

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

Reserved on: 18.09.2018
Pronounced on: 08.10.2018

+ **FAO (OS) (COMM) 151/2018 & C.M. APPL.29075-29077/2018**

M/S. PEARL DEVELOPERS PVT. LTD.Appellant
Through: Sh. Aruneshwar Gupta, Sh. Varun Dewan and
Sh. Divyanshu Shekhar, Advocates.

Versus

M/S. UNIVERSAL LAND AND FINANCE CO.Respondent
Through: Sh. Raman Kapur, Sr. Advocate with Sh.
Dhiraj Sachdeva and Sh. Karan Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. Complaining that a learned Single Judge overstepped the jurisdiction conferred by Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter “the Act”) the appellant (referred to as such, and also as “Pearl”), who succeeded before the Arbitral Tribunal, has sought appellate relief under Section 37.

2. The arbitral award dated 15.06.2016 (hereafter “the impugned award”) of the Arbitral Tribunal adjudicated disputes that arose between the parties in connection with the "Agreement for Development" dated 24.04.1987 (hereafter “the Agreement”) and supplementary agreements dated

23.02.1999, 04.11.2000 and 06.05.2002 respectively. The claimant (who is the respondent in these proceedings and is referred to also as “Universal”) had sought various monetary amounts by way of damages which were rejected on the ground that no financial loss was proved. The appellant’s counter claim too was rejected. Nevertheless, the Arbitral Tribunal awarded a sum of ₹5 crores to the appellant (hereafter “counter claimant”). The award of this ₹5 crores formed the subject matter of challenge to the arbitrators’ findings.

3. Universal, a registered partnership firm and had entered into the Agreement with the appellant for construction of 65 residential flats on a plot of land measuring 3200 sq. yards in village Deoli, Delhi. In terms of the Agreement, 35% of built up area was to be retained and owned by the claimant and the balance 65% was to be given to Pearl along with ownership rights. The construction was to be completed within twenty four months from the date of handing over the possession of the land. It was agreed that the cost of construction was to be borne by Pearl. After start of construction, the Municipal Corporation of Delhi (MCD) passed a demolition order. Universal approached the Appellate Tribunal, MCD and its appeal was allowed by order dated 23.10.1990. Pearl, in the meanwhile, fell short of funds. It, therefore, obtained a sanction for a loan of ₹75 lakhs from LIC Housing Finance Corporation Limited (hereafter “LIC”) and the parties entered into a tripartite agreement dated 18.03.1992 with the LIC. In terms of the said agreement, the land in question was mortgaged as security for due repayment of the sums due to LIC. Although LIC had sanctioned a loan of ₹75 lakhs, it disbursed an amount of only ₹49 lakhs. A supplementary

agreement dated 23.02.1999 was entered into between the parties by which twenty one months were granted to Pearl for completion of construction. In lieu of the extension of time, Universal's share was increased from original 35% to 37.5% and consequently, and Pearl's share was reduced from 65% to 62.5%. Further, it was agreed that if Pearl failed to complete the construction on time, Universal could recover the possession of the property along with damages. Pearl sought extension of time as the work was not completed within time. Therefore, the parties entered into another supplementary agreement dated 04.11.2000 extending the time for completion of the construction upto March 2001. All the terms and conditions as contained in the previous agreements remained the same except an additional amount of ₹1 lakh refundable security was to be paid by Pearl to Universal. Later, Universal entered into yet another agreement dated 06.05.2002 to pool adjoining land measuring 850 sq. yard. However, this agreement was not implemented due to unavailability of the said land.

4. Eventually, Universal by a legal notice dated 05.10.2004, terminated the Agreement on the ground of failure by Pearl to perform its obligations. Thereafter, Universal invoked the arbitration clause in the Agreement by notice dated 12.03.2007; the Arbitral Tribunal was constituted on 13.04.2010 by the Indian Council of Arbitration. Universal claimed ₹10 crores along with *pendente lite* interest at the rate of 24% p.a. Pearl resisted and counter claimed. The Arbitral Tribunal, after completing hearings, issued the impugned award. Universal's claim was rejected; it was, however, directed to pay a lump sum amount of ₹5 crores to Pearl. The Arbitral Tribunal also

awarded interest at the rate of 12% if the amount was not paid within 2 months.

