



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

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Judgment reserved on: November 01, 2023
Judgment pronounced on: December 20, 2023

+ **FAO(OS) (COMM) 68/2017**

M/S ROCKS BUILDCON PVT LTD & ANR. Appellants

Through: Mr. Tanmaya Mehta, Adv.

versus

RAM KISHAN SINGH Respondent

**Through: Mr. Kartik Nayar and Mr. Rishab
Kumar, Advs.**

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE SHALINDER KAUR

JUDGMENT

SHALINDER KAUR, J

1. The present Appeal under Section 37(1)(C) of the **Arbitration and Conciliation Act, 1996** (*hereinafter referred to as the "Act, 1996"*) has been filed by the appellants impugning an **order dated 09.01.2017** (*hereinafter referred to as "impugned order"*) passed by the learned Single Judge of this Court in OMP (COMM) No. 486/2016 titled "**Ram Kishan Singh v. Rocks Buildcon Pvt Ltd. & Anr**". The respondent herein had filed an application under section 34 of the Act, 1996 impugning an **arbitral award dated 23.04.2015** (*hereinafter referred to as "impugned Award"*) delivered by an Arbitral Tribunal comprising of a Sole Arbitrator. The



impugned Award was pronounced in the context of a dispute that arose between the parties in connection with an agreement dated 04.09.2011 (*hereinafter referred to as 'brokerage agreement'*) executed between the parties hereto in respect of a brokerage fee. The learned Single Judge had set aside the Arbitral Award holding that it is opposed to fundamental policy of Indian Law inasmuch as it does not abide by the mandate of Section 28(3) of the Act, 1996.

Factual background:

2. In order to appreciate the contention of the rival parties, certain facts deserve to be noted. The appellants had engaged the services of the respondent herein for the purpose of identifying an owner of land in Goa and for assistance in completion of the transaction of taking over of a company and / or sale of the land in Goa for the purpose of setting up a Hotel / Resort. For the aforesaid purpose, respondent informed that he would connect the appellants with the Overseas Sellers/Companies (*hereinafter as "Sellers"*), which have land as one of its assets at Varca Beach in Goa and that he would also assist the appellants in due diligence of the seller company and its assets.

3. In pursuance of this, appellants vide letter dated 15.06.2011 requested respondent to arrange a meeting with seller and for procuring relevant information / documents and also to conduct due diligence for this property. A letter dated 17.06.2011 was issued by the appellants giving the offer of Rs. 111.25 crores for purchase of the land on successful & satisfactory completion of due diligence. Another letter dated 17.06.2011 was sent to



respondent settling with him that all inclusive payment of Rs. 13.75 crores to be made to the respondent after completion of due diligence. Subsequent thereto, an advance payment of Rs. 50 lacs was made to respondent.

4. Thereafter, the brokerage agreement dated 04.09.2011 was entered into between the appellants and respondent revising and reducing the brokerage fee to Rs. 11.55 crores with mutual discussion, subject to deduction of applicable taxes exclusive of service tax as applicable, which will be in addition thereto commission and brokerage, for providing assistance in completion of a transaction which includes the brokerage after adjusting the advance of Rs. 50 Lakhs already paid to respondent. The brokerage agreement contained all the terms and conditions of engaging the services of the respondent, this agreement also contained an arbitration clause.

5. On 04.10.2011, a share purchase agreement was executed between the appellants and the seller, being the shareholders of the company namely M/s W. Investering India Pvt. Ltd. (WIPL) for transferring the entire share holding of M/s WIPL held by them in favour of the appellants herein for a consideration of Rs. 112.23 crores. The appellants are said to have deposited 25% of the purchase consideration of Rs. 112.23 crores through its nominee in an ESCROW account. It appears that certain dispute arose between the seller and the appellants herein and the seller defaulted in performance of its part of the contract under the share purchase agreement despite the extended time having lapsed on 14.12.2011. It also appears that there was some problem in title of the land. Accordingly, on 13.12.2011, the respondent



