

(2013) 04 CAL CK 0073

Calcutta High Court

Case No: A.P. No"s. 229 and 236 of 2009

Jaichandlal Ashok Kumar and Co.
Private Limited

APPELLANT

Vs

Deepak Jail Nawab Yossuf and
Another
 Nawab Yossef and
Another Vs Jaichandlal Ashok
Kumar and Co. Private Limited

RESPONDENT

Date of Decision: April 17, 2013

Citation: (2013) 4 CHN 295 : (2013) 3 WBLR 907 : (2013) 2 WBLR 861

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Ranjan Deb, Surojit Nath Mitra and Ashish Kumar Chakraborty, for the Appellant; Jayanta Kumar Mitra, Ranjan Bachawat and Prabhakar Chowdhury, for the Respondent

Judgement

Sanjib Banerjee, J.

Both the claimant and the respondents in the reference seek the annulment of the arbitral award, but to varying ends and extents. The respondents in the reference say that the award rendered under the Arbitration Act, 1940 is perverse and there are errors apparent on the face thereof as no reasonable person, on the basis of the material as carried by the parties to the reference, could have concluded that the claimant in the reference was entitled to an order for specific performance of the agreement between the parties. Though the arbitrator, in exercise of the perceived discretion u/s 20 of the Specific Relief Act, 1963, did not direct specific performance of the agreement but awarded damages in lieu thereof, the respondents in the reference insist that since the claimant was not entitled to specific performance there was no occasion for the claimant to be awarded damages. The further ground urged by the respondents in the reference (hereinafter referred to as the owners) is that the statement of claim did not contain any relief for damages in lieu of specific performance nor did the claimant quantify the alleged damages on such count. The

owners refer to the arbitrary conduct of the arbitrator in inviting a suggestion from the claimant at the second-last sitting of the reference and passing an award in damages in lieu of specific performance on the basis of the claimant's unsubstantiated statement in a few loose sheets of paper which the owners did not get a meaningful chance to deal with. The claimant's grievance, on the other hand, is that upon the arbitrator finding that the claimant was entitled to specific performance of the agreement, specious grounds were proffered to deny the claimant its rightful due. The claimant, however, admits that its statement of claim in the reference did not indicate any relief for damages in lieu of specific performance nor did the claimant quantify the damages on such score in any subsequent pleadings. The claimant maintains that it is entitled to specific performance. The claimant says that it had sought damages in addition to specific performance of the agreement and submits that the award of damages in lieu of specific performance by the arbitrator can, in any event, not be sustained. The claimant has expressly agreed to the award being set aside to the extent that it granted damages in lieu of specific performance to the claimant, on the ground that given the manner in which the award on such account was made, the claimant is in no position to sustain it.

2. The agreement between the parties of June 28, 1989 envisaged the demolition of the existing structures at the Outram Street premises and the construction of three buildings on the land measuring about 37 cottah. A sketch-map was appended to the agreement and the original agreement carved out three distinct portions of the land marked in blue, pink and green. The claimant was obliged, under the agreement, to construct, according to the plan sanctioned by the Calcutta Municipal Corporation, a commercial building on the 23-cottah southern portion of the premises, the constructed area whereof was to be shared by the owners and the claimant; and, two buildings on about seven cottah land each, one being exclusively for the owners and the other being exclusively for the claimant. The agreement recorded that there was an individual occupant at a part of the premises and a company functioned thereat under the control of such individual.

3. The claimant alleged in the reference that despite the claimant having performed its obligations under the agreement in, inter alia, making the initial payment to the owners and causing the property to be rid of the occupant, the owners did not permit the agreement to be executed by discharging the obligations cast on the owners thereunder. The owners cited the long delay on the part of the claimant and the claimant's conduct amounting to lack of readiness and willingness on its part to pursue the work under the agreement. The owners also maintained that the claimant had failed to carry out its part of the bargain and was, thus, not entitled to specific performance of the agreement that the claimant had claimed.

