

(2012) 04 JH CK 0108
In the Jharkhand High Court
Case No : Writ Petition (C) No. 2034 of 2010

Veer Krishna Sahay

APPELLANT

Vs

M/s Vardaan Builders, Ranchi and Narendra Butala

RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Constitution of India, 1950 — Article 226, 227

Citation : (2012) 2 JCR 637

Hon'ble Judges : Poonam Srivastava, J

Bench : Single Bench

Advocate : Sumeet Gododia and Bindeshwari Singh, for the Appellant; Rajesh Kumar, Amit Sinha and M.K. Sinha, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Mrs. Justice Poonam Srivastav

1. Heard counsel Shri S. Gadodia, assisted by Mr. Bindeshwari Singh, appearing on behalf of the petitioner as well as counsel Shri Rajesh Kumar, assisted by Mr. Amit Sinha and Mr. M.K. Sinha, appearing on behalf of the Respondents. The instant writ petition is preferred challenging the order dated 07.04.2010 (Annexure12) in Execution Case No. 3(A) of 2005 (B.K. Sahay Vs. M/s Vardaan Builders) passed by SubJudge VI, Ranchi.

2. The dispute relates to execution of an Award in respect of the delivery of possession of 14 flats, as mentioned in the Arbitral Award/Decree passed by the sole Arbitrator. The petitioner is the owner of 33 Kathas of land situated at 17, S.K. Sahay Road, Lalpur, Ranchi. An agreement was entered into on 01.10.1998 between the petitioner and the contesting respondent Nos. 1 and 2, who is a builder and involved in the business of development and construction of multistoried residential complex in the name and style of M/s Vardaan Builders. The parties agreed that out of the proposed construction, the owner - builder share would be in the following ratio :

(I) Owner's allocation (27%) : $(59400 \times 27) / 100 = 16,038$ sq. ft.

(II) Builder's allocation (73%) : $(59400 \times 73) / 100 = 43,362$ sq. ft.

3. This allocation was calculated on the basis of total areal of land which was 33 Kathas. The dispute arose between the parties regarding the development agreement including the handing over of the share of the petitioner. Arbitration Clause of the Development agreement was invoked at the instance of the petitioner and the matter was referred to the sole Arbitrator Hon'ble Mr. Justice P.K. Sarkar, retired Judge of the Patna High Court. The Award was passed on 31.10.2004 (Annexure2). Extract of the Award is detailed in paragraph 10 of the writ petition and the same is quoted below :

(i) In the result of the discussions above, I am of the opinion that the ownerclaimant is entitled to possession of the 14 flats containing built up area of 16038 sq. ft. along with 27 p.c. of the parking space and 50 p.c. of the roof area. Out of the above 14 flats containing built up area of 16038 sq. ft. the ownerclaimant is entitled 13 flats along with 27 p.c. of the parking space as mentioned in the report of the Commissioner within 15 days from today and the possession of the remaining one flat containing the remaining portion of 27 p.c. of the ownershare will be given to the ownerclaimant within 15 days of payment of Rs. 6 lakhs the security amount and Rs. 3 lakhs as additional amount for the deviation in specification of the construction work along with interest at the rate of 12 p.c. on aforesaid Rs. 9 lakhs from today i.e. the date of award till payment. In case the Respondent Builder fails to hand over possession of 13 flats of the owner share and 27 p.c. of the car parking space as per above direction within 15 days and also the remaining one flat measuring the remaining portion of the 27 p.c. of the built up area within 15 days of the payment of Rs. 9 lakhs along with interest at the rate of 12 p.c. from today with payment of the value surplus of area if the case such be in the measurement of the last (14th) flat, the owner-claimant will be entitled to get damages/penalty at the rate of Rs. 30,000.00 per month for the 1st 6 months and Rs. 50,000.00 per month thereafter with effect of the 16th day of the above payment till the day possession is given.

(ii) Accordingly the award is made in favour of both the owner/claimant and the Respondent Builder to the extent mentioned below :

(a) The Respondent Builder will make delivery of possession of 13 flats and 27 p.c. of car parking space as per the Commissioner's report within 15 days of today i.e. of the passing of award.

(b) The Respondent Builder should also complete the incomplete portion of the boundary wall measuring 31.512 meter and should make provision for clearing the drain water from the ground chamber towards the main Municipal drain in the front side of the Building within 15 days, failing which he will be liable to pay Rs. 30,000.00 per month for first 6 months with effect from the 16th day (from today) and Rs. 50,000.00 per month thereafter, till the above construction is complete.

(c) The ownerclaimant should pay a sum of Rs. 9 lakhs (Rs. 6 lakhs towards return of security amount and Rs. 3 lakhs towards price of the work in deviation of the specification in construction) along with interest at the rate of 12 p.c. on the above amounting Rs. 9 lakhs from today i.e. the date of award, till such payment.