offered to the appellants to walk away from the transaction. On 23.12.2011, the appellants are stated to have terminated the share purchase agreement, the shares and the amount deposited in ESCROW account was released amicably. On 27.12.2011, the appellants wrote to the respondent informing him that his services are no longer required and sought refund of Rs. 50 lacs. The letter dated 27.12.2011 was refuted by the respondent. It appears that subsequently on 15.02.2012, the same seller transferred the entire share held by the company WIPL in favour of the appellants. MOU dated 13.04.2013 was executed between the appellants and the same seller whereby the appellants agreed to purchase the same property on “as is where is” basis. On 26.04.2012, the sale deed was executed between the appellants and the seller. However, the respondent by his letter dated 29.05.2012 issued notice to the appellants invoking the arbitration clause. It appears that thereafter, there were certain discussions between the appellants and the respondent by which the appellants were lured and issued 4 Demand Drafts aggregating to sum of Rs. 5,56,74,400/- in the name of the respondent’s nominee EMPICI Electronics Pvt. Ltd. On 09.11.2012, the appellants also deducted and deposited TDS in the sum of Rs. 67,41,600/- on the sum of Rs. 6 crores (approx.) comprising of Rs. 50 lacs already paid to the respondent and for Rs. 5,56,74,400/- being Demand Drafts amount. However, it was being said that the appellants had mistakenly deposited the said TDS in the sum of Rs. 67,41,600/-. It is a matter of record that the bank drafts remained unused for a period of 3 months and had lapsed.

6. The dispute arose between the parties on the account of the agreed terms of the brokerage agreement. The respondent was aggrieved that



despite his efforts to conclude the transaction between the Seller and the Appellants, the brokerage fee was not entirely paid to the respondent by the appellants. On the contrary, appellants contended that respondent did not make any effort to conclude the transaction and did not in every respect complete its obligation under the agreed terms of brokerage agreement.

Arbitration proceedings

7. In the aforesaid context, the arbitral proceedings were initiated and the respondent filed a petition under section 11 of the Act, 1996 before this Court. Vide order dated 13.01.2014, this court referred the disputes arising between the parties for adjudication and decision through the process of arbitration. Before the Arbitral Tribunal, the respondent filed a statement of claim inter alia claiming a sum of Rs. 11.05 crores with interest thereon at 24% per annum w.e.f. 15.02.2012 to 10.12.2013 amounting to Rs. 4,82,52,000/-. The respondent also claimed payment of interest during the period of arbitration proceedings and future interest @ 24% per annum with costs of the arbitration proceedings, as balance consideration out of the total agreed consideration of Rs. 11.55 crores under the brokerage agreement for brokerage services rendered by the respondent. On the other hand, appellants claimed that the respondent did not do anything after the agreement dated 04.09.2011 for taking forward the transaction. The appellants through its own sources made efforts, which revealed that there were serious defects in the title of the property, which were not informed by the respondent to them.



8. In the above circumstances, the appellants denied their liability whatsoever to the respondent and infact demanded refund of Rs. 50 lacs with damages, reimbursement of TDS and interest by way of filing a counter claim, claiming a total sum of Rs. 9,14,41,000/- from the respondent. On the above pleas, the learned Arbitrator framed six issues and after recording the evidence of the parties passed the final award dated 23.04.2015, inter alia dismissing all the claims raised by the respondent and also dismissing the counter claim of the appellants while holding that advance sum of Rs. 50 Lakhs which had been paid to the respondent by the appellants as advance fee under the brokerage agreement, shall be retained by the respondent for the part of the services provided by the respondent.

Proceedings under section 34 of the Act, 1996

9. Before the learned Single Judge, similar pleas were raised by the parties as before the learned Arbitrator. The learned Single Judge interpreted brokerage agreement and concluded that *“There were two alternatives spelt out in the agreement in this regard. One was the completion of the taking over by the company of the land. The other was registration of the sale deed in respect of the land in question in favour of the respondent. Admittedly, both steps were in fact completed. The fact that they happened after fresh negotiations between the parties does not take away the entitlement of the petitioner in terms of the agreement”*. The learned single Judge did not accept the award and held that it does not abide by the mandate of section 28(3) of the Act and under section 28(3) of the Act, there was an obligation on the learned Arbitrator to take into account



“the terms of the contract and trade usages applicable to the transaction”. Accordingly, the impugned award was set aside and the respondent was granted liberty to again seek a fresh arbitration in accordance with law.

Submissions by the Parties

10. Learned Counsel for appellants submits that as per Clause 1 and 2 of the Brokerage Agreement provided for either forfeiture or refund of the advance sum of Rs. 50 Lakhs paid by the appellants to the respondent based on culmination or non-culmination of the transaction between the appellants and the seller and in happening of the former, respondent would be entitled to recover the said balance sum of Rs. 11.05 Crores from the appellants. As per the agreement *“towards commission for providing assistance in completion of the transaction, which includes brokerage”*, commission was payable only upon the respondent providing all services required for closing & completion of the transaction.

