

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

9.

+

O.M.P. (COMM) 486/2016

RAMKISHAN SINGH

..... Petitioner

Through: Mr. P. V. Kapur, Senior Advocate with
Mr. Kartik Nayar, Mr. Manish Singhvi, Mr.
Sidhant Kapur, Ms. Divya Kapur, Mr. V.K.
Nagrath, Ms. Pratibha Sridhar and Ms. Kaveri
Gupta, Advocates.

versus

ROCKS BUILDCON PVT. LTD. & ANR.

..... Respondents

Through: Mr. Arun Monga and Ms. K. Sandhu,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

09.01.2017

%

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 23rd April, 2015 passed by the sole Arbitrator in the disputes between the parties arising out of a contract dated 4th September, 2011.

2. The background facts are that on 4th September, 2011, an agreement was entered into between Respondent Nos. 1 and 2 i.e., Rocks Buildcon Pvt. Ltd. and Bulging Infratech Pvt. Ltd., respectively, on one hand and the Petitioner on the other in terms of which the Respondents agreed to pay to the Petitioner a total sum of Rs. 11.55 crores "subject to deduction of applicable taxes exclusive of service tax as applicable which will be in addition thereto

towards commission and brokerage for providing assistance in completion of a transaction which includes the brokerage.” The transaction contemplated takeover of the company having a plot of land in Goa by the purchaser or their nominee.

3. The recitals to the agreement acknowledged that the Petitioner had been “instrumental in letting the first party introduced with a company which has a land in Goa” and further that the Petitioner had “made lot of efforts in providing assistance to the First Party in identifying the following companies, who have a plot of land in Goa.” The recitals further stated that the aforementioned sum of Rs. 11.55 crores will be paid towards commission and brokerage for providing the assistance in “completion of the transaction i.e. either taking over of the ‘Company’ by the purchaser or their nominees” or “sale of the aforesaid plot of land from the Owners/Seller in favour of the Purchaser.” The recitals further acknowledged that by letters dated 17th June, 2011 and 28th July, 2011, the Respondents had “acknowledged and confirmed the efforts made by the Second Party and has made the on-account part payment of a sum of Rs. 50,00,000 vide demand draft...”

4. There were two contingencies spelt out in Clause 2 of the agreement in regard to the sum of Rs. 50 lakhs paid on account to the Petitioner. The first was in case the transaction was not completed due to reasons attributable to the Respondents, in which case the Petitioner had a right to forfeit the sum of Rs. 50 lakhs. In the vice versa situation i.e., if the transaction was not completed on account of reasons attributable to the Petitioner, then he would

have to refund to the Respondents a sum of Rs. 50,00,000/- within seven days of such request.

5. Clause 3 provided that any dispute or difference between the parties regarding the agreement would be resolved by arbitration. The jurisdiction for all purposes was agreed to be Delhi and the agreement was in supersession of all earlier agreements.

6. It is not in dispute that the Respondents managed to get the transaction completed as a sale deed was executed in their favour by the Seller in respect of a land in Goa. However, how that was arrived at is the bone of contention between the parties. According to the Petitioner, through his personal efforts he identified and introduced to the Respondents a group of companies which had land as one of their assets. The Petitioner also claims to have assisted the Respondents in getting the due diligence of the seller companies and their assets. After the Respondents were fully satisfied, the agreement between the parties i.e., the Petitioner on the one hand and the Respondents on the other was executed. After accounting for the Rs. 50 lakhs already paid, a claim was laid to a further sum of Rs. 11.05 crores that was payable by the Respondents to the Petitioner.

7. The transaction that was completed was the acquisition of the entire share capital of M/s. W. Investring (India) Pvt. Ltd. ('WIIPL') on 15th February, 2012 and the consequent execution of the sale deed dated 26th April, 2012. A further factor pointed out is that the Respondents had deducted tax at source to the account of the Petitioner and deposited the tax (relating to a sum of Rs. 7 crores with the Income Tax Department). However, the said sum was

not paid by the Respondents to the Petitioner. The Petitioner, accordingly, claimed the sum of Rs. 11.05 crores together with interest @ 24% per annum with effect from 15th February, 2012 to 10th December, 2013 and future interest also at 24%.

