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

+ **O.M.P. (COMM) 105/2018 and IA No. 3080-3082/2018**

ASHWANI KHATTAR

..... Petitioner

Through: Mr Pradeep K. Bakshi and Ms
Prachi V. Sharma, Advocates.

versus

SH.VIJAY KUMAR BHATIA

..... Respondent

Through: Mr Rajesh Banati, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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05.03.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 14.12.2017 (hereafter 'the impugned award') passed by the Arbitral Tribunal comprising of a sole arbitrator (hereafter 'the Arbitral Tribunal').

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to a Collaboration Agreement dated 08.04.2008 (hereafter 'the Agreement'). By the impugned award, the claims made by the petitioner have been rejected by the Arbitral Tribunal as being barred by limitation.

3. The petitioner contends that the impugned award is perverse and contrary to law, inasmuch as, the Arbitral Tribunal has ignored that the respondent had filed a suit praying for cancellation of the Agreement, which was subsequently withdrawn. According to the petitioner, the Agreement continues to subsist and, therefore, the petitioner's claim in regard to the Agreement could not be rejected as barred by limitation.

4. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

4.1 The parties entered into the Agreement (Collaboration Agreement) dated 08.04.2008, whereby the petitioner (who was described as the 'Builder') agreed to demolish the structures existing on plot bearing nos. B-7, B-8 and B-9, Sector-1, Noida, U.P. 201301 after getting the building plan sanctioned and taking all necessary permissions from the concerned authorities. The petitioner agreed to develop the said plots by raising new constructions as per the sanctioned plans.

4.2 In the Agreement, plot nos. B-8 and B-9 were referred to as Property no.2 and the same were allocated to the respondent (who was described as the Owner). In other words, the respondent would be entitled to fully developed property bearing nos. B-8 and B-9; and Plot no. B-7, referred to as Property no.1, was allocated to the petitioner.

4.3 In terms of the Agreement, the petitioner also agreed to pay a total sum of ₹1,75,00,000/- (One Crore Seventy Five Lakhs only) as

refundable security deposit in addition to bearing of the costs and expenses for construction of the buildings on the said plots. Out of the aforesaid sum, ₹35 lakhs was paid at the time of execution of the Agreement and the balance amount of ₹1,40,00,000/- (Rupee One Crore Forty Lakhs) was to be paid by the petitioner by 15.05.2008 or within 15 days from the date of grant of sanction for construction of the buildings on the plots in question.

4.4 The refundable security deposit was to be repaid from the revenue generated from property no. 2 (built up properties B-8 and B-9, Sector-1, Noida).

4.5 In terms of the Agreement, it was acknowledged that the owner (respondent) had handed over the physical possession of property no.1. Further, the respondent also agreed to hand over possession of property no.2. It was further emphasized in the Agreement that the transfer of title of properties allocated to the Builder - Property no.1 - would be executed only after the Builder had handed over the property no.2 to the owner (respondent) complete in all respects.

4.6 Admittedly, the petitioner paid a sum of ₹35 lakhs to the respondent at the time of signing the Agreement and paid a further sum of ₹1 crore to the respondent in four tranches in the year 2008 (that is ₹15 lakhs on 16.03.2008; ₹20 lakhs on 08.04.2008; ₹50 lakhs on 31.05.2008; and ₹50 lakhs on 21.10.2008). However, admittedly, the petitioner failed to pay the balance amount of ₹40 lakhs as agreed under the Agreement

4.7 The petitioner claims that it obtained the necessary building sanctions and commenced the work of demolishing the existing structures on 09.07.2008.

4.8 The petitioner claims that he applied to the electricity department for obtaining an electricity connection for the purposes of carrying on construction in October, 2008 and discovered that there were huge arrears of over ₹1.2 crores outstanding towards electricity dues in respect of the properties in question. The petitioner claims that he had repeatedly requested the respondent to clear the arrears so that the petitioner could commence the construction but the respondent had failed to comply. This is stoutly disputed by the respondent. The respondent claims that there were no arrears of any dues and further the petitioner had not called upon the respondent to clear the same.

