

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.04.2017

+ **O.M.P. (COMM) 4/2016**

DINESH GUPTA & ORS.

..... Petitioners

versus

RAKESH KUMAR JAIN & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Ms Nandita Arora.

For the Respondents : Mr. Chetan Sharma, Senior Advocate with
Mr A K Bajpai, Mr Chetan Gautam and
Mr Amit.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an award dated 12.10.2015 (hereafter 'the impugned award') passed by the sole arbitrator, Justice A.P. Shah (Retd.), who was appointed as an arbitrator by an order dated 12.07.2011 passed by this court in Arb.P. No. 167/2011.

2. The impugned award was rendered in the context of the disputes that had arisen in relation to an agreement dated 13.01.2007 (hereafter 'the Agreement') entered into between the petitioners, Mr Jagdeep Singh and one K.J.S. Ahluwalia (hereafter collectively referred to as 'the Petitioners')

on one part and, respondent nos. 1 and 2 (hereafter collectively referred to as 'the Respondents') on the other part. The Respondents were directors of two companies: Metcalfe Properties Pvt. Ltd. (hereafter 'MPPL') and Metcalfe Developers Limited (hereafter 'MDL'). Both the said companies were not parties to the Agreement, however, had consented to join as parties to the arbitration and the same was recorded by this court in its order dated 12.07.2011 (passed in Arb.P. No. 167/2011).

3. MPPL and MDL were incorporated with the primary object of development of land measuring 135 acres approximately, situated at Amritsar, Punjab.

4. Respondent no.1 (Rakesh Jain) claimed before the arbitral tribunal that he along with respondent no.2 had held 15% of the shareholding in MPPL and MDL. He further claimed that certain differences arose between the Petitioners and the Respondents and accordingly, the Respondents agreed to sever the relationship with the Petitioners and the two companies (MPPL and MDL). Accordingly, the parties entered into the Agreement whereby the Petitioners agreed to pay a sum of ₹16.20 crores in full and final settlement of the Respondents' shareholding in MPPL and MDL. Admittedly, a sum of ₹58.3 lacs was paid to respondent no.1. Respondent no.1 further claimed that respondent no.2 was only a Chartered Accountant and was entitled to only 2% of the aforesaid amount.

5. MPPL and MDL resisted the claim principally on the ground that they were not the signatories to the Agreement and the same was entered into between the Petitioners and the Respondents in their private capacity. They also claimed that the land at Amritsar belongs exclusively to the said

companies and no shareholder had any title to the same. According to MPPL and MDL, the shareholding of the respondent no.1 was initially 19.8% of the total shareholding which was subsequently reduced to 4.42% on account of further increase in the paid-up capital. It was also claimed that the investment made by respondent no.1 was only ₹2.05 crores and the investment of respondent no.2 was only ₹10.15 lacs.

6. The Petitioners also resisted the claim made by respondent no.1 on several grounds. They claimed that investment made by Respondents as recorded in the Agreement was incorrect. They also claimed that after the Agreement was executed, parties had arrived at an oral agreement in terms of which the Respondents were to receive a share proportionate to their investment after the land in question had been developed and the profits realised.

7. According to the Petitioners, the Respondents had also agreed to return the sum of ₹58.3 lacs to the Petitioners. In addition, the Petitioners also contested the claim as being barred by limitation. At the same time, the Petitioners also contended that the claim made by respondent no.1 was pre-mature as the Petitioners had only received the permission to develop the land in question only in July 2011 and the property had yet to be developed. Respondent no.2 (who was arrayed as respondent no.9 before the arbitral tribunal) filed a statement of defence disputing that he was entitled to only 2% of the total shareholding of 15% as claimed by respondent no.1. He further claimed that he was entitled to half of the amount as agreed to be paid by the Petitioners and was also entitled to a sum of ₹29.15 lacs (being 50% of ₹58.3 lacs paid initially) which was not paid to him.

8. Insofar as the question of limitation is concerned, respondent no.1 claimed that he had engaged a lawyer to issue notice and institute the proceedings and had also paid a sum of ₹40 lacs to him on various grounds including purchase of stamp duty and paying fees to the arbitrator (Justice R.C. Chopra (Retd.)). However, it later transpired that the advocate had cheated respondent no.1 as although he had claimed that Justice R.C. Chopra (Retd.) had been appointed as an arbitrator and had also received fees on the pretext of making payment to Justice R.C. Chopra (Retd.), however, no such proceedings had been commenced.

