016, C.M. APPL.37102/2016**

M/S. KIRI ASSOCIATES (P) LTD.

..... Appellant

Through : Sh. Giriraj Subramaniam with Ms. Priyadarshini Arora, Sh. Simar Pal Singh Sawhney, Sh. Sidhant Krishan Singh and Ms. Malvika Singh, Advocates.

versus

PRAMOD KUMAR MITTAL AND ANR.

..... Respondents

Through : Ms. Deepika. V. Marwaha and Ms. Worthing Kasar, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal questions the judgment of a learned single judge dismissing objections to an arbitration award, preferred by a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act" for short, hereafter). The present appellant (referred to in this judgment as "Kiri") had filed the petition, challenging the award of an arbitral tribunal dated 07.11.2014.

2. Kiri had entered into an Agreement to Sell vast stretches of agricultural land, with the respondent/Claimants, on 01.12.2009. The agreement stipulated the consideration for land in question as ₹12,99,00,000/- and that it was free from all encumbrances, injunctions, court orders etc. Part payment was made to Kiri. The balance amount of ₹ 11,49,00,000/ was payable on or before 2010. The agreement also provided that the said amount was to be paid at the time of handing over of the possession along with execution of Sale Deed in favour of the respondents or their nominee.

3. After execution of the agreement, the claimant became aware that the subject of the agreement, i.e. the land in question was notified for land acquisition- proceedings and notices under Sections 4 and 6 of the Land Acquisition Act, 1894 had been issued long before, i.e. in the year 1995/1997. Furthermore, even an award had been made which was challenged in a writ petition preferred by Kiri, which was finally disposed of in 2012. Yet notices were issued to Government of NCT of Delhi in a writ petition filed in November, 2012 challenging the said public notice.

4. The claimant invoked the arbitration clause; a former judge of this court (who retired as Chief Justice of Punjab and Haryana High Court) was appointed as the arbitrator. The tribunal considered the entire record, i.e. the pleadings, the documents and the acquisition notices etc. The claimants had urged before the Arbitral Tribunal that they had approached Kiri between 2010-13 for execution of the Sale Deed which was being deferred repeatedly, on the ground that the Sale Deeds in that area were not being registered by the Sub-Registrar. The claimants' testimony, of its witness

(Sh.Tejinder Setia) in cross examination, was that he did not deposit the balance amount as per the Agreement to Sell as an NOC was not forthcoming despite having approached Mr. Kiri many times for accepting the money. Kiri's testimony was that he did not receive any notice in writing from the claimant ever for terminating or cancelling the Agreement to Sale.

5. When Kiri's representative, Mr. Rajinder Kiri was confronted in cross examination, he admitted that there was no disclosure about the acquisition proceedings, in the agreement and feigned non-recollection about whether disclosure of such proceedings was made to the claimants. In the Award, the Arbitral Tribunal observed that the seller had induced the claimants to enter into the contract on false pretenses and had concealed the acquisition proceedings. Meanwhile, Kiri had counter claimed against the claimant in the arbitration proceeding. This was however, repelled successfully. The tribunal held that Kiri had also not disclosed the true facts, because in respect to the same land, it had executed a registered Assignment Deed in favour of one Best Build Creations Pvt. Ltd and had further also entered into an agreement to sell with one Leelajay Projects Pvt. Ltd. These facts were not in the knowledge of the claimants when they filed the claim petition. They came to know of these facts, from the website of this Court. According to Kiri, these were disclosed in the reply to the counter claim and the orders obtained from the website of this Court were filed on record. In the order sheets relating to OMP No.766/2013, what emerges is that Kiri had agreed to sell the same piece of land to Leelajay Projects Pvt. Ltd. for ₹ 17,75,00,000/- out of which ₹ 5 crore has been taken as advance. Leelajay had complained

that without disclosing to it, the said land was transferred by the way of an Assignment Deed dated to "Best Build Creations Pvt. Ltd.".

6. The Arbitrator held that the seller could not take the plea of forfeiture, as the said plea could have been taken only if there were no *mala fides* from its side while entering into the agreement in the first place. Kiri had also not proved that it had completed its part of the obligation. The tribunal held in the award that Kiri had failed to explain the non-disclosure of the acquisition proceedings notification in the agreement to sell or the pendency of the writ petition. The tribunal therefore ordered the refund of the advance amount of ₹1.5 Crore with interest at the rate of 14% compound interest annually, and directed damages of ₹25 lacs along with litigation cost to be paid to the respondents for deceiving them.

