IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 02.05.2018

\+ **O.M.P. (COMM) 432/2016 & IA Nos.12248/2016 & 8497/2017**

UNIVERSAL LAND AND FINANCE COMPANY .....Petitioner

Versus

PEARL DEVELOPERS PVT. LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Raman Kapur, Sr. Advocate with
: Mr Dhiraj Sachdeva, Advocate.

For the Respondent : Mr A. K. Singla, Sr. Advocate with
: Mr Rahul, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

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 15.06.2016 (hereafter 'the impugned award') passed by the Arbitral Tribunal. The impugned award was rendered by the Arbitral Tribunal in the context of the disputes that had arisen between the parties in connection with the "Agreement for Development" dated 24.04.1987 (hereafter 'the Agreement') and other supplementary agreements dated 23.02.1999, 04.11.2000 and 06.05.2002 respectively.

2. By the impugned award, the claims made by the petitioner, which were in the nature of damages were rejected on the ground that the petitioner had failed to establish any financial loss. The counter claim preferred by the respondent was also rejected. However, the Arbitral Tribunal has awarded a sum of ₹5 crores in favour of the respondent. The petitioner has restricted the challenge to the impugned award to the extent that it awards a sum of ₹5 crores in favour of the respondent.

3. The petitioner has assailed the impugned award essentially on two fronts. First, it is contended that since the Arbitral Tribunal had found the respondent to be in breach of the contract between the parties, the award of a sum of ₹5 crores in its favour is wholly unsustainable. Second, the respondent had not raised any monetary counter claims but had sought relief in the nature of specific performance of the Agreement. It is contended that grant of any compensation where none was sought by the respondent is contrary to Section 21 (5) of the Specific Relief Act, 1963.

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

5. The petitioner is a registered partnership firm and had entered into the Agreement with the respondent for construction of 65 residential flats on a plot of land measuring 3200 sq. yards in village Deoli, Delhi. As per the Agreement, 35% of built up area was to be retained and owned by the petitioner and the balance 65% was to be

given to respondent along with ownership right. 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 cost of construction was to be borne by the respondent.

6. After the construction had commenced on the land, the Municipal Corporation of Delhi (MCD) passed a demolition order. The petitioner successfully challenged the demolition order before the Appellate Tribunal, MCD and the appeal was decided in favour of the petitioner by order dated 23.10.1990.

7. In the meantime, the respondent fell short of funds. Accordingly, it 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.

8. A supplementary agreement dated 23.02.1999 was entered into between the parties whereby twenty one months were granted to the respondent for completion of the construction. However in lieu of the extension of time, the share of petitioner was increased from original 35% to 37.5% and consequently, and the share of the respondent was reduced from 65% to 62.5%. It was further agreed that if respondent failed to complete the construction on time,

petitioner would be at liberty to recover the possession of the property along with damages.

9. The respondent again requested for the 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 the respondent to the petitioner.

10. Subsequently, petitioner entered into another agreement dated 06.05.2002 to pool adjoining land measuring 850 sq. yard. However, this agreement was not implemented due to non availability of the said land.

11. The petitioner, by a legal notice dated 05.10.2004, terminated the Agreement on the ground of failure of the respondent to perform the same. Thereafter, the petitioner invoked the arbitration clause in the Agreement by notice dated 12.03.2007.

12. The Arbitral Tribunal was constituted on 13.04.2010 by the Indian Council of Arbitration. The petitioner filed a Statement of Claims praying for a sum of ₹10 crores along with *pendente lite* interest at the rate of 24% p.a. The respondent opposed the claim and also raised a counter claim.

13. The arbitral proceedings culminated in passing of the impugned award. The claim of petitioner was rejected and he was directed to pay a lump sum amount of ₹5 crores. The Arbitral Tribunal also awarded interest at the rate of 12% if the amount was not paid within 2 month.

14. Aggrieved by the impugned award, the petitioner has filed the present petition.

Submissions

15. The learned counsel appearing for the petitioner submitted that the Arbitral Tribunal grossly erred in awarding any compensation as no alternative relief of any compensation had been sought. He relied upon on the provisions of Section 21(5) of the Specific Relief Act, 1963 and on the strength of the said provision contended that the respondent was not entitled to any compensation without amending the statement of claims. He relied on the decision of the Supreme Court in ***Shamsu Suhara Beevi v. G. Alex And Another***: ***(2004) 8 SCC 569*** in support of his contention. He also contended that the award of ₹5 crores in favour of the respondent was without any basis. Lastly, he also urged that the petitioner 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.