4. In fact, there was a solitary owner who had executed the agreement of June 28, 1989. Upon the death of such owner in course of the reference, his heirs were

brought on record.

5. By October 1993, disputes had broken out between the parties and the claimant in the reference applied both u/s 20 as well as u/s 41 of the 1940 Act. On October 13, 1993 an ex parte order was passed directing the parties to maintain status quo until further orders. The order did not indicate the nature of the status that was to be preserved undisturbed, but it is the admitted position that such order continued till the conclusion of the arbitral reference. The arbitrator named in the relevant clause in the agreement was replaced by Court and a retired Judge of this Court appointed arbitrator. The award was rendered on March 31, 2008.

6. The award, running into almost 70 pages, records the following issues which were settled at the 11th sitting on July 8, 2000:

(i) Was the claimant ready and willing or in a position to perform his (sic, its) obligation under the Agreement dated 28th June, 1989?

(ii) Did the Respondent refund the sum of Rs. 14 lacs as alleged in the Counter Statement?

(iii) Was the said agreement partly performed as alleged in paragraphs 9(a), 9(b), 9(c), 10, 11, 12, 13 and 14 of the Statement of Claim?

(iv) To what relief, if any, are the Claimant and the Respondent entitled to?

7. Several witnesses were examined on either side and even some income tax officials were issued subpoena at the behest of the claimant. The award notes, on the basis of either the admitted facts or the evidence before the arbitrator, that the primary intention of the parties under the registered agreement of June 28, 1989 was to jointly develop the property by demolishing the old structures and by constructing a commercial building, a building for the residential accommodation of the owners and another for the residential accommodation of the principal person in control of the claimant company. The award records two Powers of Attorney being executed by the original owner in terms of the agreement pursuant to which the claimant prepared building plans and submitted the same to the corporation.

8. The arbitrator noticed the primary defence of the owners that the claimant had failed to perform its obligations and had forfeited its right to have the agreement specifically enforced; that the claimant did not have adequate resources to undertake the work contemplated in the agreement; that the claimant's conduct amounted to unreadiness and unwillingness to perform the work; that the sanctioned plan was a complete departure from how the parties envisaged the three buildings would be constructed and positioned at the premises; and, that in the claimant not taking any steps upon the sanctioned plan lapsing by efflux of time, it was not entitled to specific performance of the agreement.

9. On the basis of the correspondence and evidence, the arbitrator concluded that the claimant "was always and still is ready and willing to comply with the terms of the agreement, and Claimant's part performance of the Contract is not insignificant, which can be easily overlooked." The arbitrator observed that the claimant had adequately refuted the owners' charge of lack of financial stability on the claimant's part and held that the claimant had demonstrated that "money is always available to a Developer when necessary..." The arbitrator answered the first issue in favour of the claimant and found that the claimant was entitled to specific performance of the agreement. However, the arbitrator opined that notwithstanding a party being found to be entitled to specific performance of an agreement there was a discretion still available to the arbitrator for the relief being refused. The arbitrator observed that "any order for specific performance would be unworkable, unenforceable and as such infructuous." The arbitrator found that the relationship between the parties was "very strained and embittered" and concluded that the level of co-operation necessary between the parties to conclude the project would not be possible to achieve or ensure.

10. The arbitrator held that the owners' contention that they had refunded a sum of Rs. 14 lakh originally paid by the claimant was unfounded. The arbitrator also accepted that the agreement had been partly performed by the claimant as had been asserted by it in its statement of claim. Having answered all three primary issues in favour of the claimant in the reference, the arbitrator declined to use the discretion available u/s 20 of the Specific Relief Act in favour of the claimant and granted damages in lieu of specific performance which the claimant has expressly conceded that it cannot sustain.