7. At the preliminary hearing, the learned single judge issued limited notice on the issue of denial of compensation, refusing to go into the award, to the extent that it directed refund of the advance amount with interest to the claimant. It was observed that since Kiri's motives could not be said to be *bona fide*, evident from its failure to disclose the acquisition and legal proceedings, its plea of forfeiture could not be sustained. The appellant/Kiri had urged that since the plea of restitution through a money decree had not been claimed in arbitral proceedings, it could not be granted, in view of Section 21 (5) of the Specific Relief Act. The learned single judge rejected this plea. The discussion in this regard is as follows, in the impugned order:

“where the issues of mis-representation, non- disclosure of facts and concealment are not involved, the contention of the petitioner could have been accepted, in view of statutory

provision of Section 21(5) of the Specific Relief Act but the facts in the present case are different. No doubt, the respondents did not claim for compensation. But after examining the material placed on record and conduct of the petitioner, the learned Arbitrator has come to the conclusion that the conduct was not fair and the petitioner is guilty of mis-representation and concealment of other deals of the same property in dispute. Therefore, compensation in the nature of punitive damage was granted. There is no requirement of pleadings and evidence while granting the punitive damages. It is settled law that the punitive damages are in the nature of penalties for mis-representation of party and deception, whereby the court suo moto grant the punitive damages in the nature of compensation. Therefore, in the present case, after having considered the material available on record, I am of the considered view that the award published does not suffer from any infirmity and cannot be interfered inter alia on the following main reasons:

a) The Government of NCT of Delhi (Land and Building Department) issued Notification under Section 4 of the Land Acquisition Act, 1894, pect to the land in question. On Government of NCT of Delhi (Land and Building Department) issued Declaration under Section 6 of the Land Acquisition Act, 1894, with respect to the land in question in January 1997 and March, 1997.

b) The petitioner challenged the Notification under Section 4 of the Land Acquisition Act, 1894, before this Court in Writ Petition bearing WP(c) No.6213/1998.

c) The petitioner on, 2009 in full knowledge of the pending land acquisition proceedings and the pendency of Writ Petition with respect to the subject land, entered into an Agreement to Sell dated 10December, 2009 with the respondents. The respondents paid Rs.1,50,00,000/- in advance to the petitioner at the time of execution of the Agreement to Sell. The balance amount was to be paid at the time of execution of Sale Deed. It was specifically mentioned in the Agreement to Sell that the land was free from all sort of encumbrances, mortgages, Court injunctions etc. The

Agreement to Sell contained the indemnity clause i.e. Clause 7, wherein the petitioner undertook to indemnify the respondents and make good any losses suffered by the respondents in protecting the titles of the subject land.

d) The respondents in November, 2012 learnt through the Secretary of Vasant Kunj Enclave Housing Welfare Society that the petitioner had invoked the writ jurisdiction of this Court against the acquisition proceedings with respect to the subject land.

17. Therefore, the Award has rightly been passed by the Tribunal in the said circumstances, which is not contrary to law. The relief of Specific performance was disallowed but seeing the misconduct, misrepresentation and non-disclosure of material fact as well as hiding and concealing the crucial facts and information, the Tribunal had ordered the refund of the advance paid with compound interest and also awarded compensation and the cost of the litigation. Thus, the Award is liable to be upheld as the same does not suffer from any infirmity.”

8. Mr. Giriraj Subramaniam, learned counsel appearing for the appellant, urged that the award is patently erroneous inasmuch as it is plainly contrary to Section 21 (5) of the Specific Relief Act. That provision, it is emphasized, clearly contemplates that no compensation “*shall be awarded*” as an alternative to a claim for specific performance “*unless the plaintiff has claimed such compensation in his plaint.*” It is urged that in view of the unambiguous phraseology of the provision, the tribunal fundamentally erred in granting a relief that was barred. Counsel relied on *Shamsu Suhara Beevi versus G. Alex & Anr* (2004) 8 SCC 569. Reliance was placed on the following observation in the said decision:

"Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law".