16. Mr A. K. Singla, the learned counsel appearing for the

respondent countered the aforesaid submissions made on behalf of the petitioner. He submitted that the sum of ₹5 crores awarded by the Arbitral Tribunal was not in the nature of any compensation but in the nature of reimbursement. He submitted that Section 21 (5) of the Specific Relief Act only bars the grant of compensation and not reimbursement of expenditure incurred. He contended that the decision of the Supreme Court in ***Shamsu Suhara Beevi v. G. Alex And Another*** (*supra*) was not applicable as in that said case, the Supreme Court had held that a compensation under Section 21 could not be awarded in absence of a prayer made to the said effect; but, the court had not made any observation restricting the power of a court to grant reimbursement of expenses and costs incurred.

17. Mr Singla, also relied on the decision in the case of ***Jai Narain Parasrampuria (dead) and others v. Pushpa Devi Saraf and Others***: ***(2006) 7 SCC 756***. On the strength of the said decision, he submitted that damages could be awarded in substitution of an order of specific performance on the principles of equity. He also relied on the decisions in the case of ***Urmila Devi and Others v. Deity, Mandir Shree Chamunda Devi through Temple Commissioner and Others***: ***(2018) 2 SCC 284*** wherein the Court had awarded compensation in lieu of specific performance for a contract, which had become impossible to perform. He also referred to the decision in the case of ***Jagdish Singh v. Natthu Singh***: ***(1992) 1 SCC 647***.

Reasons and Conclusions:

18. At the outset, it is relevant to refer to the respective cases set up by the parties before the Arbitral Tribunal. It was the petitioner's case that in its statement of claims, the petitioner had averred that respondent could not complete the construction within the specified period and had requested the petitioner to bear with him. Consequently, the parties had entered into a supplementary agreement dated 23.02.1999 whereby an extension of twenty one months was granted to the respondent to perform the contract. In terms of the said agreement, the share of the petitioner in the constructed buildings was increased to 37.5% instead of 35% as agreed under the earlier agreement. The petitioner claimed that in terms of the said agreement, the petitioner was also entitled to resume the plot and recover damages for the past defaults if the respondent failed to complete the works within the stipulated period. The petitioner claimed that despite further extensions, the respondent failed to complete the construction and breached the terms of the contract resulting in loss to the petitioner. The petitioner quantified the said loss at ₹10 crores. The petitioner also claimed interest at the rate of 24% per annum. Out of the aforesaid amount of ₹10 crores, ₹7,30,00,000/- was claimed as damages on account of avoidable inconvenience, hardship computed on the basis of average rent for the completed flats. In addition, the petitioner also claimed a sum of ₹2,70,00,000/- on account of loss of business and goodwill.

19. The respondent filed its Statement of Defence raising two preliminary objections; one with regard to locus of the petitioner to

file the claims and the other regarding the authority of the authorized signatory to represent the firm. With respect to the merits of the claims made by the petitioner, the respondent claimed that it had constructed twenty six flats admeasuring approximately 52100 sq. feet in six different blocks. The respondent contended that as per the contract, the petitioner was entitled to eight flats and the same had been offered to the petitioner; however, the petitioner did not accept the same without any justification. Next, it was submitted that petitioner had defaulted in arranging additional 850 sq. yards of land in Khasra No. 672/1 located adjacent to the site and the same constituted a breach of the obligations undertaken by the petitioner. The respondent sought to justify the delay in performance of the contract on account of the orders passed by the MCD restraining any further construction on the property.

20. The respondent also preferred counter claim and, *inter alia*, prayed as under:-

> "(i) Direct respondent Nos.1 & 2 i.e. M/s Universal Land & Finance Co. (Collaborator) and M/s Indian Airlines Co-operative Group Housing Society Ltd, (Owner) to take over possession of 37.5% built up area duly constructed by claimant in accordance with specifications given in Agreement of Development and to execute Transfer Deed of ownership rights in land underneath of share equivalent to 62.5% of built up area, in consideration of claimants spending money and development and construction of built up area falling to the share of owners/ collaborators, in favour of claimant, individual or association of

persons, Society or body corporate a stated in Agreements of Development executed between the parties.

