

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 04.09.2019

Date of decision: 31.10.2019

+ **FAO(OS) (COMM) 213/2019**

M/S CHOPRA MARKETING PVT. LTD. Appellant

Through: Mr. Rajiv Talwar, Mr. Amulya
Dhingra, Mr. Diwakar Singh and Mr.
Uttakarsh Khandelwal, Advocates

versus

M/S DRISHTICON PROPERTIES PVT. LTD. & ANR.. Respondents

Through: None

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ASHA MENON, J.

C.M.Appln.39681/2019 (Exemption)

Allowed subject to all just exceptions.

FAO(OS) (COMM) 213/2019

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'). The dispute relates to a property bearing No.4, Atta-ur-Rehman Lane, Under Hill Road, Rajpur Road, Delhi, measuring around 5400 square yards popularly known as 'Anand Bhawan'.

2. From the record, it is apparent that this property was subject to several transactions of different vintage, on the basis of which disputes arose

between the parties to such transactions including M/s. Chopra Marketing Pvt. Ltd. (hereinafter referred to as 'CMPL') and M/s. Drishticon Properties Pvt. Ltd. (hereinafter referred to as 'DPPL'), which resulted in a number of litigations *inter se* parties. Finally, the Supreme Court referred the disputes between CMPL and DPPL to arbitration by appointing a Sole Arbitrator to determine the claim of CMPL for specific performance of an Agreement to Sell dated 18.07.2006, whereby DPPL agreed to transfer the said property to CMPL on payment of a final consideration of Rs.4 crores of which Rs.94 lacs stood paid by CMPL to DPPL in part performance of the said Agreement to Sell. It may be mentioned here that this Agreement contained a clause whereunder disputes were agreed to be referred to arbitration.

3. After evaluating the evidence that was led before the learned Sole Arbitrator, the Award dated 25.07.2015 was made, whereunder the claim of CMPL for specific performance of the Agreement to Sell dated 18.07.2006, was disallowed. It was further held that DPPL/respondent No.1 was to pay back CMPL a sum of Rs.94 lacs, which it had received. Interest at the rate of 12% *per annum* on the said sum of Rs.94 lacs was also awarded in favour of CMPL from the date of the Award, till payment.

4. Aggrieved by this Award, CMPL filed a petition under Section 34 of the Act. The learned Single Judge found no fault with the conclusions drawn by the learned Sole Arbitrator and vide the impugned judgment dated 01.08.2019, dismissed the said petition, which has now led to the present appeal.

5. Before proceeding further, it is to be noted that the scope of an appeal under Section 37 of the Act is fairly limited and the court cannot be expected to look into the arbitration proceedings and re-appreciate the entire

evidence. What would concern the court would be whether there is any error in the judgment of the learned Single Judge while disposing of the petition under Section 34 of the Act. In this context, it is also underlined that the scope for interference by the court in exercising jurisdiction under Section 37 of the Act is more limited than the powers vested in it under Section 34 of the Act. The court does not sit in appeal over the Award of the Arbitral Tribunal to re-assess or re-appreciate the evidence while exercising its powers under Section 34 of the Act. The court has no powers to substitute its view if the view taken by the Arbitral Tribunal is a plausible one.

6. This Court has held in several cases that the focus of scrutiny under Section 34 of the Act is to examine whether the decision of the Arbitral Tribunal was based on a legitimate process and not look for errors on the application of law or the determination of facts. The scrutiny under Section 37 of the Act would be more in the nature of a judicial review to consider whether the learned Single Judge has overlooked any patent error in the Award or has taken a glaringly preposterous view, which alone would call for interference in exercise of the powers under Section 37 of the Act. This is the view taken by the Supreme Court and High Courts in various decisions including Associate Builders vs. Delhi Development Authority AIR 2015 SC 620, M/s. CWHEC-HCIL (JV) vs. M/s. CHPRCL 2017 SCC OnLine Del 9074, M/s. Telecommunication Consultants India Limited v. M/s. Catvision Ltd. 2017 SCC OnLine Del 9235 and Container Corporation of India Ltd. through its Regional General Manager and Anr. vs. Kandla Cargo Handlers, through its Partner Shri B.L. Agrawal 2019 SCC OnLine Bom 1245.

