

(2012) 10 BOM CK 0217

In the Bombay High Court

Case No : Arbitration Appeal No. 19 of 2009

Shri Anand Umashankar Gupta, Shri Amit Umashankar
Gupta, Smt. Uma Umashankar Gupta and Shri Amrit
Umashankar Gupta

APPELLANT

Vs

Shri Jayant Maniklal Lunawat

RESPONDENT

Date of Decision : 11-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)(a)(iv), 34(2)(b)(ii), 37, 48

Citation : (2013) 2 BomCR 407 : (2013) 1 MhLj 65

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

Bench : Single Bench

Advocate : P.S. Dani, for the Appellant; S.U. Kamdar, Ms. Pooja Patil, Vivek Vashi, Darush Marfatia, Ms. Natasha B. Opaish and Ms. Alya Khan, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act, 1996"), the appellants have challenged Order and Judgment dated 4th May, 2009 delivered by the learned District Court, Pune in Civil Miscellaneous Application No. 809 of 2008 filed u/s 34 of the Arbitration Act, 1996 thereby allowing the application filed by the respondent and setting aside the arbitral award declared by the sole arbitrator on 16th August, 2008 by which the arbitrator had allowed certain claims made by the appellants. Some of the relevant facts for deciding the issue involved in this appeal are as under :-

2. By an agreement and Power of Attorney dated 12th March, 2004, M/s. Aman & Anand Associates, the partnership firm then consisting of the appellant and Mr. Anand and Shreya Mehkari acquired development rights in respect of the property bearing Survey No. 111, Hissa No. 11/1A admeasuring 21.5 R" 11/1B admeasuring 21.5 R and Survey No. 112, Hissa No. 1 admeasuring 13.56 R

situate at Village Baner, Tal. Haveli, Dist. Pune. Thereafter other partners viz. Anand and Shreya Mehkari retired from the firm and the firm was renamed as M/s. Anand and Anand Associates. On 22nd August, 2005, the respondent herein was admitted as a partner in the said partnership firm. The firm was renamed as "Sri Sri Gurudeo Reality". The Memorandum of Understanding and Deed of Partnership was executed by and between the parties on 22nd August, 2005. It was agreed that the net profits or the gross sales of the firm were to be shared in the ratio of 30% to the appellant and 70% to the respondent. The costs in advertisement, marketing and selling were to be shared by the parties according to their respective ratio of profit and loss. In the month of October, 2005, both the parties entered into a Supplementary Deed of Partnership. It was agreed that the period for completion of project was 30 months and in the event of any delay, the respondent would pay interest at the rate of Rs. 12% per annum for the delayed period to the appellants on the market value of 30% of the total permissible constructed area.

3. Clause (4) of the Memorandum of Understanding provides that 30% of the constructed area would be exclusively sold by the appellants and 70% of the constructed area would be exclusively sold by the respondent. The respondent agreed to bring Rs. 25 lacs as his capital contribution and that the amount would be withdrawn by the appellants. It was further agreed that the respondent would contribute additional sum of Rs. 25 lacs by the end of September, 2005 and the same amount would be withdrawn by the appellants. It was agreed that partnership deed executed by the parties was in respect of the development of the property referred therein and it was "specific project partnership" and shall be dissolved automatically on completion of the project and on execution of conveyance and fulfillment of all legal and other formalities in respect thereof. It was agreed that the duration of the reconstituted partnership shall be particular partnership and shall be dissolved automatically on the completion of the proposed construction and development of project in all respect and conveyance in favour of all flats, tenements, offices and building on the property referred therein. Clause (20) of the Partnership Deed provides for accounts to be taken of all the assets, credits, debts and liabilities of the partnership etc. upon the determination of the partnership and for sale of assets.

4. Clause (23) of the Partnership Deed provided that the respondent alone was empowered to look after execution, implementation and supervision and sales of constructed tenements other than which were agreed to be sold by the joint signatures of the parties of the appellants which is 30% of the total permissible constructed area.