(ii) Directing respondents jointly or individually to obtain NOC/certificate from concerned authorities certifying that any further buildings are permissible to be constructed/raised on plot measuring 3200 Sq. Yds. failing in Khasra No.136 of abadi of Village Deoli, Mehrauli, New Delhi apart from built up structure already situate and made by claimant, thereby enabling settlement of all issues/disputes between the parties under such agreements."

21. In view of the disputes, the Arbitral Tribunal framed the following issues :-

> "Issue No. 1:- Which party i.e. the Claimant or the Respondent has defaulted to carry out its obligations under the contract dated 24.04.1987 and supplementary agreements dated 23.02.1999 & 04.11.2000?
>
> Issue No.2:- Whether the agreement dated 06.05.2002 was acted upon by the parties?
>
> Issue No.3:- What relief can be granted to the Claimant or the Respondent?"

22. It is apparent from the above that the first and foremost question to be determined by the Arbitral Tribunal was as to which party was in breach of the contract between the parties. In this regard, the Arbitral Tribunal held that the respondent had presented a reasonable explanation for not executing the works from November, 1988 – when further construction was restrained by MCD – till 23.10.1990, being the date on which Appellate Tribunal of MCD had

allowed the appeal and de-sealed the premises in question. However, the Arbitral Tribunal found that there was no impediment in construction of the building after 23.10.1990. The Arbitral Tribunal also observed that the further construction could not be completed thereafter as the respondent fell short of finances and had to seek a loan of ₹75 lakhs from LIC. Out of the aforesaid sum only ₹49 lakhs was released to the respondent. The Arbitral Tribunal also observed that due to mismanagement or some inexplicable reason the said loan amount was not utilized properly. The Arbitral Tribunal also came to a finding that no construction was carried out after 31.12.1992 and the respondent's approach towards the entire agreement was *"very casual if not cavalier"*.

23. In view of the above findings, the first issue was decided in favour of the petitioner and against the respondent and the Arbitral Tribunal held the respondent to be guilty of breach of the contract.

24. With regard to the damages, the Arbitral Tribunal found that the petitioner had been unable to establish any financial loss due to non-completion of the construction and the testimony of the respondent indicated that the market price of the subject site as well as semi finished structures had shown a gradual increase. In view of the above, the petitioner's claim for damages was rejected.

25. Insofar as the counter claim is concerned, the Arbitral Tribunal, *inter alia*, observed as under:-

> "The Tribunal thus feels that since the Respondent

> himself is guilty of breaching the agreement by failing to raise the construction in the given time (even on extension of reasonably long time) and is out of possession of the subject site he is not entitled for the prayed relief on either of the two counts.*"*

Accordingly, the counter claims were rejected.

26. Although the Arbitral Tribunal rejected the counter claims, nonetheless, it proceeded to award a sum of ₹5 crores to the respondent. The only reasons indicated by the Arbitral Tribunal in support of its decision to award the said sum are contained in para 43 of the impugned award which reads as under:-

> *"*43. In so far as the Counter Claim is concerned since the Respondent is out of possession so neither of the claimed relief can be granted to him. However, the lesser relief of adequate monetary compensation requires to be given to him; firstly towards the reimbursement of the settlement with LIC Housing Finance Corporation where he paid Rs.1,99,54,927/- (One Crore Ninety Nine Lakhs Fifty Four Thousand Nine Hundred & Twenty Seven only) and secondly towards the expenses incurred in raising the semi finished structures besides being dispossessed of the subject site in some dubious manner. We accordingly award him a lump sum amount of Rs.5 crore (Five Crores) to be paid by the Claimant M/s. Universal Land & Finance Company; this amount includes the earlier figure of Rs.1,99,54,927/- (One Crore Ninety Nine Lakhs Fifty Four Thousand Nine Hundred & Twenty Seven only) and shall be paid within 2 months from the receipt of a copy of the award by the Claimant failing which he shall also be liable to pay interest @ 12% per annum from the date of the award till the clearance of the dues.*"*

27. The Arbitral Tribunal also awarded future interest at the rate of 12% per annum on the failure of the petitioner to pay the same within two months of the date of the award.

