

(1991) 04 BOM CK 0023

In the Bombay High Court

Case No : Arbitration Petition No. 111 of 1990 in Award Lodging No. 80 of 1990
in Arbitration Suit No. 2031 of 1988

M/s. Farohar and Company and Others

APPELLANT

Vs

Hemant Manohar Nabar and Others

RESPONDENT

Date of Decision : 02-04-1991

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33
Contract Act, 1872 — Section 29
Specific Relief Act, 1963 — Section 12

Citation : AIR 1992 Bom 8 : (1992) 2 BomCR 213

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : E.P. Bharucha and Ms. Kher, instructed by M/s. Mulla and Mulla Cragie Blunt and Caroe, for the Appellant; G.R. Sawant and Arun Mehta, instructed by M/s. Haresh Mehta and Co., for the Respondent

Judgement

1. This is a petition u/S. 33 of the Arbitration Act, 1940 seeking to set aside an Award dated 26th March 1990 made by Shri N. A. Shah. Advocate. By an order dated 7th October 1988, Pendse, J. decreed Arbitration Suit No. 2031 of 1988 by consent of parties and appointed Mr. N. A. Shah, Advocate, as sole arbitrator to decide all disputes and differences between the parties. By the said order, the arbitrator was directed to publish the award within a period of four months from the date of entering upon the reference. It was specifically provided in the order of reference that the arbitrator will have summary powers and will not have to give reasons.

2. By an order dated 22nd February 1990, time to make and publish the Award was extended by this Court up to 31st March 1990 as recited in the award.

3. The impugned award is a non-speaking summary award. The operative part of the impugned award reads as under :--

"And whereas having considered the pleading, the oral and documentary

evidence and also the arguments advanced by the learned counsel of parties, I make and publish my Award as under :--

(I) Upon payment by the plaintiffs to the Defendants of a sum of Rs. 10,52,000/- together with interest thereon at 18% p.a. from the date of the Award till payment, the defendants do assign in favour of the plaintiffs the decree passed in High Court Suit No. 1225 of 1982 and; or procure a conveyance of the land situate at village Eksar, Taluka Borivli, bearing Survey No. 29 Hissa No. 1 and admeasuring 5172 sq. yds. in favour of the plaintiffs and put the plaintiffs in possession thereof and deliver or cause to be delivered the title deed of the said land to the plaintiffs.

(2) Save and except the above the rest of the prayers of the plaintiffs in their Statement of Claim are rejected;

(3) In the facts and circumstances of the case the parties will bear and pay their own cost of the Reference

(4) Save and except as provided herein neither party shall have any claim against the other of them."

4. The short facts which are required to be stated for the purpose of the disposal of this petition are as under :--

(a) M/s Farohar and Company are the petitioners in this petition. The petitioners are carrying on business as builders. The petitioners had entered into an agreement with the respondents on 26th April 1986, a copy whereof is annexed as Exhibit "A" to the petition. The respondents are promoters of a proposed co-operative housing society. In the said agreement, the respondents are described as the "purchasers". The petitioners had agreed to acquire, by purchase, a plot of land situate at Borivli bearing Survey No. 29, Hissa No. 1, being the land described in the Schedule to the said agreement. The respondents paid a sum of Rs. 5,023,608/- as and by way of earnest money to the petitioners under the said agreement. Prior to entering into the above-referred agreement, a suit being suit No. 1255 of 1982 had already been filed in this Court by petitioner No. 2 Rustom Ardeshir Irani and some others against the owners of the said land i.e. Smt. Chandrabai Narayan Bhoir and others. Prior to entering into the said agreement, the said suit was already settled between the parties concerned entitling the petitioners to obtain conveyance in respect of the said land from the owners thereof. Under the said agreement dated 26th April 1986, the petitioners agreed to construct a building for the respondents consisting of 48 tenements having an aggregate built up area of 22,000 square feet. By clause 1 of the suit agreement, the respondents agreed to pay to the petitioners price calculated for the land and the building to be constructed by the petitioners at the rate of Rs. 240/ - per square foot of the super built-up area. Exhibit "A" to the said agreement prescribes the mode of payment, first on such instalment, being 20% of the purchase price, to be paid upon the execution of the agreement for sale. It is common ground that the respondents had paid a sum of Rs. 5,02,608/- on