8. The case of the Respondents on the other hand was that the Petitioner did not do anything after the agreement dated 4th September, 2011 for taking forward the transaction. After the due diligence conducted by the Petitioner, a similar effort was undertaken by the Respondents through their sources which revealed that there were serious defects in the title of the property. As far as taking over the company through acquisition of the shares of WIPL is concerned, it is contended that the amount equivalent to 25% of the purchase consideration in the sum of Rs. 112.23 crores was deposited in an Escrow account but WIPL did not perform some of their performances which were conditions precedent in terms of the Share Purchase Agreement. This continued even after the deadline of 14th December, 2011. As a result, the said agreement was terminated by a letter dated 23rd December, 2011. By a letter dated 27th December, 2011, the Petitioner was asked to refund the token sum of Rs. 50 lakhs as the transaction was not completed.

9. Thereafter, the sellers directly approached the Respondents for sale of the property on an 'as is where is basis.' After a long process of deliberations and persuasions, a settlement was arrived at. At that stage, the Petitioner again entered into the picture and offered its help. The Respondents got lured and prepared four bank drafts dated 8th November, 2012 aggregating to Rs. 5,56,74,400 in favour of EMCPI Electronics Pvt. Ltd. as was named by

the Petitioner. However, while the said bank drafts were released to the Petitioner, the Respondents mistakenly deposited the TDS in the aggregate sum of Rs. 67,41,600 in the account of the Petitioner by a transaction dated 9th November, 2012. The said DDs which have been prepared remained unused for a period of three months.

10. Later, the Respondents claimed to have directly negotiated the matter with the 'Churchill family' and a separate MoU was entered into on 13th April, 2013. In the above circumstances, the Respondents denied their liability whatsoever to the Petitioner and in fact demanded refund of Rs. 50 lakhs.

11. On the above pleas, the learned Arbitrator framed the following issues for consideration:

“1. Whether the letters dated 15.6.2011 and 17.6.2011 being Annexures R-1, R-2 and R-3 to the Statement of Defence have any effect on the claim of the claimants and if so to what extent?

2. Whether the claimant is entitled to claim and receive an amount of Rs.11.05 Crores in terms of the agreement dated 4.9.2011 and, if not, reasons for it?

3. If the aforesaid issue is answered in favour of the claimant whether the claimant is also entitled to claim and receive interest, and if so at what rate and for which period?

4. Whether the respondent are entitled to claim and receive any amount from the claimant by way of counter claim. If so, for what amount?

5. If the aforesaid issue is answered in favour of the respondent

whether the respondent would also be entitled to claim and receive any amount towards payment of interest and if so at what rate and for which period?

6. Relief and costs, if any?”

12. The Petitioner examined himself as CW-1. The Respondents filed the affidavit of evidence of Mr. Sanjiv Kumar Choudhary and later of Mr. Ashok Mittal. Mr. Ashok Mittal whose affidavit was accepted by the learned sole Arbitrator in place of the earlier one which was filed by Mr. Sanjiv Kumar Choudhary appeared as a witness and he was also cross-examined.

13. The sole Arbitrator noted that answers given by the claimant in his cross-examination indicated that he did nothing after 4th September, 2011. The Petitioner apparently stated that after the execution of the said agreement, “the only thing I am aware of is the execution of share purchase agreement between the buyer and the seller.” He did not know how many such sale purchase agreements had been executed between the buyer and the seller. In response to a specific question whether he had taken any steps for completion of the transaction after 4th September, 2011, the Petitioner answered “I have not taken any further steps for completion of the transaction after 4th September 2011. I was waiting for the execution of the transaction.”

