IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Arb. Case No. 29 of 2008

Decided on: 31st August, 2010

M/s Yamuna Cement & Minerals Pvt.Ltd. … …Petitioner

Versus

M/s Keshav Healthcare & Others … …Respondents

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1] *Yes.*

For the Petitioner: **Mr.B.C. Negi, Advocate.**

For the Respondent: **Mr.Shrawan Dogra, Advocate.**

Justice D.D.Sud,J.

The petitioner, who was the claimant before the learned Arbitrator, approaches this court under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) against the award, dated 24.5.2008, passed by the Arbitrator, Justice O.P. Garg, High Court of Allahabad, dismissing the claim of the petitioner.

2. The brief facts necessary for consideration in this case are that the petitioner lodged a claim for specific performance of two agreements and in the alternative for recovery of balance amount of money, subject matter of the two agreements and for damages.

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement*? *Yes.***

3. The claimants pleaded that they had a manufacturing unit of Ordinary Portland Cement running over two contiguous plots, namely Plot No. 85 having an area of 3680 Sq. meters and Plot No. 86 having an area of 4000 Sq. meters, situated in the Excise Free Zone, Gondpur Industrial Area, Paonta Sahib, District Sirmour, H.P. It was submitted before the Arbitrator that these plots were allotted to other owners of manufacturing units on lease basis by the State of Himachal Pradesh pursuant to a policy adopted by the State for the purpose of encouraging industrial growth in Himachal Pradesh. The Himachal Pradesh Financial Corporation provided financial assistance to the industrialists for setting up units and for ancillary purposes.

4. The claimant pleaded that it had purchased lease-hold rights for un-expired period of 74 years on plot No. 85 in an auction conducted by the Financial Corporation as also that of the remaining period of about 70 years from M/s Gulmohar Sugar Industries in Plot No. 86.

5. It is undisputed that on 10th May, 2006, both the parties entered into and executed two separate agreements for the sale and purchase of lease hold rights for the unexpired lease period of both these plots, i.e. Plot No. 85 and Plot No. 86 for a consideration of Rs. 28 and 40 lacs, totaling to Rs. 68 lacs. The claimants submitted that respondents had undertaken to defray the un-earned premium/increase payable to the Industries Department for transfer of the lease hold rights pursuant to these two agreements. The

claimants received payment of Rs. 5 lacs for plot No. 85 and Rs. 15 lacs for plot No. 86 through cheques, issued by the respondents. Two more cheques for Rs. 23 lacs and Rs. 7 lacs were issued, but these could not be encashed as the respondents had instructed their bank to stop payment. The agreements contained a stipulation that the full payment/consideration of the amount would be paid by 2nd June, 2006. The petitioner-claimant herein pleaded that since the entire consideration amount was not paid and the respondents were in breach and they prayed for specific performance of the agreements, dated 10th May, 2006, calling upon and directing the respondents to pay a sum of Rs. 71.5 lacs, in addition to the un-earned premium, due to the Industries Department and also taking of physical possession of the two plots covered by the agreements. A prayer for award of interest at the rate of 18% per annum was also made.

6. In the written statement, filed by the respondents herein, the fact of execution of the agreement and the terms contained therein were not disputed. They pleaded that the claimants had assured to the respondents that the entire liabilities in the nature of sales tax, electricity dues and other dues etc. would be paid by the 2nd June, 2006. An amount of Rs.19,72,000/- was to be paid by the claimants to the Industries Department as transfer fees, without which supplementary deeds etc. could not be executed. In short, the defence is that it is the petitioner, who had been in breach of the agreement and that no relief could be granted to them.

7. On the pleadings of the parties, 14 issues were settled, out of which issues No. 1, 2, 3 and 7 were taken up by the Arbitrator for discussion together. These related to the fact as to whether the claimant-petitioner herein was under an obligation to take steps under the two agreements for transfer of the lease hold rights on plots No. 85 and 86, whether time was the essence of the contract, out of claimant/respondent, who was liable to deposit a sum of Rs.19.72 lacs in respect of plot No. 85 and Rs. 14.84 lacs in respect of plot No. 86 and which was the party in breach of the agreement. These issues have been discussed in extenso by the learned Arbitrator. He holds while discussing these issues that the contract entered into between the parties, though executed in the form of two separate agreements, was in fact one single transaction. The Arbitrator holds that if for some reason, one plot could not be transferred, the whole contract would fall through. While discussing the evidence on record, the learned Arbitrator holds that the formalities of transfer of the lease hold rights so far as plot No. 86 is concerned, there is clear evidence on record that the agreement with respect to this plot could be enforced. However, while turning to plot No. 85, this was not the position. On the documents/evidence in the form of affidavits, the Arbitrator holds that during the course of arguments, some photocopy of letter dated 30th December, 2005 addressed on behalf of Himachal Pradesh Financial Corporation was produced saying that M/s Himachal Leather Board was the original lessee of this plot and it had been sold in auction by the Himachal

Pradesh Financial Corporation to the claimant herein. The Industries Department was requested to cancel the deed, dated 26th June, 1980 and to prepare and execute fresh deed in favour of the claimant. The endorsement on this letter mandated the claimant to contact the department of Industries for execution of fresh lease deed. The Arbitrator then holds as follows:-

