IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

FAO No. 4621 of 2017 (O&M)
Date of Decision: March 14, 2019

Vinod Kumar Makkar ...... **Appellant**

VERSUS

Jagdish Pahuja and another ..... **Respondents**

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Johan Kumar, Advocate
for the appellant.

Mr. Yash Dev Kaushik, Advocate
for the respondents-caveator.

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JAISHREE THAKUR, J.(Oral)

1. That the present FAO has been filed seeking to challenge the order dated 23.12.2016 passed by the learned Additional District Judge, Faridabad whereby objection filed by the respondent-Jagdish Pahuja under Section 34 of the Arbitration and Conciliation Act 1996 was accepted and the award passed by the Arbitrator-respondent No.2 dated 14.11.2013 was set aside.

2. Briefly the facts of the case are that petitioner-Vinod Kumar Makkar and respondent-Jagdish Pahuja were running a partnership firm

under the name and style of M/s Sai Electro-platers w.e.f. 01.04.2001. The petitioner deposited a sum of ₹85,000/- in cash with the respondent-Jagdish Pahuja as initial capital amount and as per the terms and conditions of the partnership deed, both the parties were entitled to have 50% share each in the profit and loss of business as well as assets. It was agreed that both the parties shall invest capital as agreed upon and it shall be credited to their respective account and they will be charged interest @12% per annum on such capital as decided from time to time. Apart from the above, both the parties were also entitled to get salary @ ₹2000/- per month from the firm besides the profit and loss income. It is also claimed machinery, vehicles and other items were purchased out of the joint funds of the partnership firm. Since the partnership firm was working out of rented premises and in order to expand business, an Industrial plot was applied for from HUDA in Faridabad. HUDA allotted a plot and a conveyance deed was executed in the name of the partnership firm i.e. M/s Sai Electroplater under signatures of both parties on 20.11.2003. It is the case of the petitioner, that in April 2005 the respondent became dishonest and started misusing the property of partnership firm for his personal use in illegal manner. The respondent requested the petitioner to contribute ₹60,000/- for paying the electricity bill of ₹1,20,000/- for restoring the power disconnected in July 2005 which he did not pay and he requested to release his share of profit, which was not released. That the petitioner stated that he was called in police station on 7.11.2005 and his signatures were taken on blank paper and nothing was paid to him and claimed ₹60 lacs on account of profit etc. from the firm i.e.

his share. Whereas the respondent claimed that a 'Panchayati Faisla' took place between the parties to dissolve the partnership and a full and final settlement amount of ₹1,20,000/- was paid to the petitioner-Vinod Kumar.

3. There being an arbitration clause, the matter went up to High Court and the High Court appointed Sh. M.K. Bansal as Arbitrator vide order dated 1.5.2009. After the appointment of Arbitrator, the petitioner-claimant filed his claim, claiming for dissolution of firm and a sum of ₹60 lacs on account of profit etc. due to him.

4. The respondent-Jagdish Pahuja filed his reply to the claim petition claiming that he was already carrying on the business prior to 1.4.2001 under the name of M/s Sai Electroplaters as Proprietor and the petitioner herein was taken in as a partner in 2001 and petitioner only invested ₹55,000/-. After the dispute arose between the parties, a panchayat was held and a 'panchayati faisla' was arrived at on 07.11.2005 under which the petitioner was paid ₹1,20,000/- for final settlement. All the assets and liabilities were taken over by the respondent and further submitted that the petitioner-claimant become dishonest, did not honour the panchayati faisla.

5. The Arbitrator framed the following issues to cover the dispute between the parties:-

1) Whether the firm has been dissolved w.e.f. 07.11.2005?OPR

2) Whether accounts of the firm have been settled up to 07.11.2005?OPR

3) Whether respondent is an accounting party? OPC

4) Whether plot no.462 Sector 58, Faridabad has been given to respondent, if so, its effect?OPR

5) Whether the writing dated 7.11.2005 was obtained from petitioner by fraud, undue influence?OPC

After examining the evidence led by the parties, the Arbitrator decided issues No.1, 2, 4 & 5 in favour of the petitioner-Vinod Kumar and against the respondent-Jagdish Pahuja. With regard to issue No.3, the Arbitrator admitted that all the assets and liabilities of the firm are with respondent, so he is an accounting party.