14. The learned Arbitrator noted that the Petitioner had offered no help in taking forward the transaction. Among the impediments faced by the Respondents was litigation pending in the Court in respect of the lands in question. The learned Arbitrator concluded that “since there is failure on the

part of the claimant in bringing the transaction to its completion and since the Respondents had to act on their own to get the transaction completed and due diligence in the matter done, and also because the Respondent had to start re-negotiation with the seller and after great efforts could conclude the transaction after spending a heavy amount for bringing in settlement of the cases pending in courts and also in making payment of additional amount which was not envisaged earlier in the aforesaid agreement dated 4th September, 2011 between the parties, therefore, it is held that the claimant is not entitled to receive the balance amount towards his commission and brokerage as claimed in the claim petition.”

15. The learned Arbitrator accepted the plea of the Respondents regarding the mistaken deposit of the TDS amount and held that the Respondents were justified in not making payment of the amount to the Petitioner by way of bank drafts. As regards the counter-claims of the Respondents, the learned Arbitrator did not find any merit in them either.

16. In para 38 of the Award, the learned Arbitrator was of the view that since the Petitioner had rendered some help and assistance to the Respondents in finding out a buyer and “taking some steps for furtherance of the deal as mentioned in the agreement dated 4th September, 2011, he was entitled to some amount in lieu of its services.” Accordingly, it was directed that a sum of Rs. 50 lakhs already paid to the Petitioner was a justified amount payable for the services rendered till 4th September, 2011. It was directed that the said amount need not be refunded by the Petitioner to the Respondents.

17. Mr. P.V. Kapur, learned Senior counsel appearing for the Petitioner submitted that the learned Arbitrator had proceeded on a completely erroneous reading of the relevant clauses of the contract and mistakenly concluded that there is an obligation on the Petitioner to render assistance after the agreement dated 4th September, 2011. He submitted that this was a classic case of breach of promise where despite the Petitioner satisfactorily discharging all its obligations the Respondents did not perform their part of obligation and sought refund of Rs. 50 lakhs already paid to the Petitioner. He placed reliance on the judgment of the Supreme Court in ***Abdulla Ahmed v. Animendra Kissen AIR 1950 SC 15*** to urge that it is possible that a contract of the kind in question “may be construed as promising to reward the appellant for merely introducing a potential buyer who is ready, able and willing to buy at or above the price named, whether or not the deal goes through.”

18. Mr. Kapur emphasised that as far as the present case is concerned, the deal ultimately went through with the takeover of the WIPL as well as registration of the sale deed in respect of the land in question in favour of the Respondents. Nothing more was expected to be done by the Petitioner in terms of the agreement. According to Mr. Kapur, the recitals themselves listed out whatever has already been concluded that prior to that date. According to him the recitals also acknowledged that the Petitioner had already rendered services both by way of locating the sellers as well as undertaking due diligence of the land in Goa which formed the subject matter of the agreement.

19. The above plea was resisted by Mr. Arun Monga, learned counsel appearing for the Respondents. He submits that it is inconceivable that a sum of Rs. 11.55 crores would be agreed to be paid only for brokerage. According to him a careful reading of the clause shows that in order to become entitled to the balance sum of Rs. 11.05 crores, the Petitioner was under obligation to render all assistance after the agreement dated 4th September, 2011 to carry it to its logical conclusion. According to him, the Petitioner himself admitted not doing anything after 4th September, 2011. In those circumstances, the said agreement dated 4th September, 2011 should be taken to have come to an end and there was no further obligation therein owing by the Respondents to the Petitioner.

20. Mr Monga referred to an email sent by the Petitioner to the Respondents on 15th December, 2011 *inter alia* giving the Respondents an option of 'walking away' and that this is precisely what the Respondents had conveyed to the Petitioner by the letter dated nil in response to the Petitioner's letter. Therefore, he contended that the Respondents were entitled to refund of Rs. 50 lakhs already paid to the Petitioner.