11. The owners insist that the award is contrary to law and, at any rate, at variance with the agreement between the parties. However, the primary ground of legal misconduct asserted by the owners upon the arbitrator awarding damages without any pleading or proof and in abject violation of principles of natural justice, is no longer relevant since the claimant has acceded to such part of the award being set aside. The owners require the Court to reappraise the material referred to in the award to arrive at a conclusion that the conduct of the claimant revealed that it was not ready or willing-and was, indeed, unable to perform--its part of the bargain. The owners refer to Section 14 of the Specific Relief Act and say the exception under sub-section 3(c) thereof was not available to the claimant as it was a developer. In support of such argument, the owners have relied on the Division Bench judgments reported at [Vipin Bhimani and Another Vs. Sunanda Das and Another](#), ; [Vipin Bhimani and Another Vs. Sunanda Das and Another](#), and [Sushil Kumar Agarwal Vs. Kalidas Sadhu](#),). The owners have carried another Division Bench judgment reported at (2002)4 Cal HN 115 (Baisakhi Bhattacharjee v. Shayamal Bose) for the proposition that a developer had to be registered under a State Act engrafted to regulate promoters, or else the developer would not be entitled to specific performance of the development agreement. They claim that the readiness and

willingness of a party seeking specific performance of a contract has to be continuous and the Court must take into consideration the conduct of the claimant "prior and subsequent to the filing of the suit along with other attending circumstances" as recognised in the judgment reported at [N.P. Thirugnanam \(D\) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others,](#)). The owners also cite a decision reported at [His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar,](#) on the distinction between readiness to perform the contract and the willingness to perform the same. The Supreme Court opined in that case that the readiness of a claimant to perform a contract implied "the capacity of the plaintiff to perform the contract which includes his financial position..."; and, for determining the willingness of the claimant to perform his part of the contract, "the conduct has to be properly scrutinised." The other judgment that the owners have relied on, the one reported at [Wazir Chand Karam Chand Vs. Union of India and Another,](#) to the effect that arbitrators have to comply with the rules, of natural justice, is no longer relevant since the claimant in the reference has conceded that the award of damages in lieu of specific performance cannot be sustained.

12. As to the award being contrary to law, the owners have referred to the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 and the judicial interpretation of Sections 2(g) and 3 of such Act in Baisakhi Bhattacharjee (supra). Section 14 of the Specific Relief Act and the inapplicability of the exception in sub-section (3)(c) thereof as judicially interpreted in the case of development agreements has also been put forth to assail the legal basis of the finding in the award that the claimant was otherwise entitled to specific performance of the agreement.

13. The Baisakhi Bhattacharjee (supra) judgment was placed before the arbitrator and the arbitrator took a view that notwithstanding the claimant not being registered under the relevant Act there was no lack of readiness or willingness on its part to perform its obligations under the agreement. The registration under the said Act of 1993 is a pre-requisite for a promoter before commencing construction of any building at the premises covered by the agreement between the promoter and the owner. The owners in this case do not demonstrate any disqualification on the part of the claimant in the reference to apply for or obtain registration under the said Act of 1993. The arbitrator cannot be faulted for disregarding the objection on such score since the claimant in the reference was only obliged to obtain the registration under the said Act prior to the commencement of any construction at the premises.

14. On the question of a development agreement being per se incapable of specific performance at the behest of the developer, it must be said that a developer is not defined in the Specific Relief Act and a person who has entered into an agreement with the owner of a land to carry out the construction of one or more buildings upon the land with an interest in the constructed area, may not, if he applies for specific performance of the relevant agreement, be regarded as a person who has applied

for the enforcement of a contract merely for the construction of a building or the execution of any other work on the land within the meaning of Section 14(3)(c) of the Specific Relief Act. That the Division Bench judgments in Vipin Bhimani, Dilip (Pramanik) Das and Sushil Kumar Agarwal regarded the plaintiff in each case to have applied for specific performance of agreements merely for the construction of any building or the execution of any other work on the relevant land, is, essentially, a question of fact. It must be deduced from the said three Division Bench judgments that the agreements in those cases were not regarded as being covered by the presumption under the first clause of the explanation to Section 10 of the Specific Relief Act. In the present case, one of the three buildings to be constructed upon the land in question was for the benefit of the claimant in the reference as residential accommodation for the principal person in control thereof. Even without considering that the agreement created an interest in the claimant in the reference over the proposed constructed area in the commercial building, it is evident that the agreement of June 28, 1989 was not for the mere construction of any building or the execution of any work on the land carried on by a mason or a contractor engaged for the purpose; the claim was by a party in whose favour an interest in land had been created by the agreement in that one of the proposed buildings was for the claimant's exclusive use. At any rate, an arbitrator is permitted to commit a mistake and every mistake of an arbitrator is not capable of correction in this jurisdiction. It, however, does not appear, given the tenor of the agreement between the parties, that the arbitrator committed any mistake in proceeding to consider the claimant's prayer for specific performance of the contract merely because the agreement had to be regarded as a development agreement.