5. Universal contended that Pearl was neither entitled to damages, without pleading and proving them, nor did it amend the statement of claims. It cited *Shamsu Suhara Beevi v G. Alex & Anr* (2004) 8 SCC 569 in support of its contention. It was also argued that the award of ₹5 crores to Pearl was without any basis. Furthermore, Universal complained that it had no opportunity to counter any claim for compensation and thus the impugned award also violates the fundamental policy of Indian law, which requires a fair opportunity to be granted to each party to meet the case set up against him. Pearl argued that ₹5 crores awarded by the Arbitral Tribunal was not in the nature of any compensation but in the nature of reimbursement. According to it, Section 21(5) of the Specific Relief Act barred only the grant of compensation and not reimbursement of expenditure incurred. Pearl, on the other hand relied on *Jai Narain Parasrampuriah (Dead) and Ors. v Pushpa Devi Saraf and Ors.* (2006) 7 SCC 756 and submitted that damages could be awarded in substitution of an order of specific performance on the principles of equity. Reliance was also placed on the decisions in *Urmila Devi and Ors. v. The Deity Mandir Shree Chamunda Devi through Temple Commissioner & Others* (2018) 2 SCC 284 where the Court had awarded compensation in lieu of specific performance for a contract, which had become impossible to perform.

6. The learned Single Judge, after considering the parties' submissions and analysing the award of the Arbitral Tribunal, held that:

“30. As is apparent from the paragraph no 43 of the impugned award (as set out hereinbefore) the Arbitral Tribunal has awarded a sum of ₹5 crores on two grounds. First, as reimbursement of the amount of ₹1,99,54,927/- paid by the respondent to settle the claim of LIC against the loan advanced by the said company to the respondent; and second, towards expenses incurred in raising semi- finished structures besides being dispossessed of the subject site. The impugned award indicates no reason whatsoever as to why respondent would be entitled to reimbursement of the amount of ₹1,99,54,927/- paid by the respondent to LIC. In terms of the contract between the parties, the expenses for raising construction on the site was the responsibility of the respondent and the respondent was granted loan of ₹75 lakhs by LIC Housing Finance Limited out of which only ₹49 lakhs had been disbursed. There is no reason indicated as to why the Arbitral Tribunal felt that this liability ought to be discharged by the petitioner particularly, when it was also of the view that the respondent had not utilized the said amount property.

31. It is also relevant to refer to paragraph 25 of the impugned award where the Arbitral Tribunal has observed as under:-

"25. It appears that either due to mismanagement or some other un-explicable reasons the Respondent did not utilize the loan amount properly and that was how that the LIC Housing Finance Corporation filed recovery suit no. 864 of 1994 against him and the Claimant (as he was also a party to the loan process) in Delhi High Court. A restraint order passed against both of them from creating any charge on the subject property but the fact remains that the construction of the flats was not completed even after availing of the loan for more than two years i.e. the stipulated time. It is besides the point that arranging of financial resources was the sole responsibility of the Respondent with which the Claimant had nothing to do."

32. In view of the above observations, this Court finds it difficult to reconcile the award of reimbursement of

₹1,99,54,927/- with the observations and the finding recorded by the Arbitral Tribunal.

33. The Arbitral Tribunal had awarded a consolidated sum of ₹5 crores in favour of the respondent. Thus, the balance amount of ₹3,00,45,073/- (i.e. ₹5,00,00,000/- less ₹1,99,54,927/-) has been awarded on account of expenses incurred by the respondent in raising semi finished structures. First of all, the impugned award discloses no basis on which this amount has been computed. The statement of defence and the counter claims filed by the respondent also do not refer to any such sum incurred in raising the building in question.

34. More importantly, the respondent had made no claim for expenses incurred in raising the building and there is nothing on record to establish the same. The petitioner also had no opportunity to contest any such claim. Thus the impugned award is fundamentally flawed. It is trite law that a party must have full opportunity to meet the case set up against it. This is one of the fundamental principles of natural justice. In this view, the impugned order falls foul of Section 34 (2) (iii) as well as Section 32(2)(b)(ii) of the Act inasmuch as the petitioner was not been the appropriate opportunity to present its case. Clearly, the impugned award falls foul of the fundamental policy of Indian Law.”

7. The impugned judgment also relied on *Shamsu Suhara Beevi* (supra) and the legislative history of Section 21(5); it further held that:

“36. In view of the express language of Section 21 (5) of the Specific Relief Act, 1963 no compensation could be awarded unless the same had been claimed in the plaint. Mr Singla, the learned counsel for the Respondent had contended that the said principle did not apply for in respect of award of reimbursement of expenses and therefore the impugned order cannot be faulted. The said contention is unmerited for several reasons. First of all, this Court is unable to accept that any distinction between compensation and reimbursement could be

made in the given facts and in the context of Section 21 (5) of the Specific Relief Act. It is not the respondent's case that the Agreement envisaged any reimbursement of expenditure incurred in construction of the buildings; admittedly, the Agreement was one of collaboration and the respondent was required to incur the necessary expenditure to construct the building. In this background, the award of any amount on account of expenditure allegedly incurred would plainly be in the nature of compensation."

