Jawahar Lal Wadhwa and Another

Vs

Haripada Chakroberty

Civil Appeal No. 2678 of 1985

(M. H. Kania, Sabyasachi Mukharji JJ)

14.10.1988

JUDGMENT

KANIA, J. –

1. The hearing before us now related to certain objections filed to the award made by Shri A. C. Gupta a former Judge of this Court who was appointed there sole arbitrator to adjudicate upon the dispute between the parties pursuant to the order of this Court dated November 18. 1987 in the circumstance as set out hereinafter. In order to appreciate the objections, list is necessary to refer to certain facts.

2. The Settlement Commissioner, Government of India allotted Plot No. 631 at Chitranjan Park, New Delhi measuring 160 sq. yds. to the respondent under the Settlement Scheme for the refugees from Pakistan for a total price of Rs. 4800. This allotment was made by the Settlement Commissioner on behalf of the Rehabilitation Department of the Government of India. The respondent applied for a loan from the Ministry of Defence for construction of the house on the said plot and a loan of Rs. 15,000 was sanctioned in his favour. Under the House Construction Rules of the government, the plans and estimates had to be submitted along with the application and the sanctioned amount was paid in four instalments at different stages of construction. The respondent Started the construction of a building on the said land. By the end of 1973, the respondent had constructed a house on the said plot up to the roof level. By that time he had obtained and used up a sum of Rs. 12,000 out of the loan sanctioned to him and only a balance of Rs. 3000 remained to be paid to him under the said loan. According to the respondent, this amount was not sufficient for the final completion of the house and he, therefore, sought the help of appellant 1 who advanced a sum of Rs. 5000 to him. In September 1973 the respondent entered into an agreement dated September 6, 1973 to sell the house and the said plot to appellant 1. The aforesaid amount of Rs. 5000 given by way of loan was shown in that agreement as an advance paid towards the sale price. The Respondent also executed a General Power of Attorney in favour of appellant 1 inter alia enabling him to carry on construction work on the said land on behalf of the respondent. According to the respondent, the house was not complete but the appellant who are husband and wife were occupying the same. Under circumstances, we need not discuss here, on January 29. 1974 another agreement was entered into between appellant 1 and the respondent which has been described as an agreement for construction. Under that agreement, Rs. 80,000 was to be paid by the respondent as the price of the construction to be put up by appellant 1 on the said plot and he was to charge Rs. 20,000 as the profits and labour charges. He was to deposit Rs. 15,000 with the respondent as a security. After the completion of the house, the respondent was to return the amount of Rs. 1,15,000 within three years in a lump sum and on such payment, appellant 1 was to hand over the possession of the building and the plot to the respondent. Till that amount was paid, appellant 1 was entitled to possess and occupy

