

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO-CARB No.9 of 2019

Reserved on : July 12, 2019

Date of decision: August 27, 2019

Dharam Bhushan Jain

...Appellant

Versus

Graviss Hotels and Resorts Ltd.

...Respondent

**CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA,
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU**

Present: Mr.A.K.Bansal, Advocate
for the appellant.

Mr.Ankit Midha, Advocate and
Mr.Gagan Chhabra, Advocate
for the respondents.

HARINDER SINGH SIDHU, J.

1. In this appeal the appellant has challenged an order dated 13.10.2018 passed by Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram dismissing the application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for setting aside the arbitral award dated 04.03.2016 passed by the Sole Arbitrator.
2. A dispute between the appellant and the respondent arising out of agreement to sell dated 18.03.2008 was referred to the Sole Arbitrator who made an award dated 04.03.2016.
3. Respondent No.1-Gravis Hotels and Resorts Limited

(hereinafter referred to as 'the claimant') filed the claim before the Arbitrator stating that it was a Company engaged in the business of setting up hotels. It intended to set up a hotel in Gurgaon. It approached various persons/entities for outright purchase of parcels of land as per its requirement. Its representatives Raman Mehra (CEO), Vikram Seth, late Kishore Bakshi had met Satyawarat Sangwan Real Estate agent. He introduced them to Devi Singh Rawat Real Estate agent. The latter claimed that he was aware of three separate parcels of land available for sale which would meet the requirement of the claimant.

4. Mahesh Dhamia husband of Anita Devi, D.B.Jain (appellant) and Antram Jharia along with Rajesh, Devi Singh Rawat and Satyawarat Sangwan met the representatives of the claimant on 27.02.2008 with a proposal to sell the land belonging to them. It was represented by them that the appellant, Anita Devi and Antram Jharia owned three different pieces of land which were adjacent and contiguous to each other. While negotiating the purchase of the land with the three owners the claimant wanted to conduct a joint survey of the land to ascertain its boundaries. However, Devi Singh Rawat acting on behalf of the land owners insisted that the survey should be conducted after the agreement to sell was entered into. It was projected that a survey would send a message that the land had already attracted a potential buyer. This would deter other interested purchasers from approaching the sellers and if the claimant did not eventually purchase the land it would result in loss of opportunity to sell the land to other parties.

5. The appellant was owner of 04 Kanal 14 Marlas of land situated within the revenue estate of village Nagli Umarpur, Tehsil and District Gurgaon. He agreed to sell the aforesaid land to the claimant for a sum of Rs.7 crores. The claimant paid sum of Rs.5 lacs vide cheque dated 26.02.2008 i.e., even before the execution of the formal agreement to sell. The agreement to sell was executed on 18.03.2008. The relevant clauses thereof are as under:

***“Clause 2:** That the buyer has this day paid a total amount of Rs.59,50,000/- (Rupees fifty nine lakhs fifty thousand only) vide DD No.12544 dated 15.3.2008 drawn on AXIS Bank, towards part consideration, the receipt of which the Seller hereby admits and acknowledges. The Seller also hereby acknowledges receipt of Rs.5,00,000/- (Rupees Five lakhs only) vide cheque no.6245 drawn on Axis Bank dated 26.2.2008.*

***Clause 3:** The time of performance of the agreement shall be 34 days from the date of this Agreement (Stipulated time of performance).*

***Clause 6:** That the seller shall allow the buyer to conduct an official survey jointly by the patwari and the architect of the buyer of the said land to ascertain the exact boundaries thereof, and its clear demarcation and furnish such survey plans to the buyer/Advocates of the Buyer.*

***Clause 8:** That the buyer shall pay to the seller the balance amount of Rs.6,35,50,000/- on performance of conditions stipulated in clauses 4, 5 and 7 within the stipulated time of performance at the time of the registration of sale deed.*

***Clause 10:** That on receipt of the balance consideration within the stipulated period, the seller shall execute the sale deed for the said land in favour of the buyer or its nominee as the buyer may require and shall simultaneously hand over peaceful*

vacant possession of the land and all the original title deeds, receipts, etc. pertaining to the said land to the buyer.