4.9 The petitioner filed a complaint with the Economic Offences Wing, Delhi Police, *inter alia*, on the aforesaid allegations and on or around an FIR (FIR No. 217/2011) was registered against the respondent under Section 420 IPC.

4.10 The respondent instituted a suit being Suit No. 216/2012 in the Court of Civil Judge, Gautam Budh Nagar on or around 10.02.2012. The petitioner, *inter alia*, prayed for a decree of declaration that the Agreement had come to an end on 09.07.2009 and further sought a decree of permanent injunction restraining defendant from interfering with possession of the plot bearing no. B-8 and B-9, Sector-1, Noida.

The petitioner claims that it became aware of the said suit in March, 2013 and immediately filed an application under Section 8 of the Act.

4.11 The petitioner claims that on 18.04.2013, he served a notice invoking the arbitration clause and, thereafter, in July of 2013, filed an application under Section 11 of the Act (Arbitration Petition No. 289/2013) before this Court. The respondent disputes the receipt of the notice dated 18.04.2013 and the Arbitral Tribunal has also held that the petitioner has failed to prove that the said notice was issued.

4.12 The petitioner filed an application under Section 9 of the Act (OMP No. 1020/2013) before this Court, *inter alia*, seeking an order restraining the respondent from creating any third party interest in respect of plot nos. B-8 and B-9, Sector-1, Noida, U.P. And, on 11.10.2013, this Court passed an *ad interim* order restraining the respondents from alienating the said properties. This order was subsequently confirmed on 17.02.2014.

4.13 On 17.02.2014, this Court, with the consent of the parties appointed Sh B.L. Garg, a Former District Judge as the Sole Arbitrator. In view of the above, the respondent also agreed to withdraw the suit (Suit No. 216/2012) filed in the Court of Civil Judge, Gautam Budh Nagar.

5. In the Statement of Claims filed before the Arbitral Tribunal, the petitioner claimed the following: (i) a sum of ₹1.35 crores towards security paid by the petitioner in terms of the Agreement along with compound interest at the rate of 24% per annum with effect from

21.10.2008 till the date of payment; (ii) ₹44,90,746/- being the amounts claimed to have spent towards demolition and getting the building plan prepared and sanctioned, brokerage and mobilization of resources for commencing the construction along with compound interest at the rate of 24% per annum with effect from 21.10.2008 till payment; (iii) sum of ₹2,00,00,000/- as damages on account of loss of profit, breach of contract on the part of the respondent by not clearing the dues of electricity till May, 2011 and for selling the property bearing no. B-7, Noida without seeking the consent of the petitioner along with interest at the rate of 24% per annum from the date of the petition till the payment; and (iv) ₹5,00,000/- towards the cost of litigation.

6. The respondent also filed counter claims which were restricted to ₹85 lakhs besides the cost of arbitration.

7. On the basis of the pleadings, the Arbitral Tribunal framed the following issues:-

- “1. Whether the claims of the claimant are barred by limitation? OPC.
2. Which of the parties has caused breach of the collaboration agreement dated 08.04.2008? Onus on parties.
3. Whether the claimant is entitled to damages of Rs.2 Crores as claimed in the claim petition? OPC.

4. Whether the claimant is entitled to claim the refund of Rs.1.35 crores in terms of agreement dated 08.04.2008? OPC.
5. Whether the claimant is entitled to claim Rs.44,90,746/- towards demolition, getting the building plans prepared etc. as claimed in the claim petition? OPC.
6. Whether the claimant is entitled to interest on the aforesaid claims? If so, at what rate and for what period?
7. Whether the Respondent is entitled to claim a sum of Rs.85 lac from the claimant as counter claim? OPR.
8. Relief.”