> ***"... ... ... There is nothing on record to indicate as to what steps were taken by the claimant for getting the fresh lease deed executed in its favour. In the agreement for sale dated 10th May, 2006 (Annexure 3 page 45) in respect of plot No. 85, the claimant has simply mentioned that the said plot was purchased in auction from HPFC, Shimla but the supplementary lease deed could not be registered with Sub-Registrar, Paonta Sahib due to some unavoidable circumstances. The letter dated 30th December, 2005 issued by the HPFC cannot be treated as an allotment order. HPFC has nothing to do with the lease-hold rights in the industrial plots. Finance Corporation is a body which provides financial assistance to the industrial plot holders and by way of security the subsisting rights in plot and the other assets are mortgaged and on the failure of the borrower to repay the money, the mortgaged property and assets are sold in auction. It is true that the claimant has purchased the plot and the assets of M/s Himachal Leather Board in auction from the HPFC but the lease hold rights could only be conveyed or transferred in favour of the claimant by the State Government through the Department of Industries. It is also not known as to what were the "unavoidable circumstances"***

> ***which prevented the claimant from getting the supplementary deed executed in its favour. As on date, the claimant has no document of title in respect of the lease hold rights in plot No. 85. Mere possession over plot No. 85 is not sufficient to conclude that the claimant is the lessee of the said plot as his possession was contingent on various imponderables. The title of the claimant as lessee of the land of plot No. 85 is not only shady, shaky and doubtful but totally unacceptable. … … … … … … … …"***

This in fact is the crux of the finding of the learned Arbitrator. In fact what he holds is that without there being any document on record to show that the claimant-petitioner was the owner of plot or that after its re-purchase from the Financial Corporation, any step had been taken by the claimant in the direction of having a lease deed executed in its favour, it could not be presumed that there was a valid title which could be transferred. Even before the Arbitrator there was no evidence produced by the respondents to show as to what steps in fact had been taken by the claimant to establish its claim. I am not adverting to the other issues as I find that the claimant in fact sought to enforce a contract for sale of property, for which it had no title.

8. Learned counsel for the claimant has urged a number of grounds in support of its contention that the award violates the provisions of Section 34 of the Act. The usual grounds urged are that the Arbitrator has acted irrationally, capriciously and ignored the terms of the contract. The Arbitrator was wrong in arriving at the conclusion that two agreements constitute, one inseparable contract and that

once the land had been purchased from the Financial Corporation, the petitioner had clear title.

9. It is by now well established that this court, exercising its jurisdiction under Section 34 of the Act, cannot act as an appellate authority. **{See: M/s Sumitomo Heavy Industries Limited** Vs. **Oil & Natural Gas Commission of India 2010 (7) Scale 279}** holding:-

> ***"35. … … … … … … … … … … As recently reiterated by this Court in Steel Authority of India Limited Versus Gupta Brothers Steel Tubes Limited reported in (2009) 10 SCC 63 if the conclusion of the arbitrator is based on a possible view of the matter, the court is not expected to interfere with the award. The High Court has erred in so interfering.***
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> ***36. Can the findings and the award in the present case be described as perverse ? This court has already laid down as to which finding would be called perverse. It is a finding which is not only against the weight of evidence but altogether against the evidence. This court has held in Triveni Rubber & Plastics Vs. CCE AIR 1994 SC 1341 that a perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in Arulvelu and Another Vs. State Represented***

by the Public Prosecutor and Another (2009) 10 SCC 206. In the present case, the findings and award of the umpire are rendered after considering the material on record and giving due weightage to all the terms of the contract. Calling the same to be perverse is highly unfair to the umpire. The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this court in Kwality Manufacturing Corporation versus Central Warehousing Corporation reported in (2009) 5 SCC 142, the court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

(pp.291-292)

10. In ***Madnani Construction Corporation Private Limited vs. Union of India and others (2010) 1 SCC 549***, the Supreme Court again reiterated this principle:-

> ***"20. It is well settled that the arbitrator is the master of facts. When the arbitrator on the basis of record and materials which are placed before him by the Railways came to such specific findings and which have not been stigmatized as perverse by the High Court, the High Court in reaching its conclusions cannot ignore those findings. But it appears that in the instant case, the High Court has come to the aforesaid finding that the items mentioned above are excepted matters and non-arbitrable by completely ignoring the factual finding by the arbitrator and without holding that those findings are perverse."***
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> ***(p.554)***

Only one portion of the award has been reproduced by me to show that before the Arbitrator, the claimants made no effort to establish their title or to show the steps which they had taken in the direction of perfecting this title. In the absence of this evidence, the Arbitrator has rightly declined the relief, as prayed for, by the petitioner herein. The award also cannot be set aside on any of the grounds as is enumerated under Section 34 of the Act for the reasons that it is not opposed to the public policy of India. To grant a decree for specific performance in favour of the claimants and against the respondents

for the property, in which they have no title, would be acting against law.

11. On the other aspect as to whether the contract was one whole and inseparable, I hold that the Arbitrator has not committed any error. It was not in dispute that both the plots were adjoining. The necessity for executing the two agreements is writ large on the facts of the case. The petitioners had clear title only to one plot and on the second plot, they had no clear title and for that reason two agreements were executed that the title would be clear to these plots also. In these circumstances, on the material on record, no illegality has been committed by the Arbitrator. Thus there is no merit in this petition, which is dismissed.

August 31, 2010. **(Dev Darshan Sud)**
(K/aks) **Judge.**