21. Mr. Monga, also submitted out that there were many factual findings of the sole Arbitrator which could not be interfered with under Section 34 of the Act. Inasmuch they were pure findings of facts based on evidence placed before the learned Arbitrator, none of the grounds under Section 34 of the Act stood attracted.

22. The above submissions have been considered. The learned Arbitrator in analysing the clauses of the agreement appears to have concluded that after

4th September, 2011 the Petitioner failed to render any assistance in completion of the transaction. There is merit in the contention of Mr. Kapur that the learned Arbitrator read into the clauses of the agreement certain obligations which were not spelt out. For instance, there is no mention in the entire agreement of any obligation of the Petitioner with regard to any litigation involving the land in question.

23. The learned Arbitrator also was not impressed with the contention of the Petitioner that he had already undertaken due diligence. The learned Arbitrator examined the evidence in this regard and disbelieved the Petitioner's version that he had in fact undertaken that exercise. In arriving the above conclusion, the learned Arbitrator appears to have overlooked the fact that the recitals of the agreement acknowledged that due diligence had already been undertaken by the Petitioner prior to 4th September, 2011. In fact the agreement acknowledges not only the above assistance rendered by the Petitioner to the Respondents but also the fact that the Petitioner had located companies which did have lands in Goa and the names of which were set out in the recitals to the agreement. Therefore, as far as the Petitioner is concerned he had already discharged the above two obligations spelt out in the agreement.

24. It was repeatedly emphasised by Mr. Monga that a sum of Rs. 11.55 crores was not merely for brokerage but also for rendering assistance and that no such assistance for completion of the transaction was in fact rendered by the Petitioner. The agreement appears to proceed on the basis that the Petitioner is entitled to Rs. 11.55 crores, as a specified lumpsum amount, for

the services rendered by him in locating the seller i.e., a company which has land in Goa and undertaking due diligence with respect to that land. The Petitioner had already been paid Rs. 50 lakhs on account. What the agreement did was to spell out the circumstances under which either the said sum of Rs. 50 lakhs would become refundable or adjusted. In the event of the latter, the balance sum of Rs. 11.05 would become payable to the Petitioner only upon completion of the transaction between the parties.

25. There were two alternatives spelt out in the agreement in this regard. One was the completion of the taking over by the company of the land. The other was registration of the sale deed in respect of the land in question in favour of the Respondents. Admittedly, both steps were in fact completed. The fact that they happened after fresh negotiations between the parties does not take away the entitlement of the Petitioner in terms of the agreement.

26. In *Abdulla Ahmed v. Animendra Kissen* (*supra*), the Supreme Court was considering a similar agreement entered into with an estate broker as regards the commission payable to him. The broker undertook to ensure the sale and secure the buyer. The sale deed was executed by the persons introduced by the broker to the Defendants. The Supreme Court explained as under:

“7. In the absence of clear words expressing the intention of the parties, it is possible to construe these terms in three different ways corresponding to the three patterns into which commission contracts with real estate-brokers may broadly be said to fall. In the first place, the latter may be read as authorising the appellant not only to find a purchaser ready and willing to purchase the property at the price required but also to conclude a binding contract with him for the purchase and sale

of the property on behalf of the respondent. Secondly, the contract may be construed as promising to reward the appellant for merely introducing a potential buyer who is ready, able and willing to buy at or above the price named, whether or not the deal goes through. And lastly, the commission note may be understood as requiring the appellant to find such a purchaser without authorising him to conclude a binding contract of sale but making commission contingent upon the consummation of the transaction.”