7. Keeping the above parameters in mind, we may now turn to the case

in hand. The basic grievance raised before this Court and argued by Mr. Talwar, learned counsel for CMPL is that DPPL had pleaded that the Agreement to Sell dated 18.07.2006 was a sham document, which was rejected by the Sole Arbitrator and yet having concluded that the document was not a sham, the Sole Arbitrator went beyond his jurisdiction to look into the oral evidence to conclude that this document was a Loan Agreement. This was a patent error which was ignored by the learned Single Judge. According to the learned counsel, if the Agreement was not a sham, then its contents had to be read as they were and if that had been done, it would have been clearly evident that this was an Agreement to Sell the subject property.

8. The next contention, as raised by the learned counsel for CMPL, was that the so-called contradictions relied upon by the Sole Arbitrator and reiterated by the learned Single Judge were not contradictions of such a nature to conclude that the Agreement to Sell was a loan document. It was further submitted that Rs.94 lacs had been paid by CMPL as earnest money and it could not have been considered to be a loan. It was also contended that had the document been a loan document, there would have been some provision for interest and even the Sole Arbitrator had failed to award any interest on Rs.94 lacs, while rejecting the claim of CMPL for specific performance of the Agreement to Sell and while directing DPPL to repay the said sum of Rs.94 lacs.

9. All the aforesaid submissions and arguments addressed by the learned counsel for CMPL are fact centric and it has been held by the Supreme Court in Associate Builders (supra), the Arbitrator is the sole evaluator of facts. Be that as it may, we may refer to these points, as noticed and dealt with in the impugned judgement. The learned Single Judge has set down the

facts of the case in para No.28, which is reproduced below for easy reference:-

“28.1 The subject property which admeasures 5400 square yards was sold to the wife of late Ram Lal Anand via a registered deed on 5.5.1950.

28.2 After the death of his wife, late Ram Lal Anand via two sale deeds gifted 840 square yards of the subject property which admeasures 5400 square yards in favour of his two sons. These gift deeds were executed on 9.12.1963 and 5.1.1963.

28.3 However, for some odd reason, late Ram Lal Anand executed the 1966 ATS in favour of late K.S. Bhatnagar which comprised the entire area equivalent to 5400 square yards.

28.4 With the death of late Ram Lal Anand, on 23.11.1966, K.S. Bhatnagar filed a suit for specific performance and consequent thereto, obtained a judgment and decree dated 3.10.1974 in his favour. This judgment was passed in CS(OS) No.92/1968.

28.5 Appeals against the said judgment were preferred both by K.S. Bhatnagar and one of the legal heirs of late Ram Lal Anand. These appeals were numbered as RFA(OS) No.17/1975 and RFA (OS) No.13/1975. The Division Bench of this Court dismissed RFA (OS) No.13/1975 preferred by the legal heirs of late Ram Lal Anand, on 24.12.2010. The SLP preferred against the judgment was also dismissed. Consequently, the judgment and decree dated 3.10.1974 acquired finality.

28.6 The net effect of this, as noted hereinabove, was that the legal heirs of K.S. Bhatnagar acquired, out of the total area comprising the subject property which admeasured 5400 square yards, rights in an area equivalent to 4560 square yards.

28.7 Consequently, the legal heirs of late Ram Lal Anand had rights in only the remaining area consisting of 840 square

yards.”

10. Another fact noted was that DPPL in its capacity as the General Power of Attorney Holder of the Anand Family members, on the basis of an Irrevocable General Power of Attorney dated 08.04.2005, had sold 2700 square yards from out of the property in question to Smt. Kaushalya Devi vide a Sale Deed dated 19.02.2008 for a sum of Rs.6,30,00,000/-.