5. By a Supplementary Deed of Partnership entered into in the October, 2005, Clause 26A was inserted which reads thus :-

Clause No. 26A:

The project undertaken by the firm regarding the development of property

situated at Sr. No. 111, Hissa No. 11/1A, Hissa No. 11/1B & Sr. No. 112, Hissa No. 1 totally admeasuring 56.56 Aars i.e. 5656 Sq. Mtrs. situated at Village : Baner, Tal. Haveli, Dist. Pune is to be completed within 30 months from the date of execution of the partnership deed i.e. 22nd August, 2005. In any circumstances or for any reasons, the project is delayed, then, the party of fifth part will pay damages @ 12% p.a. for the delayed period to party of the first to fourth part on the market value of the 30% of total permissible constructed area, i.e. the flats, shops, offices which are agreed to be sold by joint signature of the party of the first to fourth part.

It is further agreed by and between the parties hereto that if they agree to develop the property referred above with the adjacent land then the period of 30 months as referred above may be extended to 36 months mutually.

6. According to the respondent, after execution of the Partnership Deed, he introduced a sum of Rs. 1,53,00,000/- in the Partnership Firm, out of which a sum of Rs. 1,03,00,000/- was withdrawn by the appellants even before commencement of business of the firm. According to the respondent, the appellants had represented that the land was capable of development forthwith without any hindrance. However, at the time of demarcation of the land, it was noticed that the area and the boundaries of the land in question as mentioned in the Development Agreement were not tallying with the actual area and boundaries. Some objection was also raised by original owners in response to the public notice issued by the respondent before undertaking the work of demarcation. The work could not commence on time. The respondent submitted plan for sanction to Pune Municipal Corporation and had commenced activity.

7. The appellants by their advocates' notice dated 6th January, 2007 alleged that there was delay on the part of the respondent to commence the work of construction and various breaches were committed by the respondent and terminated the contract entered into between the parties. The respondent was instructed to stop the construction activity on the site. The respondent was informed that the appellants were at liberty to deal with and dispose of the property as deem fit. The respondent replied to the said notice through his advocate and pointed out that the large amount had been invested by the respondent and various steps had been taken by him for the development of the property. It was pointed out that 30 months time granted under the writing entered into between the parties for completion of the project had not been completed and thus the appellants could not terminate the contract.

8. In the year 2007, the respondent filed Misc. Application (383 of 2007) in the District Court u/s 9 of the Act. It was agreed that both the parties will maintain status quo with respect to land and activity till the matter was referred to the arbitrator and arbitral award was passed. The matter was thereafter referred to the sole arbitrator, Mr. Suhas P. Bora. The appellants made a monetary claim of Rs. 13,60,78,880/- against the respondent on account of alleged breach of contract and in the alternate claimed Rs. 12,49,70,400/-. The appellants also

claimed Rs. 1 crore by way of additional damages. The respondent also filed a counter claim before the learned arbitrator praying that the partnership firm be dissolved and after taking into account balance be distributed in the proportion of their respective shares and also made a monetary claim of Rs. 2,58,60,000/- with interest at the rate of 15% per annum on the amount of Rs. 53 lacs from the date of filing of the claim till realization. The parties led oral as well as documentary evidence before the learned arbitrator.

9. On 16th August, 2008, the learned arbitrator declared an award. The learned arbitrator recorded the finding that the respondent had committed default in not completing the project within 30 months. It is held that the appellants were entitled for damages for the default as stipulated in clause 26A of the Supplementary Deed of Partnership. The Learned arbitrator recorded a finding that the respondent had proved that the Agreement dated 22nd August, 2005 was a Partnership Agreement and not a Development Agreement. The arbitrator recorded that the claim of the appellants was computed at Rs. 3,800/- sq.ft. and the appellants was also eligible for the damages at the rate of 12% per annum for the period of delay on the market value of 30% of total permissible constructed area. It was further held that the market value of the constructed area average out to be Rs. 5,000/-, the interest at the rate of 12% would work out at Rs. 1,30,17,750/-. The arbitrator held that the appellants were entitled to claim Rs. 17,35,70,000/- and an amount of Rs. 1,30,17,750/- by way of damages pursuant to Clause 26A of the Supplementary Deed of Partnership. It is held by the arbitrator that the respondent was entitled to sale proceeds of 70% of the constructed area, the construction costs of which were to be borne by the respondent. It is held that in the event the respondent did not agree to the direction as given by the arbitrator, the only alternative solution to the dispute would be that the appellants refund the amount of Rs. 93,00,000/- plus interest on the capital at the rate of 12% per annum plus expenditure incurred by the respondent on the project till the date of award to the respondent. It is further held that in such a situation, respondent would not be entitled to any further claim by way of interest or damages and further that he shall move out of the partnership without any right, title or interest in the development rights.