and enjoy the same and to receive rents thereof. According to the respondent, this transaction was sham and bogus. Disputes arose between the parties and the respondent filed a suit in August 1977 claiming for the return of the possession of the said plot and the house. A notice of motion under Section 34 of the Arbitration Act, 1940 for stays taken out by the appellants was dismissed. An appeal was preferred against the said decision. In the appeal, which came up for hearing before the Additional District Judge, Delhi, with the consent of the parties, Shri Bakshi Man Singh was appointed as the sole arbitrator to adjudicate upon the disputes in the suit. The said Shri Bakshi Man Singh died in July 1979 without making any award. On an application by the respondent, the learned Additional District Judge filled up the vacancy by appointing Shri Hari Shanker, advocate, as the sole arbitrator. Shri Hari Shanker made and published his award which went against the appellants. According to the appellants, the said award was made ex parte. The appellants challenged the award by filing objections under Sections 30 and 33 of the Arbitration Act before the learned Additional District Judge and applied for setting aside the said award. This application was dismissed by the learned Additional District Judge. The appellants filed an appeal against this decision on October 14, 1982 before the Delhi High Court but the said appeal was dismissed by the learned Single Judge of that High Court on April 30, 1985. This decision of the learned Single Judge was challenged before this Court by way of special leave petition under Article 136 of the Constitution. Leave was granted and the present appeal came to be numbered as aforesaid. This appeal came up for hearing before a Division Bench of this Court on November 18, 1987. After hearing learned counsel for the parties, in order to ensure fair play in action, this Court set aside the award of the arbitrator and also the judgment of the Delhi High Court and appointed Shri A. C. Gupta, a former Judge of this Court, as the sole arbitrator to adjudicate upon the disputes between the parties. The arbitrator was directed to make his award with short reasons within four months from the receipt of the copy of the order. Certain other conditions like payment of compensation and additional expenses were imposed on the appellants. Pursuant to the said order of this Court, the said Shri A. C. Gupta entered upon the reference and made and published his award on March 18, 1988. Under the said award, it was held that the respondent was entitled to a sum of Rs. 58,498.60 and interest on this amount at the rate of 18 per cent per annum from the date of the reference to the date of the award which worked out to a sum of Rs. 3510. Taking into account the amount paid by the respondent initially towards the arbitrator's remuneration and other costs and after setting off the dues of appellants against the respondent, it was held that the respondent/claimant was entitled to recover possession of there disputed building from the appellants and that a sum of Rs. 57,753 was payable by the appellants to the respondent. It is this award which is challenged before us now.

3. The sole submission made by Mr. Bhandare, learned counsel for the appellants is that the award is bad in law and liable to be set aside as there is and error of law disclosed on the face of the award. In this connection, Mr. Bhandare drew our attention to Clause 2(b) of the agreement to sell dated September 6, 1973 referred to earlier. The earlier part of the agreement set out that the purchase (appellant 1) had paid to the seller (respondent) a sum of Rs. 5000, the receipt of which was acknowledged by the respondent and the said Clause 2(b) which runs as follows :

> The purchaser shall pay to the seller Rs. 105 each month against the sanctioned loan of Rs. 15,000 by the fifth day of every English calendar month till such time the full amount of loan is recovered from the seller by the Government of India. The first instalment shall commence with effect from October 5, 1973. The purchaser, if he desires, can also deposit the actual remaining amount towards this loan at any time in lump sum to the Government of India on behalf of the seller.

4. It is a common ground that the sum of Rs. 105 per month referred to in Clause 2(b) of the said

agreement was paid by the respondent only up to January 1976 and that this payment covered up to 23 instalments and more than 100 instalments were remaining unpaid. Mr. Bhandare pointed out that it was contended by the appellants before the arbitrator that, although the agreement for sale between the parties was not registered and might not convey any interest to appellant 1 in the property, the appellants shad been put in possession of the said land and construction pursuant to the said agreement since September 1973, as appears from the agreement of sale, and, in view of this, appellants were entitled to retain possession under the protection afforded by Section 53-A of the Transfer of Property Act, 1882. He drew our attention to the following statements contained in the award of the learned arbitrator :

> The respondent who has been in possession of the property Since September 1973 as would appear from the first agreement for sale, claimed that his possession was protected under Section 53-A of the Transfer of Property Act ....
>
> Section 53-A affords protection to a transferee on certain condition, one of which is that "the transferee has performed or is willing to perform his part of contract". Under the agreement for sale, the respondent was required to pay there claimant a monthly sum of Rs. 105 to enable the latter to pay the instalments in discharge of the house building loan. From the receipts filed it appears that the respondent paid only up to January 1976 which covered 23 instalments only and more than 100 instalments remained to be paid. There is no valid reason why he should have failed to carry out his obligation under the contract. Thus it cannot be said that the respondent had performed or was willing to perform his part of the contract. Therefore, the respondent was not entitled to retain possession of the disputed property beyond January 1976.