11. Learned counsel submits that admittedly, the respondent in his cross-examination stated that he did not provide any services to appellants after the execution of the brokerage agreement and there was a culmination of relationship between the appellants and the sellers and that his part of the obligation under the brokerage agreement was over with the execution of brokerage agreement.

12. However, even part of the services i.e. conducting due diligence, which was within scope of services agreed to be rendered vide the brokerage agreement was not met with and respondent breached the said agreement and failed to perform his obligations *‘arising in completion of transaction’*.



13. Learned counsel further submits that it was impermissible for the learned Single Judge under Section 34 of the Act, 1996 to give own interpretation to the terms of the brokerage agreement interfering with the factual findings arrived by the learned Sole Arbitrator based on evidence recorded before it and adjudicating purely on merit. Findings of fact by the learned Arbitrator attains finality since the Arbitrator is the final arbiter of the resolution of disputes between the parties and the award is not open to challenge merely on the ground that the Arbitrator reached a wrong conclusion as held in **Steel Authority of India v. Gupta Brothers Steel Tubes Limited** [JT 2009 (12) SC 135, para 32].

14. Further submitted that the learned Single Judge adopted the other view, out of the two available to the Arbitrator, is beyond the jurisdiction under Section 34 of the Act, 1996, placing reliance on **Rashtriya Ispat Nigam Limited v. M/s Dewan Chand Ram Saran** [2012(5) SCC 306, paras 43-45].

15. Learned counsel also submitted that the Court under Section 34 of the Act, 1996 does not reassess or re-appreciate the evidence and it is not possible to re-examine the facts to find out whether a different view could have been reached at by the Arbitrator, placing reliance on **Associate Builders v. DDA** [2015(5) SCC 49, para 33]

16. Conversely, learned counsel for respondent submits that the agreement stipulated two events, first, when the transaction stood concluded, the balance amount of Rs. 11.05 Crores was to be paid by the appellants to the respondent. Second, when the transaction does not conclude between the



appellants and the seller, on account of appellants, the respondent shall forfeit Rs. 50 Lakhs paid as advance. Third, provided that the said advance amount was only liable to be returned to the appellants by the respondent in event the transaction does not conclude on account of the Seller.

17. Learned counsel submits that learned Sole Arbitrator passed the impugned award by creating a fourth scenario which the express terms of the agreement did not stipulate and therefore, acted beyond jurisdiction by acting as a conciliator and not as an arbitrator by granting the nature of relief on some misplaced principle of equity, which is not based on the terms of the agreement. Such a finding is contrary to the provisions of Section 28(2) and Section 28(3) of the Act, 1996. Thus, learned Arbitrator travelled beyond the terms of the agreement, giving own interpretation to the terms of the agreement.

18. Further submits that learned Single Judge on applying the observation of the Hon'ble Supreme Court in **Abdulla Ahmed v. Animendra Kissen** [AIR 1950 SC 15] rightly held that the learned Arbitrator deviated from the express terms of the contract between the parties and vide the impugned award, which had essentially re-written the contract by fastening obligations which were not spelt out in the terms of the agreement.

19. Learned counsel also submits that the scope of interference by this court is limited under Section 37 of the Act, 1996 inasmuch as the proceedings cannot delve into merits of the case unless it is shown that the impugned order is patently erroneous on facts or in law and manifestly perverse relying on **Mahanagar Telephone Nigam Ltd V. Finolex Cables**



Ltd [FAO(OS) 227/2017], **Pramod Kumar v. Religare Securities Ltd.** [2018 (168) DRJ 538 (DB)]. Therefore, the impugned judgement dated 09.01.2017 requires no interference by this Hon'ble Court and the learned Single Judge has rightly set aside the impugned award dated 23.04.2015 since it does not abide by the mandate under Section 28(3) of the Act, 1996.

Reasons and conclusions

20. As far as Section 34 of the Act, 1996 is concerned, the law is well settled that the Court does not sit in appeal over the arbitral award and may interfere on merits on limited ground provided under section 34(2)(b)(ii) i.e. if the award is against the public policy of India. Unless the arbitral award is patently unreasonable, the Court cannot interfere with the arbitral award. The legal position is well settled that an arbitral award cannot alter the terms and conditions of valid contract consciously executed between the parties. In case, an arbitrator travels beyond the contract, he would be acting without jurisdiction as he has no power apart from what the parties had given him under the contract.