11. In the background of these facts, the learned Single Judge concluded that the Sole Arbitrator had rightly declined specific performance (i) because the area of 840 square yards owned by the legal heirs of late Ram Lal Anand, who was the original owner of the property and the subsequent sale of 2700 square yards out of the subject property by DPPL in favour of Smt. Kaushalya Devi vide Sale Deed dated 19.02.2008, rendered such specific performance impossible as it was not possible to demarcate 840 square yards or 2700 square yards and to conclude whether or not any area, leave alone 1500 square yards, was available for transfer by DPPL to CMPL. CMPL has not been able to point out how this conclusion was erroneous or how any land, leave alone 1500 square yards, was easily identifiable as not forming a part of the gift of 840 square yards made by late Ram Lal Anand in favour of his two sons or 2700 square yards, which formed a part of the Sale Deed dated 19.02.2008, executed in favour of Smt. Kaushalya Devi.

12. No doubt, the Sole Arbitrator has concluded that the document in question, namely, the Agreement to Sell dated 18.07.2006 was not a sham document, but it was not beyond his jurisdiction to look into the said document to determine the nature of transaction. While doing so, the Sole Arbitrator noted that certain terms and conditions were in contradiction with

each other, particularly, in respect of the nature of the transaction being either in the future, on payment of the complete sale consideration or as if it was a completed transaction and the property had been sold and legal possession handed over to CMPL. The learned Single Judge concluded that the Sole Arbitrator had not stepped beyond the document and had relied on the “intrinsic evidence available” in the said document, which rightly led him to conclude that the document had been executed only to secure the sum of Rs.94 lacs advanced by CMPL to DPPL. The relevant terms of the Agreement to Sell dated 18.07.2006, relating to the so-called transfer are reproduced herein below: -

“AND WHEREAS the seller has agreed to convey, sell, assign, transfer and deliver to the purchaser and purchaser has agreed to purchase and accept from THE SELLER the said property, in and against the full and consideration of Rs.4,00,00,000/= (Rupees Four Crores Rupees only) and subject to the terms and conditions of this Agreement.

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c) The seller company assures to the purchaser that the company is in part possession of the said property which has been delivered to the purchaser.

d) The seller company is absolutely seized and possessed of or otherwise well and sufficiently entitled to ALL THAT the said property free from all encumbrances, charges, liens, lispendens, whatsoever or howsoever nature and have a good marketable title in respect of the said property.

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B.1. The seller company shall convey, sell, assign, transfer in absolute, complete, clear all the titles, interests in the said property and deliver the vacant and peaceful possession of the said property at the time of receipt of full and final consideration of Rs.4,00,00,000/- (Rupees Four Crores Rupees only) simultaneously by execution of the Sale Deed/Conveyance Deed/Title Deed etc. in favour of the purchaser and that the purchaser shall acquire the titles, interests in the said property free from all encumbrance with good marketable, fee simple and insurable title of the said property.

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2. *The purchaser has paid to the seller company a sum of Rs.94,00,000/- out of total and final consideration of Rs.4,00,00,000/- as in part performance of this Agreement to Sell in respect of the said property, the receipt whereof is hereby admitted and acknowledged by the seller company and in consideration of the said amount the seller company hereunder grant, convey, sell, transfer, assign and assure unto and to the use of the said purchaser to have and to hold the same unto and to use of the said purchaser its, executors administrators, representatives and assigns absolutely and forever.*
3. *The seller company shall execute the deed of conveyance or conveyances on the terms and conditions of this agreement either in favour of the purchaser or in the name of its nominee/nominees along with the vacant and peaceful possession of the said property by the*

seller company against the balance amount of Rs.3,06,00,000/- and the Stamp Duty and registration cost with all other incidental cost thereto shall be borne and paid by the purchaser.