9. The arbitral tribunal recorded oral evidence and after examining all relevant material, passed the impugned award declaring that the Petitioners were jointly and severally liable to pay an amount of ₹6,62,64,300/- to respondent no.1 and ₹3,74,35,700/- to respondent no.2 along with interest at the rate of 18% per annum on the said amounts from 01.11.2011 till date of actual payment. In addition, the Petitioners were also directed to pay costs to each of the Respondents quantified at ₹5 lacs.

Submissions

10. Ms Nandita Arora, learned counsel appearing for the petitioners contended that the impugned award was perverse and unsustainable as it was clearly barred by limitation. She submitted that the Agreement was entered into in 2007 and the arbitration petition (Arb.P. No. 167/2011) was instituted in 2011, which was beyond the period of three years as prescribed under Article 54 of the Schedule to the Limitation Act, 1963. She further submitted that although respondent no.1's lawyer may have cheated him, however, that would not extend the limitation as the Petitioners had not received the legal notice dated 10.09.2009 claimed to

have been sent to the Petitioners, MDL and MPPL. She earnestly contended that although the arbitral tribunal had held that respondent no.1's allegation about his lawyer cheating him would not extend the limitation; he had split the amount claimed by the Respondents by rejecting a part of the claim as barred by limitation but accepted the claim for the balance to be within limitation. She submitted that it was not permissible for the arbitral tribunal to split the cause of action and if the respondent no.1's claim was barred by limitation, it ought to have been rejected in entirety.

Reasoning and conclusion

11. There is no dispute that the parties had entered into the Agreement on 13.01.2007. In terms of the said Agreement, the Respondents were entitled to receive ₹16.20 crores for 15% shareholding in MPPL and MDL. The Petitioners had agreed to purchase the entire "*15% undivided shareholding*" in MPPL and MDL on the terms as set out in the Agreement. A bare perusal of the Agreement indicates that the parties thereto had valued the total land as on 07.01.2007 on 'as is where is basis' at approximately ₹108 crores and had agreed that the value of the Respondents' shareholding was ₹16.20 crores.

12. The Petitioners had agreed to pay the aforesaid amount in the following manner:-

“1) Total amount of Rs. 16 Crore lac shall be payable by First Party collectively to the second party as follows:

(a) That amount of Rs. 16 Crores lac total value, the principal cost and interest i.e. capital account invested by second party till 31.12.2010 of their 15% shareholdings, i.e. their entire shareholding

lying credited with Metcalfe Properties Pvt. Ltd. and Metcalfe Developers Ltd. comes to 583.00 lac will be payable by the first party to the second party as under:-

- (i) Rs. 58.30 lac i.e. 10 percent of the Principal / Capital including interest amount of Rs.583.00 lac shall be paid by first party on or before 14.01.2007 by means of cheque in favour of Shri Rakesh Jain & Shri Mukesh Aggarwal or their nominee(s)
 - (ii) Rs. 291.50 lac i.e. 50 percent of the total capital amount of Rs.583.00 lac shall be paid by first party on or before 28.02.2007 by means of nominee(s). This amount of Rs.291.50 lac shall be paid after adjusting proportionate registration charges which may comes to the share of the Second Party in respect of the said land.
 - (iii) Rs. 233.20 lac i.e. 40 percent of the Capital amount of Rs.583.00 lac shall be paid by first party on or before 30.04.2007 by means of cheques in favour of Shri Rakesh Jain and Shri Mukesh Aggarwal or their nominee(s).
- (b) Remaining balance of Rs.10.37 Cr. (out of Rs.16.20 Cr) as profit, in the fully paid land value of about 135 acres of land as mentioned above will be paid by the first party to Shri Rakesh Jain, Shri Mukesh Agarwal or their nominee(s) by means of cheques in 4 equal installment in the following manner:-
- i) First installment is payable by first party to second party by issuing cheques within 3 months from the date of launching of the project or 15 days after obtaining the

license from the concerned authority whichever is earlier by Metcalfe Properties Pvt. Ltd. the tentative date of the launching or of the project is about 28.2.2007.

- ii) Second installment is payable by first party to second Party by issuing cheques within six months of the launching of the project.
- iii) Third installment is payable by first party to second party by issuing Cheques within 9 months of launching of the project.
- iv) Fourth and final installment is payable of first party to the second party by issuing Cheque within 12 months of launching of the project.”