21. It is no longer res nova that interference under section 37 cannot travel beyond the restriction laid down under section 34 of the Act, 1996. In other words, the Court cannot undertake an independent assessment of the merits of the award and must only ascertain that it has not exceeded the scope of the provisions.

22. In the present case, learned Arbitrator passed the impugned award by noting that respondent had not assisted the appellants in taking forward the transaction after 04.09.2011. Learned Arbitrator further observed that



amongst other impediments faced by the appellants, litigation pending in the Courts in respect of the land in question was another hurdle in concluding the land deal between appellants and the seller. The appellants had to re-negotiate with the seller and to part with heavy amount for bringing in settlement of the litigation pending in courts in respect of the land. The learned Arbitrator attributed the failure on the part of the respondent in bringing the transaction to its completion. The aforesaid factors dissuaded the learned Arbitrator from passing the award with respect to balance amount of brokerage claimed by the respondent. However, the learned Arbitrator directed a sum of Rs. 50 lacs already paid to respondent as advance amount of brokerage not to be refunded to the appellants. For this, the learned arbitrator was of the view that respondent had facilitated the appellants in introducing the seller to the appellants and thereby took initial steps for furtherance of the deal between appellants & the seller. The other pleas raised by the respondent and the counter-claims of the appellants did not find favour with the learned arbitrator and were dismissed.

23. It is material to note, when the arbitral tribunal passes an award against the very terms of the contract between the parties and the law, it is held to be a good ground for setting aside the arbitral award. Thus, the contention of the parties have to be examined considering the scope of section 37 of the Act, 1996. It is an admitted fact between the parties that the seller, whose shares and the land were eventually purchased by the appellants was identified and introduced by the respondent herein. As early as on 15.06.2011 and 17.06.2011, the appellants were acknowledging the efforts made by the respondent for identifying the seller and the due



diligence done. Thereafter, on 28.07.2011, the appellants acknowledged the efforts made by the respondent and agreed to pay sum of Rs. 13.75 crores to the respondent as brokerage / commission charges. On the same day, the appellants offered to the respondent to reduce the amount of the brokerage / commission and also paid a sum of Rs. 50 lacs to him.

24. Perusal of the arbitral award particularly, the discussion therein pertaining to the clauses of the agreement dated 14.09.2011 shows that the learned arbitrator after referring to the relevant clauses has placed most emphasis on the point that respondent during his cross-examination on a specific question put to him replied that he had not taken any further steps for completion of the transaction after 04.09.2011 as he was waiting for execution of the transaction. The learned arbitrator therefore came to the conclusion that it is established from the evidence on record and he took a specific stand that his responsibility as envisaged under the agreement dated 04.09.2011 came to an end with the execution of the same and he had no further obligation to complete the transaction. The learned arbitrator held that after reading clause 1 & 2 of the agreement, along with other recitals therein establishes that firstly, the respondent was to provide assistance in completion of the transaction and secondly, the sale purchase completion was the condition precedent to entitle the respondent to claim any amount but the respondent offered no help and assistance in taking forward the transaction. Learned arbitrator further held that the appellants herein had to face litigation pending in the Court in respect of the land in question and had to cancel the earlier agreement and enter into fresh agreement with the seller and thereafter was compelled to take various actions where no help and



assistance was provided by the respondent, which ultimately resulted in completion of the transaction. Learned arbitrator also observed that the appellants gave another chance to the respondent to settle the things with “Churchill family” and in order to maintain cordiality and to avoid unnecessary litigation, got prepared four demand drafts but did not hand over the same to the respondent and waited for completion of the obligation by the respondent, which the respondent again failed to perform.

25. Whereas learned Single Judge found merit in argument raised on behalf of the counsel for respondent herein that there is no mention in the entire agreement of any obligation of the respondent herein with regard to any litigation involving the land in question. The learned Single Judge observed that in arriving the above conclusion, the learned Arbitrator appears to have overlooked the fact that the recitals of the agreement acknowledged that due diligence had already been undertaken by the appellants prior to 04.09.2011. In fact the agreement acknowledges not only the above assistance rendered by the respondent herein to the appellants herein but also the fact that the respondent had located companies which did have lands in Goa and the names of which were set out in the recitals to the agreement. Therefore, as far as the respondent is concerned, he had already discharged the above two obligations spelt out in the agreement.