9. Mr. Subramaniam pointed out that this decision was approved and applied later in *Shiv Kumar v Santosh Kumari* (2007) 8 SCC 600. Counsel urged that since the claimant had sought the relief of specific performance of the contract, rather than refund of money, without amending its claim, in accordance with provisions of the Specific Relief Act [particularly proviso to Section 21 (5)], the relief granted by the tribunal was contrary to law.

10. It is urged on behalf of the respondent claimant that the tribunal directed refund of earnest money, no more no less; it did not amount to grant of compensation. Furthermore, stated counsel, the findings in the award clearly point to perpetration of fraud and misrepresentation by the appellant, which rendered the agreement a nullity. In such circumstances, the party injured is entitled to restitution, having regard to the principles underlying Sections 65 and 70 of the Indian Contract Act, 1872.

11. The preceding discussion of facts shows that the appellant does not anywhere dispute that the claimant was kept in the dark about a material and relevant fact when the agreement to sell was entered into, i.e. the acquisition proceedings. The agreement and representations held out by the appellant were that the property in question was free from encumbrances and had good marketable title. On the faith of these representations, the claimant paid substantial amounts as advance to Kiri. The latter discovered, later, that acquisition proceedings were initiated in 1997 and that the seller Kiri had even initiated writ proceedings to challenge them in 1998. That these were

not disclosed was established in arbitration proceedings. Furthermore, during the proceedings another fact came to light, i.e. that the appellant had “sold” the same property to some third party, and litigation in that regard was pending before this court.

12. The claimant for some reasons sought specific performance without a further claim for compensation. The arbitral tribunal directed return of earnest money or advance paid, with interest and some further amount. The appellant’s main ground of challenge to the award- and correspondingly, the learned single judge’s order, is Section 21 (5) of the Specific Relief Act. That provision is textually cast in imperative terms, as it enjoins the court from awarding compensation in proceedings for specific performance, if no such relief is claimed. The proviso enables the court to allow amendments to grant such compensatory relief. Does this mean, that the amount awarded in the present case, should not have been granted to the claimant? This court’s opinion is that the learned single judge concluded correctly that the prohibition in Section 21 (5) did not apply to this case, because of Kiri’s lack of *bona fides*. Differently put, the concealment of a material fact, and active representation that the title to the suit lands were good and it was free from encumbrance, was a fraud or certainly a misrepresentation, that ultimately resulted in the avoidance of the contract. In such circumstances, the claimant was entitled to say that it should not be disadvantaged, and should be restituted. Furthermore, there is no principle – either in law or in equity, which can sustain the appellant’s claim to retain the amount. Here the learned single judge correctly held that the arbitrator’s conclusion with respect to entitlement to the amount and preclusion of the plea of forfeiture

was justified. Therefore, the claimant was entitled to the amount of advance, i.e. ₹1.5 crores with some interest. In this regard, the tribunal's orders are in consonance with law - the judgment in *Ashok Kumar Arora v. D.S. Sodhi & Anr* (RFA 152/2013, decided on 21st March, 2013) is to this effect.

13. The question which survives is whether the award of ₹ 25 lakhs was justified. Amendment, under proviso to Section 21 (5), was not sought by the claimant to seek damages. However, if one considers that the object of that provision- as indeed Section 22 of the Specific Relief Act, was to avoid multiplicity of proceedings, rather than to bar them and the flexibility afforded to courts to permit amendment at any stage (i.e. even appellate and execution stage), it is apparent, that the matter is one of procedure and not of substance. As long as the basic ingredients, which make up the cause of action are the same (i.e. an agreement to sell, inability of the seller, due to his fault or omission to honour it and injury to the purchaser) the party at the receiving end of the bargain is not remediless. Given the fact that the relief is admissible in law, but may not be granted *sans* a specific amendment by a court, due to a procedural hurdle, in arbitration proceedings, a tribunal would be liberated from such an impediment. It has been observed by the Supreme Court, that “*procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy*” (Ref. *Pasupuleti Venkateswarlu vs The Motor & General Traders* AIR 1975 SC 1409). In these circumstances, it cannot be held that grant of that relief, i.e. ₹

25 lakhs is a “patent illegality” or that such damages are contrary, or unknown to law, or contrary to public policy.

14. For the foregoing reasons, the court holds that there is no merit in the appeal. It is accordingly dismissed, without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

JULY 03, 2017



YOGESH KHANNA
(JUDGE)