IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CR No.5029 of 2014 (O&M)
Date of decision:27.04.2018

Surjit Kaur and others ... Petitioners

Vs.

Tilak Raj Jain and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Naresh Markanda, Senior Advocate with
Ms. Kavita Markanda, Advocate
for the petitioners.

Mr. G.S.Rana, Advocate and
Mr. P.S.Rana, Advocate
for the respondents.

AMIT RAWAL J.

The present revision petition is directed against the judgment dated 02.07.2014 (Annexure P-11) passed by the Additional District Judge, Chandigarh, whereby, the arbitration appeal filed by the respondents against the order dated 31.03.2011 (Annexure P-8) of the Arbitrator, has been allowed.

It would be in the fitness of things to give few facts which give rise for adjudication of the present petition.

Petitioners 8 in number claimed themselves to be owners of SCO No.1001-1003, Sector 22-B, Chandigarh. On demise of Prem Singh, his share transferred in the name of his wife Surjit Kaur who became owner of 2/9th share of property and rest of the petitioners were owners to the extent of 1/9th share of the property. The petitioners stated to have entered into an agreement dated 25.12.2001 (Annexure P-1) entered into between the parties with respondents, i.e., Tilak Raj Jain son of late Inder Pal Sain for sale of the aforementioned property containing certain terms and conditions for a valuable sale consideration of ₹1,15,00,000/- against the receipt of ₹15,00,000/- as earnest money.

Clause 11 and 12 of the agreement contained recital that they were 8 co-owners of the property and if any of sellers die before the final day of bargain or due to unavoidable circumstances, the NOC was to be taken from the Estate Officer Chandigarh or Income Tax Department. The purchasers shall be entitled for the refund of earnest money with interest at the Commercial Bank rate and would not be entitled for any other liquidated damages or will have right to go to Court for filing suit under Specific Relief Act for part performance of said seller and in case, any dispute arose, the same shall be referred to the named Arbitrator.

Similarly the parties set their hands in Clause 12 envisaging a situation where purchasers back out from the agreement, in such situation, his earnest money stood forfeited and if the sellers back out (except in the circumstances mentioned in para 11) then they would be liable to refund double the amount of the earnest money to the said purchasers as liquidated damages. The said purchasers shall have the option either to accept such liquidated damages or get the sale deed executed in their favour through the Court of law at the risk of the sellers.

As per the averments made in the petition, the Estate Officer refused to grant the NOC on 14.02.2002. On 13.12.2004, respondents filed a suit for specific performance.

Since the agreement contained the arbitration clause, petitioners approached this Court vide Arbitration Case No.34 of 2006 for reference of dispute arising from agreement to sell to an Arbitrator. This Court, vide order dated 30.01.2009 (Annexure P-2), appointed Sh. B.R.Gupta, Retire Additional District Judge as an Arbitrator to adjudicate the dispute between the parties.

Vide order dated 21.03.2009, (Annexure P-3), the suit for specific performance was withdrawn in Lok Adalat which reads as under:-

"Tilak Raj Vs. Surjit Kaur

Present: Plaintiff in person with counsel Sh. Deepak Saran

Sh. R.S.Gurgaon, counsel for defendant.

File taken up in the Lok Adalat. Vide separate statement of even date, the plaintiff withdrew the present suit. Accordingly, the present suit is hereby dismissed as withdrawn. Court fee be also refunded to the plaintiff, as per the provisions of State Legal Services Authority. File be consigned to the records."

Announced in open Court.

21.3.2009 *Sd/-*

(Rajinder Pal Singh)
Presiding Officer
Lok Adalat Chandigarh."

On 29.05.2009 (Annexure P-4), an application was filed by the petitioners before the Arbitrator for withdrawal of the claim. Vide order dated 26.08.2009 (Annexure P-5), Arbitrator allowed the petitioners to withdraw the claim but allowed the respondents, i.e., vendee to file the claim petition. On 25.09.2009, (Annexure P-6), respondents filed the claim petition before the Arbitrator. The petitioners, vide application dated 17.09.2010 (Annexure P-7) under provisions of Section 16 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act") before the Arbitrator challenging his jurisdiction. The Arbitrator, vide order dated 31.03.2011 (Annexure P-8) allowed the aforementioned application and terminated the proceedings. The respondents preferred an appeal under Section 37 of 1996 Act, before the Principal Court. Vide impugned order dated 02.07.2014 (Annexure P-11), the aforementioned appeal as noticed above, has been allowed. It is in that circumstances, the present revision petition has been filed.