13. The arbitral tribunal held that the alleged legal notice claimed to have been issued on 10.09.2009 was of no consequence as the arbitration clause was not invoked. Further, the arbitral tribunal also held that respondent no.1's allegation about his lawyer cheating him would not provide any ground for extension of limitation. He held that for the purpose of limitation, the date of the claim would be taken as 11.05.2011 being the date or which respondent no.1 had filed the application under Section 11 of the Act before this court.

14. In view of the above, the arbitral tribunal held that the amount payable to the Respondents before a period of three years from 11.05.2011 would be barred by limitation. However, the arbitral tribunal noted that certain sums were to be paid only after the project was launched. The project was, undisputedly, launched in 2011; therefore, the claim for a sum

of ₹10.37 crores - which was to be paid after the launch of the project - would not be barred by limitation.

15. The relevant extract of the impugned award is as under:-

"90. The Tribunal next takes up Issue No. 2, as to whether the Claim is barred by limitation.

91. There is only a bald plea made by the Respondents that the claim is barred by limitation, and no reasons for the same are given. In the written submissions, it is argued by Respondents 1 to 8, that since the claim is for specific performance, Article 54, Limitation Act, 1963, would apply. The Respondents 1 to 8 contend that, as per the agreement, the first instalment was to be paid on or before 28.02.2007, and consequently, the performance of the contract would be deemed to have been refused when the first instalment was due and not paid. The cause of action for instituting any proceedings for specific performance would as such accrue on the default of that first instalment itself, and since, the claim is not filed within the period of limitation for three years from that date, this claim would be barred.

92. The invocation of Article 54, the Limitation Act, 1963, is on the basis of the new plea that the Claimant ought to have claimed specific performance. However, this plea has been rejected by the Tribunal, and therefore, Article 54, Limitation Act, 1963, has no application in the present case.

93. Nevertheless, the law requires the Tribunal to ascertain whether the claim of the Claimant is within limitation or not.

94. For this purpose, the Tribunal notes that out of the payment of the amount of Rs 5.83 crore, being the

capital amount invested by the Claimant and Respondent 9, the first 10% of the amount was already paid. However, 50% of the Rs 5.83 crore, i.e., Rs 291.50 lakh was to be paid by 28.02.2007, and the remaining 40%, Rs 233.20 lakh, was to be paid by 30.04.2007. These two instalments of 50% and 40% of the capital amount were admittedly not paid.

95. At this stage, the Claimant claims that his then lawyer, Mr Amit Singh Narag, issued a legal notice on 10.09.2009 to Respondents 1 to 8. The receipt of the said notice is denied by the Respondents. However, there was no invocation of arbitration subsequent to the alleged sending of this legal notice, and therefore, this notice is of no consequence.
96. Further, even if it is assumed that the Claimant's allegations about Mr Narag to be true, regarding the fact that the lawyer allegedly cheated the Claimant, and so on, there would be no grounds for extension of limitation.
97. The Tribunal finds that the date of the claim has to be taken as 11 May 2011, when the application under Section 11, Arbitration and Conciliation Act, 1996, was filed before the Delhi High Court. In this regard, the claims of amounts of Rs 291.50 lakh (payable on 28.02.2007), and Rs 233.20 lakh (payable on 30.04.2007) are clearly barred by time. But the remaining payment of Rs 10.37 crore was to be made within three months of launching of the project or three months of obtaining the requisite license/letter of intent/permission from the concerned authorities.
98. There is no dispute that the project was launched in 2011, and thus, this claim of Rs 10.37 crore is obviously is not barred by limitation.

99. Accordingly, the Tribunal finds that this issue is answered partly in favour of Respondents 3 to 8 to the extent of these two instalments of Rs 291.50 lakh (payable on 28.02.2007), and Rs 233.20 lakh (payable on 30.04.2007)."

16. This court does not find the aforesaid view to be perverse or patently illegal. Indisputably, the right to demand the sums agreed to be paid after the project was launched could arise thereafter, and it was not open for the Respondents to have claimed the same prior to that date. Therefore, the conclusion that the claim for such amounts were not barred by limitation is a reasonable and a plausible view. Further, the arbitral tribunal had also found that the contentions sought to be advanced on behalf of the Petitioners were not pleaded by the Petitioners and thus such pleas could not be entertained. This court finds no infirmity with the aforesaid approach. In the circumstances, no interference with the impugned award is warranted.

17. The petition is, accordingly, dismissed. All pending applications also stand disposed of. No order as to costs.

VIBHU BAKHRU, J

APRIL 27, 2017
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