It was submitted by Mr. Bhandare that these statements clearly disclose an error apparent on the face of the award. It is pointed out by him that, prior to February 1976, the respondent by his advocate's notice dated January 16, 1976 had repudiated the said agreement for sale by contending in his notice that it had been procured by fraud, undue influence and coercion practiced by appellant 1 and it was submitted that the said repudiation was wrongful and in view thereof appellant 1 was absolved from his obligation to make any further payment of Rs. 105 per month or to continue to be ready and willing to perform the agreement. I was submitted by him that the afore stated statements contained in the award ran counter to the settled position in law and disclosed a clear error of law on the face of the award. He drew our attention to the decision of this Court in International Contractors Ltd. v. Prasanta Kumar Sur ((1961) 3 SCR 579 : AIR 1962 SC 77). In that case the appellant had purchased the property in dispute from the respondent but soon thereafter these was an agreement for reconveyance of the property to the respondent within a period of two years for almost the same value for which it was sold. Before the expiry of the stipulated period, the respondent entered into correspondence with the appellant, asking for the completion of the agreed reconveyance and intimating that the purchase money was ready to be paid, but after some further correspondence, the appellant's solicitors, on his behalf, repudiated the agreement for reconveyance. The respondent then did not end the price agreed to be paid and filed a suit for specific performance. The suit was dismissed by the trial court on the ground that the respondent had not paid the money. The High Court reversed the decision and decreed the suit. On an appeal to this Court, it was held that as the appellant had totally repudiated the contract for reconveyance and had failed to perform his part of the contract, it was open to the respondent to sue for its enforcement and the High Court was right in holing that respondent was entitled to a decree for specific performance. In our view, Mr. Bhandare may be right in contending that this decision does show that it has been held by this Court

that in certain circumstances once a party to a contract has repudiated a contract, it is not necessary for the other party to tender the amount payable under the contract in the manner provided in the contract in order to successfully claim the specific performance of the contract. The decision, however, nowhere lays down that where one party to a contract repudiates the contract, the other party to the contract who claims specific performance of the contract is absolved from his obligation to show that he was ready and willing to perform the contract. Mr. Bhandare's argument really is to the effect that the respondent wrongly repudiated the contract by his said letter dated January 16, 1976, before all the mutual obligations under the contract had been carried out, that is to say, he committed an anticipatory breach of the contract and in view of this, appellant 1 was absolved from carrying out his remaining obligations under the contract and could claim specific performance of the same even though he failed to carry out his remaining obligations under the contract and might have failed to show his readiness and willingness to perform the contract. In our view, this argument cannot be accepted. It is settled in law that where a party to a contract commits an anticipatory breach of the contract, the other party to the contract may treat the breach as putting an end to the contract and sue for damages, but in that event he cannot ask for specific performance. The other option open to the other party, namely, the aggrieved party, is that he may choose to keep the contract alive till the time for performance and claim specific performance but, in that event, he cannot claim specific performance of the contact unless he shows his readiness and willingness to perform the contract. The decision of this Court in International Contractors Limited v. Prasanta Kumar Sur ((1961) 3 SCR 579 : AIR 1962 SC 77), properly analysed, only lays down that in certain circumstances it is not necessary for the party complaining of an anticipatory breach of contract by the other party to offer to perform his remaining obligations under the contract in order to show his readiness and willingness to perform the contract and claim specified performance of the said contract. Mr. Bhandare also referred to the decision of the decision of the Andhra Pradesh High Court in Makineni Nagayya v. Makineni Bapamma (AIR 1958 AP 504 : (1958) 1 Andh WR 250 : ILR 1958 AP 120). We do not consider it necessary to refer to this decision as sit does not carry the case of the appellants any further. The ratio of the said decision in no way runs counter to the said position in law set out above.