Mr. Naresh Markanda, learned Senior counsel assisted by Ms. Kavita Markanda, Advocate for the petitioners submitted that impugned order is not sustainable in the eyes of law as the Principal Court misunderstood the scope and intent of Clauses 11 and 12 of the agreement to sell, for, Clause 11 of the agreement to sell only provided that arbitration proceedings would be initiated. The pre-condition for invoking the arbitration would envisage existence of dispute with regard to refund of earnest money in case of non-issuance of NOC by the Estate Officer or Income Tax Department. It prevented the vendee to seek the specific performance of the agreement to sell.

Clause 12 of the agreement would come into play only in case the seller backs out from the bargain and in that situation, purchaser has two option, i) to accept double the amount of earnest money as liquidated damages; or ii) to file the proceedings in the competent Court of law for specific performance of the agreement to sell.

For all intents and purposes, the dispute before the High Court was with regard to issue covered under Clause 12 of the agreement to sell which could be only decided by a Civil Court and not by the Arbitrator. It is in that background the application under Section 16 of 1996 Act, was filed. The respondents filed another suit for specific performance in April 2011. The aforementioned suit had been dismissed by the trial Court, vide judgment dated 29.04.2014 (Annexure P-10) by holding the suit to be barred under Order 23 Rule 4 CPC. All these facts have not been adverted to by the Court below and thus, there is gross illegality and perversity in the order which is without jurisdiction.

In support of his submissions, relied upon the judgment rendered by the Hon'ble Supreme Court in **Harsha Constructions Vs. Union of India and others 2014(9) Supreme Court Cases 246** to contend that Arbitrator could not deal as no situation had arisen for adjudication of the claim under Clause 11 of the agreement and therefore, the Arbitrator is precluded from preceding with the claim being excepted matter.

Since the Arbitrator had allowed the petitioners to withdraw their claim, order of the Arbitrator in terminating the proceedings was correct interpretation of law. Section 16 of 1996 Act enjoined upon an obligation upon the Tribunal to rule its jurisdiction. It would be in the domain of the Arbitrator, in case, there was any interpretation or violation of conditions envisaged in Clause 11 of agreement but in the absence of same, remedy to the respondents lied elsewhere and urged this Court for setting aside the order under challenge by allowing the petition.

Per contra, Mr. G.S.Rana, Advocate and Mr. P.S.Rana, Advocate for the respondents submitted that order under challenge is perfect, legal and justified and do not call for any interference, for, this Court, while appointing the Arbitrator vide order dated 30.01.2009 (Annexure P-2), left the question of interpretation of Clauses 11 and 12 of the agreement in the domain of Arbitrator. In fact, the petitioners have adopted all dilatory tactics in tiring out the respondents from seeking vindication of their grievance. It was a well conceived plan on behalf of the petitioners to move application for withdrawal of claim petition and they had already contemplated to move an application under Section 16 of 1996 Act. Arbitrator could not have terminated the services and kept the question open to be decided at the final stage, for, Arbitrator has power to grant specific performance in view of the law laid down by the Supreme Court of

India in **Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and others 1999 (5) SCC 651,** in other words, he submitted that Arbitrator has power to grant discretionary relief under Section 20 of Specific Relief Act, 1963. Reliance has also been laid to the judgment rendered by the Hon'ble Supreme Court in **P.D'Souza Vs. Shondrilo 2004(3) RCR (Civil) 668** to contend that even if the agreement to sell does not envisage any right to the vendee to seek specific performance of agreement and is limited only to the liquidated damages, relief of specific performance is inherent and thus, urged this Court for upholding the order under challenge by dismissing the revision petition.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Markanda.

For the sake of brevity, Clauses 11 and 12 of agreement to sell and order dated 31.01.2009 passed by this Court read as under:-

> *"11. That at present, there are eight co-owners of the said property and God forbids, if any of the sellers will die before the final day of bargain or if due to any unavoidable circumstances the NOC would not be issued in the name of present purchaser or in the name of his nominee/s from the Estate Officer, Chandigarh, or ITC would not be issued without any willful neglect on the part of the sellers, the said purchaser shall only be entitled for the refund of earnest*

money with interest at the Commercial Bank rate. The purchaser will not be entitled for any other liquidated damages nor he shall have right to go to Court for filing suit under Specific Relief Act for the part performance of said sellers. In case of any dispute, it will be referred to the sole arbitration of Sh. Raman Mahajan.

12. That it is given clear understanding to the said purchaser that if he backs out from this bargain then his earnest money shall stand forfeited in favour of said sellers and if the said sellers will back out from this bargain willfully (except in the circumstances as mentioned in para no.11) then the said sellers will be liable to refund double the amount of the earnest money to the said purchasers as liquidated damages. The said purchaser shall have the option either to accept such liquidated damages or get the sale deed executed in his favour through Court of law at the risk of sellers (except in the circumstances as mentioned in para no.11).