execution of the said agreement, which was less than 20% of the purchase price to be computed under c). 1 of the said agreement. Cl. 9 of the said agreement provided that out of the total consideration amount calculated at Rs. 240/- per square foot, a sum calculated at Rs. 70/- per square foot was to be treated as the price of the land to be conveyed by the petitioners to the respondents. The relevant portion of the said clause provided that the petitioner shall, if required by the respondent and in part performance of the petitioners' obligation under the said agreement, procure from the original vendors a deed of conveyance in favour of the respondents or the co-operative housing society to be formed or their nominee or nominees in respect of the land described in the schedule thereunder written on payment to them of the aggregate amount of Rupees 16,80,000/-. Thus the petitioners agreed to procure deed of conveyance in respect of the said land in favour of the respondent on payment of stipulated price. The aggregate consideration of Rs. 240/- per sq. foot was split up between the parties in the said agreement. It was also provided in the later part of Cl. 9 of the said agreement that upon obtaining the said permission and acceptance of the title by the respondents/ purchasers, the petitioners shall commence construction of the building proposed to be constructed by them. Clause 16 of the said agreement provided that the parties to the agreement were aware that it would be necessary to procure a suitable right of way over and across the adjoining strip of land and to construct the said approach road in accordance with the Municipal rules and regulations in that behalf. It was provided in the said clause that the cost of construction of the road shall be paid by the builders and the purchasers in equal shares. By Cl. 18 of the said agreement, it was provided that if additional FSI in excess of 24,000 square foot was made available by the Municipal Corporation, and "the builders were in a position to consume such additional FSI by putting up additional construction", the petitioners shall be liable to pay a sum calculated at Rs. 14.40 per square foot to the respondents in respect of such additional FSI. It is the petitioners' case that additional FSI of 9,000 square foot approximately was sanctioned by the Municipal Corporation, vide its letter dated 18th September 1986 and the petitioners desire to avail of the additional FSI in terms of their alleged entitlement under cl. 18 of the agreement. Cl. 23 of the said agreement provided for the arbitration clause.

(b) It appears that after execution of the said agreement and receipt of earnest amount, the petitioners made no progress towards commencement of construction of houses for the members of the proposed society of which respondents were members. Accordingly the respondents sought arbitration in respect of their claims either for specific performance of agreement in entirety or at least in respect of procurement of conveyance of the said land, obligation to convey the land for specified consideration being severable according to the respondents.

(c) My attention is invited by the learned counsel for the petitioners to pleadings filed before the learned arbitrator including additional prayer for specific performance in respect of procurement of conveyance of the said land etc.

5. It is well settled that the award is final both on facts and on law and jurisdiction of this Court is circumscribed by S. 30 of the Arbitration Act, 1940. It is well settled that the Court must lean in favour of upholding the award as far as possible. The award does not set out any proposition of law. The arbitrator had summary powers and was not bound to record any evidence. It is equally well settled that the powers of this Court u/Ss. 30 and 33 of the Act are not Appellate or revisional powers. With the above preface, let us examine the contentions urged by the learned counsel for the petitioners.

6. It is the contention of the petitioners in this petition that the impugned award is based on an erroneous interpretation of the agreement dated 26th April 1986 and the learned arbitrator could not have granted specific performance of only a part of the agreement. Mr. E. P. Bharucha, the learned counsel for the petitioners, has argued that the impugned award requires the petitioners to assign in favour of the respondents the decree passed in High Court Suit No. 1225 of 1982 and procure conveyance of the land in question measuring 5172 square yards on payment of the balance of Rs. 10,52,000/- together with interest. The learned counsel submits that the agreement dated 26th April, 1986 was incapable of specific performance. The learned counsel submits that the learned arbitrator could not split up the package deal. The learned counsel submits that the said agreement is vague and uncertain and it is therefore void.

7. Clause 23 providing for arbitration, forms part of the agreement dated 26th April, 1986. If the agreement dated 26th April, 1986 was void for lack of certainty under Sec. 29 of the Contract Act as alleged by the petitioner, no reference to arbitration could have been made. By consent of the parties, Pandse, J. decreed Arbitration Suit No. 2031 of 1986 and allowed the arbitration agreement to be filed in Court and appointed an arbitrator. It is not open to the petitioners to raise a contention now to the effect that the agreement itself was void. Even on merits this contention is not acceptable to me. In my judgment, the agreement is not vague and uncertain and in any event it is capable of being made certain. It is not open to this Court to speculate over the mental process of the learned arbitrator since the award is a non-speaking award and indulge in conjectures.

8. Even if an agreement is vague to some extent, it could be made certain with reference to contemporaneous and other evidence. It is not open to this Court to assess the materials on record and record a finding of fact or finding of law, That was exclusively the domain of the learned arbitrator. There is no error on face of the award. An award is final not merely on question of fact but also on question of law. An award can be assailed on the ground of error of law apparent on the face of the award only when the award incorporates a proposition of law which is the basis of the award. In the case of a non-speaking award, it is not permissible for me to speculate as to what must have appealed to the learned arbitrator and imagine the reasoning which must have appealed to the learned arbitrator. I have no hesitation in rejecting the contention of the learned counsel

for the petitioners that the agreement dated 26th April, 1986 is void. I hold that the said agreement is valid. I further hold that the petitioners are precluded from assailing the validity of the said agreement in view of consent order of reference passed by Pendse, J. to which reference is already made by me in earlier part of this judgment.