Clause 12: *That in case the buyer commits a breach of this agreement i.e. falls to make the payment of the balance consideration to the seller within 15 days of the fulfillment of the conditions precedent by the seller as stipulated in clauses 4, 5 and 7 of this agreement, this agreement shall automatically stand cancelled and the earnest money paid herewith stand forfeited and the buyer shall have no claim monetary or otherwise of whatsoever nature.*

Clause 14: *If the seller defaults or neglects to fulfill his part of the understanding contained herein i.e. if the seller falls to fulfill the conditions precedent by the seller as stipulated in clause 4, 5 and 7 of this agreement within the stipulated time of performance, the buyer shall, in addition to the other rights and remedies available in law, seek specific performance of this agreement. The buyer shall also be at liberty to terminate this agreement after giving 15 days notice in writing in this behalf to the seller, whereupon, the seller shall be liable to refund to the buyer, the entire amounts paid by the buyer to the seller in terms of clause 2 above along with all other costs incurred by the buyer in relation to the proposed purchase of the said land from the seller, together with interest thereon at the rate of 15% per annum from the date hereof until date of payment. The buyer shall have a charge on the said land to secure such repayment of the amounts recoverable under this Agreement in case of non fulfillment of the conditions stipulated in this agreement”*

6. The land subject of the agreement along with its boundaries was described in the First Schedule to the Agreement as under:

“FIRST SCHEDULE

All that piece of land bearing Khewat No.68 Khatauni No.101, Mustteel No.1, Killa No.14(0-3), Mustteel No.1 Killa No.17/1(2-16), Mustteel No.1 Killa No.18/1(1-15) admeasuring 4 Kanal 14 Marla situated at village Nangal Umarpur, Gurgaon

North: Road for Sector 56

East: Kachha Rasta

South: Land owned by Antram etc.

West: Land owned by Mrs.Anita Devi”

7. A sum of Rs.64,50,000/- was paid to the appellant by the claimant as part consideration. One cheque of Rs. 5 lakh was not correctly signed and was returned.
8. Similar agreements to sell dated 18.03.2008 were entered into by the claimant with the other two land owners namely Anita Devi and Antram Jharia.
9. The claimant got a joint survey of the properties conducted on 02.04.2008. This survey revealed that a plot of land measuring approximately 12,000 ft. belonging to HUDA fell between the properties belonging to the appellant (D.B.Jain) and Anita Devi. Thus the survey revealed that plots of Anita Devi and D.B.Jain were not adjacent and contiguous to each other. As the claimant was interested in a single piece of land for setting up of a hotel the claimant served a notice terminating the agreement alleging that there was misrepresentation on the part of the appellant.
10. Through the claim petition it sought recovery of the amount of

Rs.59,60,000/- paid to the appellant along with interest.

11. The case of the appellant was that there was no misrepresentation on his part. The appellant had made available to the claimant all records relating to the title, location of the land including the master plan. The claimant satisfied itself about the title of the appellant. As per the agreement dated 18.03.2008 the sale-deed was to be executed within 34 days i.e. upto 21.04.2008. The claimant having failed to do so the agreement automatically stood terminated and earnest money forfeited. It was his case that he had nothing to do with the other land owners i.e., Anita Devi and Antram Jharya. The agreement with him was in no way dependent on the agreement that the claimant had entered into with Anita Devi and Antram Jharya. He denied that he had anything to do with Devi Singh Rawat or that he was his broker. Devi Singh Rawat had come to the appellant with the representative of the claimant and requested him to sign the agreement. The appellant did not agree to certain conditions. He got them deleted. The sale consideration was enhanced to Rs.7 crores. The appellant filed a counter-claim seeking damages etc.

12. The learned Arbitrator framed the following questions as arising for consideration:

- “1. Who has committed breach of the agreement;*
- 2. Whether there is any misrepresentation by the respondent, if so, its effect;*
- 3. Whether the claimant is entitled to the amount claimed;*
- 4. Whether earnest money has rightly been forfeited;*
- 5. Whether respondent is entitled to any amount; and*
- 6. Relief.”*

13. The Ld. Arbitrator first considered the question as to whether the claimant had been able to establish that it required the land for setting up of a hotel. In this regard the Arbitrator noticed that though there was no specific mention in the agreement to sell that the land was required for setting up a hotel, the witness of the claimant Vikram Seth in his statement had clearly indicated that the land was required for setting up of a hotel and three contiguous lots were intended to be purchased. There was no suggestion to him on behalf of the appellant that the claimant did not want to set up a hotel. Further apart from the appellant, the claimant had entered into an agreement with two other persons. It was a company engaged in this business. The necessary inference must be that the land was required for setting up of a hotel at Gurgaon.

14. While describing the boundaries of the land in the agreement to sell it was mentioned that to the west of the land of the appellant was the land of Anita Devi. But the survey revealed that between the lands of Anita Devi and the appellant there was a piece of land belonging to Haryana Urban Development Authority. Thus, the lands were not contiguous. He thereby concluded that the appellant had given incorrect description of the boundaries in the agreement to sell.

15. The Arbitrator also did not agree with the contention of the appellant that there were no previous negotiations between him and the claimant. In this regard reference was made to paragraph 2 of the agreement to sell where it was mentioned that the appellant had accepted

Rs.59,50,000/- as part consideration and that a cheque of Rs.5 lakhs dated 26.2.2008 had been received. The agreement thus acknowledged a fact which had already taken place which clearly belied the claim of the appellant that there was no prior negotiation between him and the claimant.