` **The order dated 30.01.2009 reads thus:**-

"*The present application is for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') arising out of an agreement to sell dated 25.12.2001 in respect of sale of SCO No.1001, 1002 and 1003, Sector 22B, Chandigarh. The* *petitioners are one of the co-owners of the aforesaid property, which was agreed to be sold for a total consideration of Rs.1,15,00,000/-*

The sale deed in pursuance of the said agreement could not be executed between the parties on account of non-issuance of No Objection Certificate for the sale of such property by Chandigarh Administration. According to the petitioners, the dispute falls within the Clause 11 of the agreement and therefore, the matter is required to be referred to an Arbitrator, whereas as per respondents, the dispute falls within the Clause 12 of the agreement and therefore, the matter does not require adjudication by an Arbitrator.

The fact whether the matter falls within the Clause 11 or Clause 12 of the Agreement is in itself a dispute and requires adjudication. Therefore, the dispute between the parties in respect of performance of respective obligations of the parties under the said agreement to sell is required to be decided by an Arbitrator.

In view of the said fact, with the consent of the parties, Shri B.R.Gupta, Retd. Additional District Judge, R/o # 587, Sector 8-B, Chandigarh, is appointed as an Arbitrator to adjudicate the dispute between the parties.The Arbitrator shall be free to *fix his fee keeping in view the claim amount as also the time required to adjudicate upon the same.*

Parties through counsel are directed to appear before the Arbitrator on 23.03.2009 for further proceedings."

On plain and simple language of the aforementioned provisions of Clauses and order, the entire exercise taken by the petitioners seeking termination of the arbitration proceedings was to circumvent the order dated 30.01.2009, for, arbitration application appointing the Arbitrator came to be decided only at the instance of the petitioners and nobody else, therefore, in my view, the petitioners were estopped by taking the aid of Section 16 of 1996 Act seeking the termination of arbitration proceedings. The respondents correctly withdrew the suit for specific performance, for, the agreement to sell contained dissolution of dispute by an Arbitrator. The Arbitrator, as per the ratio decidendi culled out in **Olympus Superstructures Pvt. Ltd (supra)** has the power to grant discretionary relief. Paras 33, 34 and 36 of the judgment read thus:-

"33. We may point out that the Punjab High Court in Laxmi Narayan vs. Raghubir Singh [AIR 1956 Punjab 249] the Bombay High Court in Fertiliser Corporation of India vs. Chemical Construction Corporation [ILR 1974 Bombay 856/858 (DB)] and the Calcutta High Court in Keventer Agro Ltd. vs. Seegram Comp. Ltd. [Apo 498 of 1997 & Apo 449 of (401)] (dated 27.1.98) have taken the view that an arbitrator

can grant specific performance of a contract relating to immovable property under an award. No doubt, the Delhi High Court in M/s PNB Finance Limited vs. Shital Prasad Jain & Others [AIR 1991 Del. 13] has however held that the arbitrator cannot grant specific performance. The question arises as to which view is correct.

34. In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the partiess to agree - with a view to shorten litigation in regular courts - to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or section 48(5) (b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immoveable property.

36. Further, as pointed in the Calcutta case, merely because *there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms.Ruma Pal,J. observed:*

> *".....merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does nto means that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties chould be precluded from referring the dispute to arbitration."*

We agree with this reasoning. We hold on Point 3 that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) is not attracted. We overrule the view of the Delhi High Court. Point 3 is decided in favour of respondents."

It was the domain of the Arbitrator to see whether either of the parties would be entitled to liquidated damages or otherwise, for, interpretation of law would be domain of Arbitrator by interpreting the law.

There is no dispute with regard to the ratio decidendi culled out by the Hon'ble Supreme Court in **Harsha Constructions (supra).** It was a case where dispute had arose between the parties containing settlement of disputes only by an independent party or a managing director of the company and not by the Arbitrator and in those circumstances, the Court had the occasion while interpreting the agreement by holding that dispute fell within excepted matters. However, as noticed above, Clauses 11 and 12 of agreement cannot be read in isolation but had to be read in conjunction and that too subject matter of Arbitrator.

I refrain myself to comment further as it may not seriously prejudice the right of the parties in a pending arbitration application but fact of the matter is that order under challenge is perfect, legal and justified and cannot be said to have been passed without jurisdiction, rather Arbitrator abdicated in exceeding the jurisdiction by terminating the proceedings. It was defiance of order dated 30.01.2009 (Annexure P-2).

Accordingly, the revision petition stands dismissed.

Anything observed herein above shall not be construed as an expression of opinion in the pending matter.

(AMIT RAWAL)
JUDGE

April 27, 2018
savita

Whether Speaking/Reasoned Yes/No

Whether Reportable Yes/No