8. The learned Single Judge also rejected the claim that compensation was by way of reimbursement and held as follows:

"41. Secondly, even if it is accepted - which this Court does not - that the nature of a claim for reimbursement is different than a claim of compensation, no such claim could have been awarded as no such claim was preferred. Plainly, for the respondent to succeed in a claim for reimbursement of expenditure it was necessary for the respondent to specifically plead and establish the same. In the absence of any pleadings for reimbursement of expenses, the petitioner had no opportunity to contest the same. This runs contrary to fundamental policy of Indian law which recognizes the principles of natural justice as its integral constituent.

42. Lastly, the petitioner would have to establish its claim by placing sufficient material on record. Plainly, the respondent had not produced any material to establish that it had incurred expenditure of the amount that has been awarded to it.

43. In view of the above, the impugned award cannot be sustained as it is plainly in conflict with the public policy of India. The impugned award is, accordingly, set aside."

9. Mr. Aruneshwar Gupta, learned counsel for the appellant submitted that this impugned judgment is in error. According to learned counsel, the

Arbitral Tribunal took into consideration the terms of contract, the attendant circumstances as well as the evidence and correctly concluded that the appellant was entitled to ₹5 crores for work in lieu of shares of 62% of the total built-up area which worked out to 16 flats measuring 32562 sq. ft – out of the total constructed flats with a total area of 52100 sq. ft. The market value of the 26 flats in 2016 at ₹3,000/sq. ft would have been ₹15.63 crores of which Pearl's share would have worked out to ₹9,76,87,500/-. Given these facts, the award of a much lower amount of ₹5 crores is reasonable compensation, was tenable and sound in the overall circumstances of the case. It was also highlighted that the appellant, i.e. Pearl had borne the cost of construction, the capital employed and all the risks. These aspects were considered by the Arbitral Tribunal in the awards of compensation.

10. It was argued that the Arbitral Tribunal in para 40 of its award rendered a clear finding that in the initial year in 1987 when Pearl had booked flats for sale, its share was at ₹ 300 per sq. ft which rose in four years to ₹600 per sq. ft and that it was subsequently in the range of ₹2000 per sq. ft. Learned counsel also referred to the evidence by way of affidavit dated 20.04.2013 which had stated that the market value of the flats as on 2013 was ₹2000 per sq. ft of constructed area. The pleadings and the fact that Pearl had invested ₹4 crores, besides obtaining the loan of ₹ 49 lakhs had also been made. Taking all these aspects and facts into consideration, learned counsel contended that the Arbitral Tribunal's awarding the compensation of ₹5 crores was just reasonable and should not have been set aside. Learned counsel argued that the work done was untenable and could not be treated as performed gratuitously and relied upon Sections 65 and 70 of the Indian

Contract Act. Learned counsel relied upon *Pilloo Dhunji Shaw Sidhwa v. Municipal Corporation of the City of Poona* AIR 1970 SC 1201.

11. Learned counsel also submitted that the mere circumstance that an award does not expressly record any reason in support of a factual finding by itself does not amount to a vitiating factor, justifying interference by the Court. Rather it is only when the Arbitral Tribunal proceeds on principles, which are plainly erroneous and are so borne out from the award, does the Court derive jurisdiction to set it aside or otherwise interfere with it. Learned counsel relied upon *Jivaji Bhai Ujamshi Sheth v. Chintaman Rao Balaji* 1964 (5) SCR 480; *Satna Stone and Lime Company Ltd. v. Union of India and Anr.* 2018 (14) SCC 785 as well as *Associate Builders Ltd. v. Delhi Development Authority* 2015 (3) SCC 49. He also submitted that the learned Single Judge could not have reappreciated the findings given the extremely circumscribed scope of jurisdiction, confirmed by Section 34. It is submitted that the approach of the learned Single Judge in concluding that lack of specific reasoning, rendered illegal the award of compensation at ₹5 crores was based on an erroneous understanding. Learned counsel highlighted that an after appreciation of relevant materials can direct award of a lumpsum amount and that the appreciation of facts and law in that regard would be final. It was lastly urged that the arbitral proceedings cannot be treated on the same footing as in the case of proceedings before the Court. Learned counsel relied upon a Division Bench ruling of this Court in *Kiri Associates (P) Ltd. v. Pramod Kumar Mittal and Anr.* [FAO(OS)(Comm) 87/2016, decided on 03.11.2017] and submitted that restitution can be granted inherently by the arbitrator regardless of Section 21(5) of the Specific Relief Act. Learned counsel lastly relied upon the 11th District Court of Appeals in *Karen Gray v.*

Donald Petronelli 2017 Ohio 2601 and submitted that it is neither expected, nor necessary that in all cases involving damages, in construction cases, should proof be necessary and specific reasoning called for.