10. Being aggrieved by the said Award, the respondent herein filed Civil Misc. Application (809 of 2008) u/s 34 of the Arbitration and Conciliation Act, 1996 before the District Court. By an order dated 4th May, 2009, the Learned District Judge allowed the said application and set aside the impugned award dated 16th August, 2008.

11. The Learned Counsel appearing for the appellants submits as under :-

(a) that the agreement entered into between the parties was not only an agreement for partnership but was a development agreement. The nature of the transaction arising between the parties shows that it was development agreement. There is no format prescribed under the provisions of the Partnership Act for execution of a Partnership Deed.

(b) There is no provision under the Indian Partnership Act, 1932 prohibiting such clause in the partnership deed. The partnership deed and Memorandum of Understanding intermingled with each other and was partnership cum development agreement.

(c) That though the finding was recorded by the learned District Judge that deed of partnership, Memorandum of Understanding and Supplementary Deed of Partnership were admittedly executed between the parties and all the terms and conditions in those documents were also specifically admitted, the learned Judge erred in holding that the arbitral award passed by the arbitrator was in consonance with the provisions of law and was legal and binding.

(d) That Clause 26A inserted by consent of both the parties in the Supplementary Partnership Deed by which the respondent had agreed to pay damages/interest to the appellants was not contrary to any provision under the Indian Partnership Act. Such agreement was voluntarily entered into between the parties and was not contrary to law.

(e) That the award given by the learned arbitrator was based on finding of facts which could not be interfered with by the learned District Judge.

(f) The claim for damages was maintainable before the arbitrator. The learned District Judge could not have substituted the factual finding of the learned arbitrator and could not have arrived at a different finding in view of limited scope of Section 34 of the Act.

12. The learned senior counsel Mr. S.U. Kamdar appearing for the respondent submits as under :-

(a) The learned arbitrator ought to have dissolved the partnership firm and ought to have settled the accounts between the parties u/s 48 of the Partnership Act, 1932 which reads thus :-

48. Mode of settlement of accounts between partners.-In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:-

(a) losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:-

(i) in paying the debts of the firm to third parties;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(iii) in paying to each partner rateably what is due to him on account of capital;

and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

(b) The learned arbitrator did not decide the counter claim filed by the respondent seeking dissolution of the firm and for settlement of the accounts as per the provisions of Section 48 of the Partnership Act. The award is vague and incomplete. The learned arbitrator not having decided the counter claim filed by the respondent and not having settled the accounts as per Section 48 which is mandatory, the entire award was vitiated being contrary to law and in conflict with public policy. The learned District Judge was thus right in setting aside the impugned award u/s 34(2)(a)(iv) and (v) and section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

(c) That though the appellants had made claim for damages at the rate of Rs. 3,800/- sq.ft., the arbitrator has considered the claim at Rs. 5,000/-. The arbitrator had thus exceeded his jurisdiction and had decided contrary to the submission made by the parties for adjudication.

(d) That the alternate award given by the learned arbitrator is totally perverse and contrary to law and could not be implemented in any manner whatsoever. The learned district judge was right in setting aside such perverse award.