26. In the aforesaid factual background of the case, the relevant clauses of the brokerage agreement executed between the appellants and the respondent need to be examined, which read as follows:

“AND WHEREAS the Second Party has also been assisting the First Party in the due diligence of the Seller Company and its assets;



AND WHEREAS, the First Party had agreed with the Second Party that the First Party would pay a sum of Rs.11.55 crores [Rupees Eleven Crores Fifty Lacs Only] subject to deduction of applicable taxes exclusive of service tax as applicable which will be in addition to thereto, towards the commission and brokerage for providing the assistance in completion of the transaction i.e. either taking over of the 'Company' by the purchaser or their nominees;

OR

sale of the aforesaid plot of land from the Owners/Seller in favour of the Purchaser;

AND WHEREAS, the First Party vide its letter dated 17th June 2011 followed by letter dated 28th July, 2011, had acknowledged and confirmed the efforts made by the Second Party and has made the on-account part payment of a sum of Rs.50,00,000/- [Rupees fifty lakhs only] vide Demand Draft No.001880 dated 28.07.2011 drawn on IDBI Bank Limited.

NOW THIS DEED WITNESSETH AS UNDER:

1. That the First Party hereby acknowledges, confirms and promises to pay a total sum of Rs.11.55 Crores [Rupees Eleven Crores and Fifty Lacs Only] Subject to deduction of applicable taxes, exclusive of service tax, as applicable which will be in addition thereto, to the Second Party towards commission for providing assistance in completion of the transaction, which includes the brokerage. This amount less the amount of Rs.50,00,000/- [Rupees Fifty Lacs Only] already paid, shall be paid by the First Party to the Second Party simultaneously at the time of completion of the aforesaid transaction between the Purchaser and the Sellers.

2. That in case the transaction is not completed due to the reasons attributable to the First Party, then in that event, the Second Party has a right to forfeit the aforesaid sum of Rs.50,00,000.00 [Rupees fifty lacs only] paid by the First Party to the Second Party. However, in case the transaction is not completed on account of the reasons attributable to the Sellers, then in that event, the Second Party shall refund the aforesaid amount of Rs.50,00,000/- [Rupees fifty lacs only] to the First Party within 07 (seven) days of such request.....”

27. Proper reading of the aforesaid clauses would show that the scope of the respondent's obligation was for providing assistance in completion of the transaction i.e. either taking over of the company or sale of the land. The commission and brokerage for providing the assistance was payable on



the completion of the transaction. It is also provided that if there was a default on the part of the respondent in completion of its part of the obligation then the appellants were entitled to refund of Rs. 50 lacs already paid and if there was a default on the part of the appellants in completion of its obligation then the respondent was entitled to forfeit the sum of Rs. 50 lacs. Accordingly, the learned Single Judge has rightly held that the learned Arbitral Tribunal failed to take note of the law laid down by the Hon'ble Supreme Court in the case of **Abdulla Ahmed (supra)**. Admittedly, the present case would not fall under second example set out in the said judgment. Now, the only question is whether first example applies or will it be third example. For applicability of the first example in the agreement dated 04.09.2011, the parties ought to have imposed obligation on the respondent herein to conclude the binding contract for the purchase and sale between the appellants and the seller. However, that is not the obligation casted herein. In the present case, all that was required by the respondent was to assist the appellants in completion of the transaction and ofcourse, the commission and brokerage was payable to the respondent only if the transaction is completed between the appellants and the seller.

28. Keeping in mind the conduct of the parties even as late as in November, 2012 read with brokerage agreement, this Court finds that the Learned Arbitral Tribunal misconstrued the terms of the brokerage agreement between the parties leading to perverse finding. We find that there is no infirmity in the jurisdiction exercised by the learned Single Judge under Section 34 of the Act in interfering with the arbitral award.



29. For the aforementioned reasons, the impugned award has been rightly set aside by the Learned Single Judge giving liberty to the respondent to again seek a fresh arbitration in accordance with law.

30. Consequently, in view of the detailed discussion herein above, we find no merit in the present Appeal. The same is accordingly dismissed along with pending applications, if any.

SHALINDER KAUR, J.

SURESH KUMAR KAIT, J.

DECEMBER 20, 2023/ss