12. Mr. Raman Kapur, learned senior counsel for Universal relied upon the learned Single Judge's reasoning and contended that Pearl was not entitled to compensation without amending its statement of claims. Relying on *Shamsu Suhara (supra)*, learned senior counsel highlighted that the award of ₹5 crores could not be justified in proceeding under Section 34 or even under Section 37 and that the duty on the arbitrator to adduce reasoning could never be vague. It was submitted that it is not the duty of the Courts to decipher to what went into the mind of the Arbitral Tribunal when it decides to grant or refuse damages or other monetary claims. If indeed there was material to justify award of ₹5 crores or any other amount, it was essential for the Tribunal to deal with it and render specific finding. Having held that the petitioner was in breach but the question of its claiming any restitution firstly did not arise. Secondly, if there were specific claims, the arbitrator ought to have dealt with the evidence. Singular lack of any reasoning in that regard was a patent error of law which the learned Single Judge correctly interdicted.

Analysis and Conclusions

13. It is plain on a narration of the facts, that the dispute, which was adjudicated in arbitration by the Arbitral Tribunal, was upon a claim by Universal. That claim was based on its allegation that Pearl had breached the agreement between the parties. Universal also sought a monetary award for compensation. The Arbitral Tribunal indisputably held that Universal could

establish breach on the part of Pearl. However, its claim to any amount as compensation was not accepted. The counter claims by Pearl were also rejected; however, the Arbitral Tribunal stated that nevertheless, Pearl was entitled to ₹5 crores. Therefore, the question is whether this amount has been correctly awarded given that the party itself was in breach; furthermore, there was no evidence on the record to substantiate that amount and more fundamentally, could any such award be given in the absence of reasoning. To this court, clearly such an award (directing compensation) was not tenable.

14. The learned Single Judge, we notice, has given two reasons, for holding that the award had to be interfered with. The first one is lack of reasons. Section 31 (3) clearly stipulates that “*The arbitral award shall state the reasons upon which it is based, unless*” and then goes on to provide two contingencies- one, where parties agree that reasons are not necessary, and the second, if the award is on agreed terms under Section 30. Neither contingency applied in this case, since the dispute was contested by the parties, on merits and neither of them agreed to an unreasoned award. Plainly, therefore, the award as an unreasoned decision, could not be sustained, as regards the direction to pay ₹ 5 crores is concerned. Though an Arbitral Tribunal may not give detailed reasons it must mention the basis for his conclusions. As held in *Government of NCT of Delhi v Ved Prakash Mehta* 2005 (Supp) Arb. LR 170 there must be “*a nexus of reasoning between the pleaded facts and the conclusion drawn by the arbitrator.*” Consequently, the impugned Award as regards ₹5 crores is not sustainable in law. The court is unpersuaded by the submission of the appellant that there is sufficient material to support the grant of compensation to the tune of ₹ 5

crores. It is not for the court to justify the award, or improve upon the conclusions by adducing reasons, when nothing on the face of the record suggests what persuaded the arbitrator to act as he did.

15. As regards the second contention that the award of ₹5 crores was justified because it was towards the work performed, the court is of the opinion that reasons for such a course of action was absolutely essential, in this case. Concededly, the Arbitral Tribunal found that the appellant was in breach of the contract between the parties; it was, however, not satisfied that the claimant suffered losses (or in any case, was not convinced by the evidence led before it) as to justify grant of damages. The appellant's counter claim on various items too was negative. Yet, it was held entitled to ₹5 crores. Surely, this amount should have been claimed in some manner – in the pleadings and also proved through evidence. Sadly, this was not the case. The Arbitral Tribunal, of its own accord, directed payment of ₹ 5 crores. The argument with respect to Section 21(5) of the Specific Relief Act, and the absence of the claimant's specific pleading on this ground, is justified. Apart from omission or failure to give reasons, the Arbitral Tribunal, in our opinion fatally erred in awarding the sum of ₹5 crores without pleading or proof- more importantly, without giving the respondent the opportunity to say that it was not liable to pay such amounts.

16. The court wishes to emphasize that the credibility of the arbitration process and the soundness of decisions rendered by arbitrators not only depends on their capability and acumen, but also the willingness that they display in following the discipline of the law. That dimension was regrettably scarified by the Arbitral Tribunal, which adopted some kind of *a priori* logic in granting the ₹5 crores to the appellant. For these reasons, the

court holds that the findings and conclusions of the learned Single Judge are sound and do not call for interference. The appeal is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

OCTOBER 8, 2018