(e) That the learned arbitrator considered the damages on the basis of the market value of the constructed property. The construction of the property admittedly was not complete. The appellants had admittedly terminated the agreement before expiry of 30 months. The District Judge had thereafter by consent of both the parties had granted status quo order. The appellants thus in no circumstances could claim damages against the respondent for not completing the construction before expiry of the period of 30 months. The appellants themselves were responsible for the respondent's not completing the construction within 30 months. The claim thus awarded by the arbitrator was totally perverse and on the face of it illegal.

13. The learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, , judgment of this Court in case of Sherbanubai Jafferbhoy vs. Hooseinbhoy Abdoolabhoy and another AIR (35) 1948 Bom. 292 and judgment of the Supreme Court in case of Asandas Mitharam Narsinghani and Others Vs. Tekchand Mitharam Sevakramani and Others, in support of his plea that the arbitrator was bound to settle accounts between the parties in the mode and manner prescribed u/s 48 of the Partnership Act, 1932 and not having done so, the award was totally contrary to law and thus in conflict with public policy.

14. It is not in dispute that the respondent had made counter claim before the learned arbitrator seeking dissolution of the firm and for settlement of the

account. On the perusal of the award, it is clear that the counter claim made by the respondent had not been decided by the learned arbitrator. Though the learned arbitrator was bound to decide the issue of dissolution of the firm and to settle the accounts between the parties in the modes and manner prescribed u/s 48, admittedly no such exercise has been done by the learned arbitrator in the impugned award. The learned arbitrator granted relief of retirement of a partner and not dissolution. In my view, the learned arbitrator was bound to follow the mandatory procedure u/s 48 while dissolving the firm and to settle the account of the firm in the manner setout therein. In my view, the award made by the learned arbitrator was not in compliance of mandatory procedure prescribed u/s 48 of the Partnership Act and was thus in conflict with public policy. In my view the learned District Judge was right in setting aside the said perverse and illegal award and thus the said order passed by the learned District Judge cannot be faulted with.

15. The learned arbitrator could not have ignored the counter claim made by the respondent which was referred to him. The award was thus incomplete and vague. The learned District Judge was thus in my view correct in setting aside the impugned award given by the learned arbitrator.

16. The Clause 26(A) of the Supplementary Deed provides for payment of interest at the rate of 12% per annum to the appellants by the respondent if the respondent was not able to complete the construction of the plot in question within a period of 30 months. The record indicates that before the expiry of 30 months, the appellants had terminated the agreement and thereafter the status-quo order came to be passed by the learned District Judge against both the parties by consent. The claim thus made for damages by the appellants on the basis of clause 26(A) was on the face of it not maintainable. In view of such premature termination, the appellants could not have made any claim for damages under Clause 26(A). The learned arbitrator acted contrary to the terms of the contract and thus the award was in conflict with public policy. The arbitrator was bound to decide in accordance with the contract and in accordance with Clause 26(A) of the Supplementary Deed and not having done so, the award is in conflict with the public policy. The learned District Judge was thus right in setting aside the same.

17. The record produced by the parties also indicates that though the claim made by the appellants was for damage at the rate of Rs. 3,800/- per sq.ft. whereas the learned arbitrator has considered claim at the rate of Rs. 5,000/-. In my view, the learned arbitrator cannot award more than claim made by a party. The arbitrator has thus exceeded his jurisdiction by awarding more than what was claimed by the appellants. The award was on the face of it illegal and in conflict with public policy. The appellants did not lead any evidence in support of such claim for damages. The onus to prove such damages was on the appellants which the appellants had failed to discharge. The learned arbitrator could not have awarded claim for damages without any such evidence produced and

proved by the appellants. The award was totally vitiated and was rightly set aside by the learned District Judge.

18. In my view, there is no merit in the submissions made by the Learned Counsel appearing for the appellants. In my view, the learned District Judge has rightly set aside the impugned award and does not require any interference by this Court u/s 37 of the Arbitration and Conciliation Act, 1996.

19. The appeal is dismissed.

20. There is no order as to costs. It is made clear that the parties are free to adopt such proceeding as are permissible in law.