(d) On such payment being made by the ownerclaimant the Respondent Builder should hand over possession of the remaining 14th flat measuring the balance portion of 27 p.c. of the built up area. If the measurement of the flat does not fulfill the exact remaining 27 p.c. of built up area the difference either more or less will be paid at the rate of Rs. 525.00 per sq. ft. by the concerned party before such possession. The possession of the 14th flat will be delivered by the Respondent/Builder within 15 days of the above payment to the ownerclaimant.

(e) In case the Respondent Builder fails to hand over possession of the 13 flats and 27 p.c. car parking space as per Commissioner report within 15 days from today as directed above the ownerclaimant will be entitled for damages/penalty at the rate of Rs. 30,000.00 per month for the first six months from the 16th day (from today) and Rs. 50,000.00 per month thereafter, till such hand over of possession.

(f) Similarly, if the Respondent Builder fails to deliver possession of the 14th flat constituting the remaining portion of 27% of the Built up area (with payment of less or more area as directed above) within 15 days the ownerclaimant will be entitled for a sum of Rs. 30,000.00 per month for the 1st 6 months w.e.f. the 16th day (from today) and Rs. 50,000.00 per month thereafter, till such hand over of possession.

(g) As regards the cost of litigation in this arbitration proceeding the parties should bear their own legal expenses.

(h) The petitioner/claimant also execute the remaining Power of Attorney within 15 days from delivery of possession of the 13 flats by the respondents/Builders to the owner/claimant.

Rest of the claims and counter claims of both the parties are dismissed/rejected.

4. It is also brought to my notice that during the course of arbitration proceeding, one Devabrata Bhadra, retired G.M. (Civil) CMPDI was appointed as Commissioner to make measurements of the apartment constructed in the multistoried building with a view to allocate and demarcate respective shares of the parties. The Commissioner was to submit measurements of the parking space separately. A report was submitted by the Commissioner which included a supplementary report duly signed by the petitioner and a representative of the builder. There was no objection from either side regarding Commissioner's report. The Award was given by the sole Arbitrator on 31.10.2004 and it forms part of the record as Annexure- 2.

5. The builder filed an application challenging the Award u/s 34 of the Arbitration

and Conciliation Act, 1996 (hereinafter referred to as "Act") in the court of SubJudge, Ranchi. The application u/s 34 was dismissed by the SubJudge VI, Ranchi, vide order dated 07.09.2005 in Misc. Case No. 01 of 2005. Order was challenged before the High Court in Arbitration Appeal No. 15 of 2005, which was also dismissed, vide Annexure4 to the writ petition dated 14.06.2007. This order was once again challenged before the Hon'ble Supreme Court which stands dismissed, vide Annexure5 to the writ petition dated 23.07.2007.

6. Shri S. Gododia appearing on behalf of the petitioner has also emphasized that the Commissioner's report was confirmed and the same was never challenged.

7. In fact, the controversy arose on account of the reason that after the actual construction was completed and measurements were made, there was an excess construction of 634 sq. ft. The report of the Commissioner is Annexure3 to the writ petition.

8. Contention of the learned counsel is that altogether 14 flats were to be allotted to the petitioner. 13 flats were already reserved measuring an area of 1470.57 sq. meter, which is equivalent to 15829.51 sq. ft. The remaining area of the share of owner/petitioner was $16678.81 - 15829.51 = 849.30$ sq. ft., but due to conversion, there was a difference of approximately 1.30 sq. ft. The Arbitrator has mentioned in the order that the owner was entitled for 848 sq. ft. of the remaining area. There is no dispute on this 848 sq. ft. It is further stated that 14th flat comprises an area of 91.22 sq. meter, which is equivalent to 987.27 sq. ft. Since the owner was entitled for 848 sq. ft., he is also entitled to the additional area, subject to payment at the rate of agreed cost. Therefore, the petitioner deposited the cost of the excess area in the court below i.e. approximately 138/139 sq. ft. at a price of Rs. 525/sq. ft.

9. Shri. Gododia while emphasizing his submissions stated that the executing court while passing the impugned order was swayed by a certain typographical error and placed reliance upon an inadvertent observation made by the Arbitrator that the area allotted to the petitioner was only 16038 sq. ft. The executing court merely on the basis of the said figure mentioned in the Award proceeded to execute the decree and held that after making calculation of the owner's share on the basis of 16038 sq. ft., an area of 214 sq. ft. remains to be allocated. The court held that the owner/petitioner is not entitled to the 14th flat and at best he can claim the value of 214 sq. ft. @ Rs. 525/per sq. ft. from the builder.

10. Shri Rajesh Kumar, counsel appearing on behalf of the respondent/builder has countered the arguments of Shri S. Gadodia on the basis of assertion made in AnnexureB to the rejoinder of the supplementary affidavit filed on behalf of the builder that the executing court passed the order after hearing both the parties. He made an offer to the judgment debtor to fulfill the Award by giving 27% of the car parking space and a flat of 213 sq. ft.