5. In the case before us, what the arbitrator has done is to set out in his award the relevant portion of Section 53-A of the Transfer of Property Act in terms of the said section. There can be no dispute that these provisions have been correctly set out. There is thus no error in the proposition of law set out by the learned arbitrator in the award. It may be that there is an error, although that is by on means certain, in the application of these principles in coming to the conclusion that, notwithstanding the repudiation of the said contracts by the respondent, appellant 1 was not absolved from his obligation to pay the remaining instalments of Rs. 105 per month as provided under the contract.

6. In Coimbatore district Podu Thozillar Samagam v. Balasubramnia Foundry ((1987) 3 SCC 723) it has been held by this Court that it is an error of law and not a mistake of fact committed by the arbitrator which is justiciable in the application before the court. If there is no legal proposition either in the award or in any document annexed to the award which is erroneous and constitutes the basis of the award and the alleged mistakes or alleged errors, are only mistakes of fact the award is not amenable to corrects by the court. In its judgment, the court referred to the decision of this Court in Union of India v. A. L. Rallia Ram ((1964) 3 SCR 164 : AIR 1963 SC 1685) and, after referring to certain factors pertaining to awards in arbitration proceedings and the machinery devised by the Arbitration Act, 1940, pointed out that the award was the decision of a domestic tribunal chosen by the parties and the civil courts which were entrusted with the power to facilitate arbitration and to effectuate the awards, could not exercise appellate powers over the decisions. This

Court reiterated that it was now firmly established that an award was bad on the ground of error of law on the face of it only when in the award itself or in a document actually incorporated in it, there was found some legal proposition which was the basis of the award and which was erroneous. This vies was enunciated by the Judicial Committee in Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. ((1922-23) LR 50 IA 324 : AIR 1923 PC 66 : 1923 AC 480) This view was again reiterated and emphasised by this Court in Kanpur Nagar Mahapalika v. M/s. Narain Das Haribansh ((1969) 2 SCC 620 : (1970) 2 SCR 28) where Ray, J., as the learned Chief Justice then was, observed at page 30 of the Report relying on Champsey Bhara case ((1922-23) LR 50 IA 324 : AIR 1923 PC 66 : 1923 AC 480) (SCC p. 622, para 7)

[A]n error of law on the face of the award means ... that one can find in the award, or in a a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which one can say is erroneous.

7. In State of Orissa v. M/s. Lall Brother ((1988) 4 SCC 153) it was held by a Bench of this Court that it is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled him to arrive at his conclusions. Reference was made in this connection (see paragraph 8) to the observations of the Judicial Committee in Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd. ((1922-23) LR 50 IA 324 : AIR 1923 PC 66 : 1923 AC 480) and of this Court in Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji ((1964) 5 SCR 480 : AIR 1965 SC 214).

8. It was next contended by Mr. Bhandare that the award disclosed an error in law as certain important documents relied on by the appellants were not referred to or discussed in the award at all. In support of this contention Mr. Bhandare referred to the decision in K. P. Poulose v. State of Kerala ((1975) 2 SCC 236). In that case the arbitrator failed to take into account material documents, which were necessary to arrive at for a just and fair decision to resolve the controversy between the parties and it was held that this amounted to legal misconduct on the part of the arbitrator and his award liable to be set aside. This decision is not of much assistance in the case before us as it is not the contention of Mr. Bhandare that the award is bad on the ground of any misconduct of the arbitrator but on the ground that it discloses an errors of law on the face of the record. Moreover, our attention has not been drawn to any particular document which was essential to resolve the controversy between the parties nor has it been demonstrated that any such document was not taken into account by the arbitrator. In view of this, there is no basis to support that contention of Mr. Bhandare which must be rejected. It cannot be even said in this case that the arbitrator was guilty of any legal misconduct or otherwise.

9. The objections to the award of Shri A. C. Gupta, therefore, fail and are dismissed. There will be a judgment in terms of the award. Let the decree be drawn up accordingly. In the facts and circumstances of the case, there will be no order as to costs to the hearing before us.

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