16. The learned Arbitrator concluded that the claimant wanted to purchase contiguous pieces of land for setting up a hotel. It was represented to it that the land of the appellant, and Anita Devi were contiguous. The schedule to the agreement showed the property of Anita Devi as being on the west of the property of the appellant. The survey revealed that these properties were not contiguous but there was land of HUDA in between. The claimant realised that there had been misrepresentation about the contiguous nature of the land. He immediately terminated the contract. Accordingly, it was concluded that the appellant had committed breach of the agreement as there was misrepresentation on his part and the claimant was within its right to terminate the agreement.

17. Award was passed against the appellants for a sum of Rs.59,50,000/-.The claimant was also held to be entitled to interest @ 7.5% per annum from the date of appointment of the Arbitral Tribunal till final payment. Rs.4 lakhs were awarded as costs. The counter claim of the appellant was dismissed.

18. In the petition under Section 34 of the Act filed by the appellant against the arbitral award it was contended on his behalf that the award was contrary to the provisions of law and in conflict with public policy and being patently illegal was liable to be set aside.

19. The learned Court rejected the contentions and dismissed the petition.

20. The Court held that the agreement dated 18.03.2008 had to be performed within 34 days. The appellant (seller) had permitted the claimant (buyer) to conduct a survey of the land to ascertain the exact boundaries. All the records pertaining to the title, location plan and copy of the master plan had already been given to the claimant as per the stipulation in the agreement itself. It was an admitted fact that the agreement had been got drafted by the claimant. On the basis of evidence before it the Arbitral Tribunal concluded that the appellant was aware of the existence of the other two land owners and that the claimant was negotiating with them. There were prior negotiations between the parties before the execution of the agreement which was clear from the fact that advance payments had been made to the appellant before the execution of the agreement. The survey conducted after the execution of the agreement revealed that the boundaries as described in the agreement were not correct. Thereafter the claimant terminated the contract by sending a notice. From this it could in no way be concluded that the Arbitrator had decided the dispute contrary to the terms and conditions of the agreement or that the award was against public policy or vitiated on any ground. The petition was dismissed.

21. Ld. Counsel for the appellant has mainly stressed that the agreement to sell as drafted by the claimant had a clause 13 which was as under:

“The seller is aware that the buyer is negotiating with (i)

Anita Devi the owner of the adjoining consolidated piece and parcel of land bearing khewat no.34/32, Khatauni No.41, Mustteel No.29, Killa No.22/2 (3-8) Mustteel No.36, Killa No.3(1-16), Kita 2 admeasuring 0.65 acres situate at village Tigra, District Gurgaon and (ii) Mr.Satpal and Mr. Dhaniram the owners of the adjoining land bearing Khewat No. 67/67, Khatauni No. 100 Musteel No. 1 Killa No. 17/2 (4-0) Musteel No 1 Killa No. 18/2 (4-1), Kita 2 taal admeasuring approximately 8 kanals 1 marlas (1 acre) situated at village Nagli Umarpur, Gurgaon, District Gurgaon for the purchase of the same. The seller agrees that in the event the proposed purchase of such adjoining pieces of land fails to consummate, then in that event, this agreement shall stand terminated and the seller shall refund all the amounts received from the buyer till then.”

22. The appellant deleted this condition before signing the agreement. Incorporation of this clause in the agreement would have meant that the appellant acknowledged his being aware of the claimant negotiating for the purchase of two other parcels of land which were adjoining to the land of the appellant and further agreeing that if the proposed purchase of such adjoining pieces of land did not materialize then this agreement would stand terminated and he would refund all the amounts received from the buyer till then. The same result cannot ensue once this clause was deleted.

23. There is no force in this contention. The fact of the deletion of this clause has been noticed by the Arbitral Tribunal. Despite that, on the basis of the evidence before it, the Arbitral Tribunal concluded that the appellant was aware of the existence of the other two land owners and that

the claimant was negotiating with them. There were prior negotiations between the parties before the execution of the agreement which was clear from the fact that advance payments had been made to the appellant before the execution of the agreement. The Schedule to the agreement showed the property of Anita Devi as being on the west of the property of the appellant. The survey revealed that these properties were not contiguous but there was land of HUDA in between. The claimant realised that there had been misrepresentation about the contiguous nature of the land. He immediately terminated the contract. Accordingly, it was concluded that the appellant had committed breach of the agreement as there was misrepresentation on his part and the claimant was within its right to terminate the agreement.

24. Clause 13 appears to have been incorporated in the agreement *ex abundanti cautela*. Once the Arbitral Tribunal came to the conclusion that there was misrepresentation and mis-description regarding the property and the contract had proceeded on an apparent mistake of fact on both sides, even in the absence of Clause 13 the contract was to fail.

25. Accordingly there is no merit in the appeal and the same is dismissed.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

August 27, 2019
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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No