11. Contention of the respondent's counsel is that the claim of the petitioner is altogether baseless. He cannot be given 14th flat as it will be in excess of the

area given in Award. The builder's counsel has also pointed out certain anomalies regarding the measurement of the Commissioner and argued that in the event the said measurement of the Award is accepted, the Award becomes inexecutable.

12. I have heard counsel for the respective parties at length and gone through the records as well as the judgments. Apparently, both the parties have tried to raise a factual controversy regarding measurements. The measurements were made by the Commissioner and the report was accepted by the Arbitrator. No objections were raised and the Award was passed in terms of the Commissioner's report. The Award and its intention are liable to be given effect by the executing court.

13. I am not inclined to examine the factual controversies in exercise of jurisdiction under Article 226 of the Constitution of India. However, the legal submissions raised on behalf of the petitioner is regarding the question that whether the execution court could go behind the Award relying upon a solitary typographical error in para 38 of the Award. Learned counsel has emphasized that the findings has to be looked into and if there is some anomalies then it had to be got rectified at the instance of the aggrieved party. I cannot loose sight of the fact that the Award was challenged by respondent builder u/s 34 of the Act, thereafter in appeal and finally, before the Apex Court which was dismissed. In the event the builder was not aggrieved by the Award and he was satisfied with the observations, then there was no occasion for him to challenge the Award. The Award has also been appended to the writ petition as Annexure 2. The Award given by an Arbitrator after examining the entire controversy, cannot be turned and twisted so lightly.

14. On bare perusal of the extract of the Award as well as the operative portion, it is stated in subpara D of Issue No. 9 that on such payment being made by the owner claimant the respondent builder should hand over possession of the remaining 14th flat measuring the balance portion of 27 p.c. of the built up area. In the event the measurement of the flat does not fulfill the exact 27 p.c. of the built up area the difference either more or less will be paid at the rate of Rs. 525.00 per sq. ft. by the concerned party before such possession. The possession of the 14th flat will be delivered by the respondent/ builder within 15 days of the above payment to the owner claimant.

15. A mere mention in sub Clause A that the respondent builder will make delivery of possession of 13 flats and 27 p.c. of car parking space will not render the Award redundant. The mistake occurred while mentioning the area as 16038 sq. ft. in para 38 Issue No. 9 sub Clause (i) is an error which the executing court was liable to examine. On bare reading of the entire Award, besides, Annexures - 6 and 6/1, which are orders of this Court in W.P. (C) No. 1818 of 2008 dated 21.10.2008 and also in Civil Review No. 106 of 2008 dated 03.03.2009, is sufficient to substantiate the contention on behalf of the petitioner. The review application was dismissed with cost of Rs. 25,000/payable by the

respondentbuilder to the petitioner by the executing court.

16. These orders were part of the record before the executing court, but I fail to understand how all these aspects and orders and judgments were completely overlooked by the executing court. In fact, I fully agree with the observations made by this Court in the writ petition and also Review application that the respondentbuilder has all along abused the process of law by raising frivolous and vexatious objections. The process of law has blatantly been abused. The petitioner has approached equity jurisdiction. This Court has also to examine and ensure equities as well as that the orders and decree passed are complied with. The Award was given in the year 2004, but the petitioner who is incidentally also the owner of the property has been dragged into unnecessary litigation. It is not the case of the respondent either before the executing court or any other court that his share is less than the allocation of share agreed upon in the initial agreement. Even if there was some discrepancy then it had to be raised and got corrected before the Arbitrator. The Commissioner's report was also not challenged and it is only at a subsequent stage, some inadvertent error was noticed by the builder which he tried to use it as a weapon to his advantage against the petitioner to somehow stall the execution of the Award.

17. Before I part with the writ petition, I must express my concern over the lackadaisical approach of the executing court either mistakenly or it was stepinaid to ensure that the decree is not executed.

18. In the facts and circumstances detailed hereinabove, the writ petition is allowed. The order of the executing court is set at naught and the executing court is directed to ensure that the delivery of 14th flat, which has an excess area, then other 13 flats is handed over to the petitioner within a period of two months from the date a certified copy of this order is produced before him. He has also to ensure that the calculated amount already deposited by the petitioner in lieu of the excess area is correctly calculated, but without interfering with the decision of the Arbitrator which was confirmed by the SubJudge u/s 34 of the Act upheld by the Hon''ble High Court in Arbitration Appeal as well as accepted and confirmed by the Apex Court. The Award is liable to be given effect to within the aforesaid stipulated period of two months and any dereliction on the part of the executing court or the respondent cannot be accepted since this Court while exercising jurisdiction under Article 226 of the Constitution of India also exercises the supervisory power under Article 227 of the Constitution. The writ petition is accordingly allowed in the terms and observations made hereinabove.