9. It was then argued by Mr. Bharucha, the learned counsel for the petitioners, that the respondents were not ready and willing to carry out their part of the contract. It is contended that the respondents had not even paid 20% of the purchase price. It is not possible for me to go into these questions. It appears to me to be clear on the face of the agreement that the petitioners had accepted the amount of Rs. 5,02,608/- as sufficient earnest money or deposit payable at the time of the execution of the said agreement.

10. It has been urged by Mr. Bharucha with some force that the learned arbitrator could not have granted specific performance of part of the agreement. The learned counsel has contended that the obligation of the petitioners to procure conveyance in respect of land in question was not an independent severable obligation. The learned arbitrator could either grant specific performance of the said agreement as a whole or reject the claim of the respondents in toto submits the learned counsel. The learned arbitrator has directed the petitioners to procure conveyance of the land to the respondents by assigning the decree or otherwise on payment of stipulated price and has rejected rest of the claims and counter-claims of both sides. This argument is undoubtedly attractive at the first blush. After consideration of this argument, I have come to the conclusion that the learned arbitrator had ample discretion to mould the relief or grant specific performance in part i.e. restricted to the conveyance of the land depending upon the equities of the case and assessment of the situation and overall view of the facts and conduct of the parties. The view taken by the arbitrator is a possible view. Assuming that the Court of law would have taken a different view in respect of interpretation and legal effect of the agreement and the provisions of Special Relief Act, that would not be sufficient to characterise the award as legal misconduct of proceedings or vitiated by error apparent and set aside the same. After all, the Court must lean in favour of upholding the award. It is not possible for me to hold that the impugned award violates the provisions of the agreement dated 26th April, 1986 or the provisions of law. The view taken by the arbitrator is one of the reasonably possible views. No case for judicial intervention is therefore made out. The petitioners submit that the learned arbitrator ought to have granted specific performance of obligation of petitioners to construct the building and avail of additional VSI. The learned arbitrator has rejected the various claims of the parties and moulded the relief according to equities and justice of the case as he deemed fit. The impugned award is not shown to be opposed to any law "on the face of it" or otherwise.

11. The learned counsel for the petitioners has relied upon the judgment of the

Supreme Court in the case of Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, . In this case, extra amounts were awarded to the contractor in face of express prohibition under the contract. With respect, this case has no analogy to the facts of the present case. Law does not prohibit the Courts or the arbitrators from granting specific performance of part of a contract altogether. In a given situation depending upon the interpretation of the contract, facts and equities of the case, conduct of the parties, severability of consideration for different obligations under the contract etc. the arbitrator or the Court may even grant specific performance of part of the contract. The impugned award is a non-speaking award. I am not exercising appellate or revisional power. The impugned award is not ex facie violative of any provision of law and cannot be termed as ex facie illegal. It is not permissible to me to probe into the reasons which persuaded the learned arbitrator to grant specific performance of part of the contract. I do not find any merit in the challenge to the award on the ground that it is opposed to law. Similarly, it is not possible to uphold the plea of the petitioner that the impugned award ignores the material terms of the agreement or is in breach of prohibitions contained in the said agreement. Interpretation of the contract and the application of law to the facts and equities of the situation was left to the learned arbitrator and no case is made out for setting aside of the award. Since the jurisdiction to set aside the award is circumscribed by the grounds specified under the Arbitration Act, 1940 and the award is final both on facts and in law, it is not possible for me to reappreciate the materials on record or reinterpret the contract or go through the exercise of deciding the dispute as if the suit is being heard by me. In the result, the challenge made by the petitioners to the said award fails.

12. Mr. Bharucha, the learned counsel for the petitioners, has also relied upon the judgment of our Court in the case of Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. Vs. Hindusthan Petroleum Corporation Ltd. and Others, and the judgment of the High Court of Calcutta in Puspabala Ray Vs. Life Insurance Corporation of India, . These cases, with respect, have no application to the facts of the present case.

13. Mr. Bharucha, the learned counsel for the petitioners, then argued that the learned arbitrator has virtually forgotten to take care of the petitioners' right to the additional FBI. In a non-speaking award made in a reference where the parties had agreed to specifically confer summary powers on the arbitrator with a provision that the arbitrator need not give reasons for the award, no such presumption can be made against the arbitrator as desired by the petitioners. This Court cannot sit in appeal over the decision of the arbitrator.

14. There is no merit in any of the contentions urged on behalf of the petitioners.

15. Accordingly, the award is confirmed and the petition is dismissed with costs.

16. Petition dismissed.