4. *The purchaser after making payment of entire sale consideration of this agreement to sell and after completion of sale of said property under this agreement to sell shall become sole and absolute owner of the said property under sale as mentioned above and shall be fully entitled, empowered, authorized to use, occupy, enjoy, hold, sell, mortgage, gift, exchange, lease out or to dispose of or to transfer the same in any manner as also the purchaser deems fit and proper to do so as its own property without any claim, demand, objection of the seller company or any of its legal heirs of previous owner or owners or any other person(s) claiming under the seller or under the previous owner or owners.*
5. xxxxx xxxxx
6. *The seller company has sold, transferred, conveyed, handed over all his rights, titles, powers, legal possession, interests, authorities of ownership of said property under said unto the Purchaser through this Agreement to Sell which the seller company has acquired by vide agreement to sell dated 6.2.2005 and an Irrevocable General Power of Attorney dated 8.4.2005 in its favour duly registered in the office of Sub Registrar, Delhi registered as document no. 2526 in Block no. IV volume no.1767 on pages 74 to 116 dated 8.4.2005.*
7. *The seller company hereby represent and assure the purchaser that the titles, interests in the said property shall be given to the purchaser free from all*

encumbrances, liens, tenancies, lease, licensees, chattels, mortgages, sale agreements, security interest, covenants, conditions, restrictions, judgments, rights of way, easements, encroachments and any other matter effecting title or use of the property etc. and the transfer of all shares and interests in the said property shall be without any condition and for forever and if it is proved otherwise then the Seller company shall be liable and responsible for the same and the Purchaser shall acquire all such shares and interests and rights in the said property.”

(Emphasis supplied)

13. As can be seen from the above, these terms are clearly contradictory, as either the transaction had been concluded and possession alongwith title transferred or the title and possession were to be transferred in the future. Both the conditions recorded in the document cannot exist simultaneously. In the face of such inherent contradictions, the learned Single Judge concluded that it had become necessary for the Sole Arbitrator to examine the terms of the Agreement and then ascertain the true intent of the parties and that the Award could not be faulted on this ground. We are in complete agreement with the said view.

14. It is also significant to note that the Sole Arbitrator has given sound reasons for treating the aforesaid document as being one executed in respect of an unsecured loan of Rs.94 lacs extended by CMPL. The learned Single Judge has referred to this summing up done in the Arbitral Award, which need not be reproduced here for sake of brevity. Suffice it is to state that the Sole Arbitrator noted that the document was one sided and weighed in favour of CMPL and against DPPL as the consideration of Rs.4 crores

mentioned therein was far below the actual value of the property, determined on circle rates, which may have come to about Rs.10 crores. Reference was also made to the sale of 2700 square yards out of the said property to Smt. Kaushalya Devi for a consideration of Rs.6.30 crores and the fact that the amount of Rs.4 crores, mentioned as the sale consideration for the subject property in the Agreement to Sell dated 18.07.2006, was less than half of the value of the said property at the relevant time. For the said reason too, it was held that the document could not have been an Agreement to Sell and was rather, a document executed towards an unsecured loan. We see no reason to differ with the said view.

15. The learned Single Judge also agreed with the Sole Arbitrator that there was nothing to show that CMPL was ever ready and willing to perform its part of the obligations as provided in the purported Agreement to Sell dated 18.07.2006. It was also noted that CMPL had not even bothered to raise an objection to the sale of a part of the subject property to Smt. Kaushalya Devi on 19.02.2008, even though one Sh.Naresh Chandra was a Director of both, CMPL as well as DPPL. At no point of time, did CMPL offer to pay the balance sale consideration or show any interest in actually concluding the sale transactions. The argument advanced that no interest was provided for in the document in question, does not impress us as the parties being in the real estate business, were familiar with the nature of customary business practice that exist in the said business.

16. In view of the above discussion, there is no ground to hold that the learned Single Judge has reached an untenable or preposterous conclusion in agreeing with the view expressed by the Sole Arbitrator, which can call for interference in exercise of the limited jurisdiction vested in this Court under

Section 37 of the Act. In the result, the appeal is dismissed *in limine* being devoid of any merits.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

OCTOBER 31, 2019
s/MK