6. Vide award dated 14.11.2013, the Arbitrator decided that petitioner/claimant is entitled to ½ share in the property i.e. plot No.462, Sector 58, Faridabad. It was held that if assets and liabilities of the firm were with the respondent, he must have paid the amount from the income of the firm. It was held that no cogent evidence was adduced to show that bank loan was paid by respondent after taking loan from anybody. The Arbitrator also awarded that as per balance sheet for the year 2004-2005, the capital investment of the petitioner-Vinod Kumar Makkar was specified at ₹93,435/- and he is entitled to the said amount along with interest @12% per annum from 01.04.2005 till payment is made. With the above findings, the Arbitrator decided to dissolve the firm with effect from 14.11.2013 and the respondent became owner of assets and liabilities of the firm and the amount found due remained a charge on the assets of the firm till payment.

7. Aggrieved against the award, the respondent-Jagdish Pahuja filed application under Section 34 of the Arbitration and Conciliation Act, 1996 seeking setting aside of the award dated 14.11.2013 passed by the Arbitrator. He stated that the firm was dissolved vide Panchayati Faisla

dated 07.11.2005 and as per the same he paid ₹1,20,000/- to the petitioner-Vinod Kumar Makkar as full and final settlement and all the assets and liabilities were taken over by him. He stated that the Arbitrator has passed the award on presumptions and assumptions and further the oral and documentary evidence led by him was not properly appreciated and prayed for setting aside of the award of the Arbitrator. The petitioner filed his reply to the application and submitted that the award passed by the Arbitrator is a well-reasoned and detailed award. He further submitted that the respondent-Jagdish Pahuja failed to prove the Panchayati faisla and the same was considered to be a false document by the Arbitrator and prayed that the application may be dismissed.

8. The Additional District Judge after examining the pleadings and evidence led by the parties vide order dated 23.12.2016 held the findings of the arbitrator that the compromise between the parties was not properly and legally drafted by any legal expert is no ground to discard the same as a sham paper, as observed by the arbitrator to be not tenable. He held that the arbitrator ignored the outstanding liabilities of the partnership firm of about ₹6,15,000/- towards electricity and towards State Bank of Hyderabad, which is an apparent mistake made by the arbitrator while passing the award. In view of the said outstanding liabilities, he has held that the 'panchayati faisla' does not suffer from any illegality, and arrived at between the parties in presence of witnesses from both the sides, voluntarily, with their own will and consent, without any force, pressure or coercion. While holding that after receiving ₹1,20,000/- the petitioner-

Vinod Kumar Makkar has no right to re-open the issue, the Additional District Judge, Faridabad allowed the objection petition and set aside the award passed by the arbitrator and directed the petitioner-Vinod Kumar Makkar to obey and honour the terms and conditions of the compromise amicably arrived with the respondent-Jagdish Pahuja.

9. The present appeal has been filed challenging the aforesaid order dated 23.12.2016 passed by the Additional District Judge, Faridabad.

10. I have heard the counsel for the parties and with their assistance have perused the pleadings and the case law cited. I have also perused the judgment of the Additional District Judge, which is palpably without jurisdiction**.** The provisions of Section 34 of the Act provides for setting aside of an arbitral award under Section 34 of the Act, which is re-produced as under:-

> *"34 Application for setting aside arbitral award. — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
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> *(2) An arbitral award may be set aside by the Court only if—*
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> *(a) the party making the application furnishes proof that—*
>
> *(i) a party was under some incapacity, or*
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> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not given proper*

notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India."

A bare perusal of the Section reproduced above would show that the provisions are stringent wherein it is specified that an arbitral award may be set aside by the Court only if: (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; and or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or if the Court finds that:- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India.