28. This Court finds it difficult to understand the basis on which the Arbitral Tribunal has entered an award in favour of the respondent after having concluded that the respondent was in breach of the contract between the parties. The finding of the Arbitral Tribunal in this regard is unambiguous as is apparent from the following extract of the impugned order:-

> "28. All the aforesaid circumstances show that right from the beginning the Respondent's approach towards the entire agreement was very casual if not cavalier; to put in simple words there is no just explaination as to why there was no further construction after 31st December 1992.
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> xxxx xxxx xxxx xxxx
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> 32. To be precise, examined from any angle the Tribunal cannot avoid the conclusion that it was the Respondent who was guilty of breach of the Contract.
>
> The issue is decided accordingly against the Respondent."

29. Concededly, the relief claimed by the respondent in the counter claims was in the nature of specific performance of the contract between the parties. Clearly, this could not be awarded since the Arbitral Tribunal had found the respondent to be in breach of the contract.

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.

35. There is also much merit in the contention advanced on behalf of the petitioner that the impugned award is contrary under Section 21(5) of the Specific Relief Act, 1963. In ***Shamsu Suhara Beevi v. G. Alex And Another*** (*supra*) the Supreme Court had observed that sub section (4) and (5) of Section 21 of the Specific Relief Act had resolved the diversion of opinion in the High Courts in respect of the jurisdiction of the Court to award compensation in lieu of or in addition to the relief of specific performance. The Law Commission in its 9th Law Commission Report dated 19.07.1958 had referred to the diversion of opinions with regard to award of compensation in a suit for specific performance. The Lahore High Court had taken a view in ***The Arya Pradeshak Pritinidhi Sabha v. Lahori Mal***: ***AIR 1924 Lahore 713*** that Court has the power to award damages in substitution of or in addition to specific performance even though the plaintiff has not specifically claimed the same. The Madras High Court had taken a contrary view in ***Somasundaram Chettiar v. Chidambaram Chettiar***: ***AIR 1951 Mad 282*** and held that the Court could not award damages in absence of a specific claim for damages. This was resolved by introducing subsection (5) in section 21 of the Act, which reads as under:

> "(5) No compensation shall be awarded under this section unless the plaintiff has claimed such

> compensation in his plaint.
>
> Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation."

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.

37. It is also relevant to understand the rationale for introducing section 21(5) of the Specific Relief Act, 1963. In ***The Arya Pradeshak Pritinidhi Sabha v. Lahori Mal*** (*supra*), the court had awarded damages on the principle that Code of Civil Procedure

conferred ample discretion upon the court in the matter of granting appropriate relief. In ***Somasundaram Chettiar v. Chidambaram Chettiar*** (*supra*), the Madras High Court did not concur with the aforesaid view, *inter alia*, for the reason, which the court articulated in the following words:

> "When such an allegation is made by the plaintiff, the defendant would have a fair opportunity of convincing the court that there are no facts and circumstances which would render it just to award damages in addition to specific performance. Then again, the defendant ought to be put on notice that a particular amount is being claimed by the plaintiff for damages on this ground and it must be open to the defendant to adduce evidence that the damages claimed are excessive or that the plaintiff has not sustained any damages."

38. Thus, the rationale of not allowing a claim for damages without a specific pleadings in this regard rests on the principle that the plaintiff must establish the same and defendant must have an opportunity to counter it. The divergence of opinion was resolved by enacting sub section (5) of section 21 of the Specific Relief Act, which proscribes award of damages in lieu of or in addition to a relief of specific performance but at the same time permits the plaintiff to amend the plaint to seek such relief at any stage.

39. As noticed above, the principal reason why the courts had held that damages, which were not prayed for, could not be granted rests on fundamental principle that the defendant ought to have a fair opportunity to counter such claim. This principle does not admit any

exception on the ground that the claim made is in the nature of reimbursement and not compensation.

40. The decision in the case of ***MSK Projects India (JV) Limited v. State of Rajasthan and Another***: ***(2011) 10 SCC 573*** – which was relied upon by Mr Singla in support of his contention – is also of little assistance to the respondent. In that case, the Court observed that *"In Common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expended. Similarly, "compensation" means anything given to make the equivalent."* However, this observation was not made in the context of Section 21 (5) of the Act. More importantly, this decision is not an authority for the proposition that reimbursement can be awarded to a plaintiff without the plaintiff making any claim for the same.

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.

44. All pending applications are also disposed of. Parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 02, 2018
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