27. In the present case, the third example mentioned in the above passage applies. The contract required the Petitioner to find a purchaser. It made the commission contingent upon confirmation of the transaction. In the circumstances, it was not open to the learned Arbitrator to have varied the amount payable to the Petitioner towards brokerage and assistance rendered by him. In terms of the contract the Petitioner could not have retained even the Rs. 50 lakhs paid to him if he did not fulfil his obligations. There was no basis in law for the learned Arbitrator to permit the Petitioner to retain Rs. 50 lakhs payable only for 'some' services rendered. Either the Petitioner was entitled to the entire sum in terms of the agreement or he was not. If indeed he had rendered those services and if in fact the deal went through, as it did in the present case, the Petitioner would be entitled to the entire sum as agreed. The agreement does not contemplate that the Petitioner would not be entitled to the balance sum of Rs. 11.05 crores if he did not render assistance after the date of the agreement. In deciding to the contrary, the learned Arbitrator appears to have not only deviated from the express terms of the contract but re-written it in a manner of speaking by fastening on to the Petitioner further obligations which were not spelt out therein.

28. Under Section 28(3) of the Act, the learned Arbitrator was bound to render an Award consistent with the clauses of the contract. Under Section 28(2), the Arbitrator shall decide *ex aequo et bono* only if the parties have expressly authorised it to do so. Further, under Section 28(3) of the Act, there was an obligation on the learned Arbitrator to take into account “the terms of the contract and trade usages applicable to the transaction.” In ***M.S.T.C. Limited v. Jain Traders (2011) 4 Comp LJ 387 (Del)***, it was observed in paras 18 and 19 as under:

“18. This distinction has been completely ignored by the learned Arbitrator and he has, on the basis of equitable considerations and his notions of fairness, superimposed the concept of proportionate refund in Clause 5.3, even though the same is specifically excluded from Clause 5.3.

19. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide on the basis of his notions of equity and fairness, particularly in such a manner that it goes contrary to the specific contractual terms. Section 28(2) of the Act provides that “The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorized it to do so”. (emphasis supplied). The phrase “*ex aequo et bono*” means “according to equity and conscience” (see Black’s Law Dictionary 6th edition). In relation to the expression “Amiable compositeurs” the Black’s Law Dictionary refers to “Amicable compounders” and states that “amicable compounders are arbitrators authorized to abate something of the strictness of the law in favour of natural equity”. The parties in this case have not agreed that the Arbitrator may decide as an amiable compositeur or on the basis of “justice and fairness”. Therefore, the learned Arbitrator could not have disregarded the plain and grammatical meaning of Clauses 5.3 and 5.4 of the General Conditions of Contract to give way to his own sense of equity, fairness or justice. Reference in this regard may also be made to

the decision in ***Food Corporation of India v. Chandu Construction & Another***, (2007) 4 SCC 697. The Supreme Court in this decision held as follows:

“11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see ***Associated Engg. Co. v. Govt. of A.P.***, (1991) 4 SCC 93; and ***Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises***, (1999) 9 SCC 283).

12. In this context, a reference can usefully be made to the observations of this Court in ***Alopi Parshad & Sons Ltd. v. Union of India***, AIR 1960 SC 588, wherein it was observed that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, “completely outside the contemplation of parties” at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in ***Naihati Jute Mills Ltd. v. Khyaliram Jagannath***, AIR 1968 SC 522, this Court had observed that where there is an express term, the court cannot find, on construction of the contract, an implied term

inconsistent with such express term.

13. In ***Continental Construction Co. Ltd. v. State of M.P.***, (1988) 3 SCC 82, it was emphasised that not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

14. In ***Bharat Coking Coal Ltd. v. Annapurna Construction***, (2003) 8 SCC 154, while inter alia, observing that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus: (SCC pp. 161-62, para 22)

“22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.”

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action (also see ***Associated Engg. Co. v. Govt. of A.P.***, (1991) 4 SCC

93).”

29. In that view of the matter, the Court is of the opinion that in the present case, the impugned Award cannot be sustained as it is opposed to the fundamental policy of Indian law inasmuch as it does not abide by the mandate of Section 28(3) of the Act.

30. For the aforementioned reasons, the impugned Award is set aside. The petition is allowed but, in the circumstances, with no order as to costs. It will now be open to the Petitioner to again seek a fresh arbitration in accordance with law.

JANUARY 09, 2017
dn

S. MURALIDHAR, J