11. It is further well settled by the Supreme Court that the court, while considering the correctness of the award, does not examine it as an appellate Court, and while exercising the said power, the Court cannot re-appreciate all the materials on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case the award in question could have been made. The power and the jurisdiction of the Court to set aside an award are specifically laid down in Section 34 of the 1996 Act. Reference may be made to judgments rendered in **Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629 : Associate Builders v. Delhi Development Authority (SC)(2015) 3 SCC**

49. Navoyadaya Mass Entertainment Ltd. Vs JM Combines (2015) 9 SCC 698 where the ratio and the circumstances have been culled out as to when an award of the arbitrator can be interfered with.

12. In the present case the arbitrator clearly discarded the Panchayati Faisla after having appreciated the evidence on the record. The Panchayati Faisla available on the record as Ex-D11 was found to be a suspicious document. It was further held that *"from the evidence it comes out that Panchayati Faisla was according to respondent scribed in the factory but evidence whether any accounts were gone into, or how the sum of ₹1,20,000/- due to the claimant has been worked out is not clear. This Panchayati Faisla, when seen with naked eye shows that line A to A1 that paperwork will be completed by 20.11.2005 were inserted later on. This Panchayati Faisla has the word PTO written at the bottom, but there is nothing at the back. The scribe says that accounts were to be detailed at the back but respondent does not state so. This Panchayati Faisla does not inspire confidence about the fact that ₹1,20,000/- were paid in cash. Had it been so, receipt would have been obtained separately or there would have been writing in the hand of claimant about having received ₹1,20,000/- in cash."*

13. The arbitrator also noted that the dissolution deed was got prepared on 07.11.2005, which was not signed by the claimant and the same did not mention about Panchayati Faisla. The dissolution deed also did not mention that an amount of ₹1,20,000/- was paid to the petitioner-complainant on account of his share. The dissolution deed only bears the

signatures of the respondent-Jagdish Pahuja. Apart from taking note of the dissolution deed, the arbitrator took note that the plot was purchased during partnership from the funds of the partnership firm on 21.11.2003. In the Panchayati Faisla it was clearly mentioned that half share in the plot was to be transferred in the name of the respondent and his nominee which half share was valued at ₹1,60,000/-. The arbitrator concluded that no person would agree to receive only ₹1,20,000/- on dissolution of a firm which owned immovable property of a value of ₹3,20,000/- beside other machinaries and vehicles. It was also noted that there was no cogent evidence available on the record to adduce that the respondent had paid the bank loan towards the plot in question after taking any other loan and concluded that if all assets and liabilities of the firm were throughout with the respondent, he would have paid the amount from the income of the firm.

14. The Additional District Judge while allowing the objections has erred in acting as an Appellate Authority and has re-appreciated the evidence on the record. The court has to act within the strict parameters as set out in Section 34 of the Arbitration and Conciliation Act, 1996 and cannot act as a Court of appeal and re-appreciate the evidence. The Additional District Judge has erred in this regard, as would be evident in the discussion in para 11 of the impugned order. The Court cannot substitute the view of the arbitrator, even if some evidence could have been read in a different fashion. Until and unless the court finds that some of the grounds mentioned in sub clause (2)(a) of section 34 of the Arbitration and Conciliation Act, 1996 have been violated, the court cannot interfere in the

award of the arbitrator.

15. In the instant case, the Additional District Judge while allowing the objections has acted as a court of appeal which is not permissible. A reading of the award would reflect that the arbitrator has appreciated the evidence on the record and found that the 'Panchayati Faisla' as relied upon by the respondent herein is a suspicious document, and therefore, it was not within the jurisdiction of the Additional District Judge to have re-appreciated the evidence and come to a contrary decision.

16. Therefore, as the order dated 23.12.2016 by the Additional District Judge is based upon re-appreciation of evidence, the same is set aside.

17. Accordingly, the appeal stands allowed.

(JAISHREE THAKUR)
JUDGE

March 14, 2019
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Whether speaking/reasoned	Yes
Whether reportable	Yes/No