8. In respect of the first issue, the Arbitral Tribunal concluded that the petitioner's claims were barred by limitation. The Arbitral Tribunal held that the buildings were to be completed within a period of 12 months from the date of receipt of the sanctioned plans, which were admittedly received on 09.07.2008. The Arbitral Tribunal did not accept the petitioner's claims that it had served a legal notice dated 18.04.2013 and, therefore, considered the date of filing of the Statement of Claims as the relevant date for determining whether the claims were within limitation. Since, the Statement of Claims had been filed beyond the period of three years from the date on which the building was to be completed, that is 08.07.2009, the claims preferred by the petitioner were held to be barred by limitation.

9. The Arbitral Tribunal also decided the second issue in favour of the respondent and held that the petitioner had breached the Agreement.

10. The Arbitral Tribunal rejected the petitioner's claim for damages in view of the finding that the petitioner was guilty of breach. The Arbitral Tribunal also rejected the petitioner's claim for refund of the amount paid as the Arbitral Tribunal found that the said claim was barred by limitation and further that the petitioner was also responsible for breach of the Agreement.

11. The petitioner's claim for ₹44,90,746/- for costs was rejected for want of sufficient evidence.

12. Mr Bakshi, the learned counsel appearing for the petitioner submitted that the impugned award was patently illegal as the Arbitral Tribunal had erred in not taking into account that the respondent had filed a suit before the Civil Judge, Gautam Budh Nagar, Noida in 2012 seeking a declaration for termination of the Agreement. He stated that this clearly indicated that the respondent had also acknowledged that the Agreement was subsisting and, therefore, the Arbitral Tribunal had grossly erred in proceeding on the basis that it came to an end on 08.07.2009, that is, one year after the petitioner obtaining sanctions of the building plans (that is, one year from 09.07.2008). He further stated that since the said suit was withdrawn, the Agreement continues to subsist.

13. This Court finds the aforesaid contention to be unmerited. First

of all, the respondent had filed a suit, *inter alia*, claiming a decree declaring that the Agreement had come to an end on 09.07.2009 and that the respondent was the actual allottee on the plots in question. Plainly, the same cannot be construed as an acknowledgment on the part of the respondent that the Agreement was subsisting. The contention that the Agreement continues to subsist as the said suit was withdrawn is equally unmerited.

14. The petitioner claims that he became aware in October, 2008 that *there were huge arrears of ₹1.20 crores pending on account of electricity dues* which the petitioner had failed to clear. This, according to the petitioner, amounted to playing a fraud on the petitioner as he had entered into the Agreement on an express understanding that there are no outstanding Government dues.

15. It is apparent from the above that even according to the petitioner, the cause of action on which his claims are premised had arisen in October, 2009. However, admittedly, the petitioner took no steps for instituting any proceedings for recovery of the amounts claimed. The petitioner claims that it became aware of the suit filed by the respondent in March, 2013 and, thereafter, filed an application under Section 8 of the Act. Although, the petitioner claimed that it had served a notice dated 18.04.2013 invoking the arbitration clause, the same has not been accepted as the Arbitral Tribunal found that the petitioner had failed to prove the same. However, even if it is accepted that such a notice had been issued by the petitioner, his claims would still not be within the period of limitation; according to the petitioner,

the petitioner had discovered the alleged fraud in October, 2008 and, thus, the petitioner's claims were plainly barred by limitation.

16. In this view, this Court finds no reason to interfere with the impugned award in these proceedings.

17. Next, Mr Bakshi contended that the Arbitral Tribunal had grossly erred in not accepting the petitioner's claim that there were huge electricity dues in respect of the properties in question at the time when the parties entered into the Agreement. The Arbitral Tribunal had concluded that the petitioner had failed to prove the same. This is a question of fact and the findings of the Arbitral Tribunal on questions of fact, unless found to be perverse, are final.

18. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court has explained the above principle in the following manner:

“It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

19. In view of the Arbitral Tribunal's finding that the petitioner's claims are barred by limitation, it is not necessary for this Court to examine whether the Arbitral Tribunal's conclusion that the petitioner had failed to prove that there were arrears of electricity dues in any further detail.

20. The petition is, accordingly, dismissed. All the pending applications are also disposed of.

MARCH 05, 2018

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VIBHU BAKHRU, J