15. The arbitrator found, on the basis of the wealth of material before the arbitrator, that the readiness and willingness on the part of the claimant in the reference to perform its obligation under the agreement had been established. In this jurisdiction, the Court can scarcely sit in appeal over the award and supplant the Court's perception over the arbitrator's or tinker with the discretion exercised unless it is palpably absurd or patently perverse. The arbitrator found that the claimant in the reference had the financial capability to discharge its obligations under the agreement and it had, by its conduct, evinced its willingness to undertake and complete the work thereunder. Given the limited scope of scrutiny available and the even more limited scope of interference in matters of the present kind, the Court can hardly be persuaded to look into the matter afresh and hold otherwise than has been held by the arbitrator.

16. There are certain elementary principles in this jurisdiction that must be kept in mind. Apart from the obvious that proceedings under Sections 30 and 33 of the 1940 Act are not akin to an appeal, the Court is enjoined with a duty to support an award of the forum of consensus rather than find fault with it. Even a wrong conclusion or the failure of the arbitrator to appreciate facts in their proper perspective may not be good enough for the Court to interfere with an award. It is

also beyond question that an arbitrator is to be regarded as the sole judge of assessing the quality and quantity of the evidence in support of a finding. The Court is not to look into the reasonableness of the reasons furnished by an arbitrator in support of a finding or the award itself. Merely because the view taken by an arbitrator may not appeal to the Court is also not a ground for annulling an award or a finding therein if the arbitrator's view is a possible or a plausible view. In short, an award or a finding therein may not be interfered with by Court unless it is found to be bad in the meanest sense and mistakes in construing a provision of law or in interpreting the matrix contract may still not excite the Court to lift its pen against the award. The Court looks to correct errors of jurisdiction and, more often than not, glosses over the perceived errors of the arbitrator if the matters pertaining thereto were within the bounds of the arbitrator's authority to adjudicate upon and if there is no manifest miscarriage of justice thereby.

17. There is no merit or basis to the owners' assertion that no reasonable person in the position of the arbitrator could have concluded that the claimant in the reference was entitled to specific performance of the agreement. Not only was the arbitrator entitled to answer the issue in favour of the claimant, but also adequate reasons for forming the opinion have been indicated in the award.

18. It is then the claimant's contention which has finally to be considered: as to whether the arbitrator had any discretion to decline specific performance of the agreement despite finding the claimant to be entitled thereto; and, whether the discretion was appropriately exercised in the circumstances.

19. Section 20 of the Specific Relief Act confers a discretion on the Court to grant a relief of specific performance and provides that the Court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion is hedged with the condition that it is not to be arbitrary but is to be sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. Now that it is judicially accepted that a prayer for specific performance of an agreement may be carried to an arbitral reference, the underlying principle in Section 20 has to come through in an award based on a claim for specific performance of an agreement.

20. If the award calls for some criticism, it would be in it declining to grant the principal relief claimed though it answered all the primary issues in favour of the claimant. The refusal of the relief of specific performance of the agreement, in the circumstances, may appear anomalous since the claimant in the reference had a substantial interest in the performance of the contract other than to merely construct one or more buildings for the owners to enjoy. A weighty consideration that ought to have been of relevance in the exercise of discretion appears not to have crossed the arbitrator's mind. Further, the arbitrator did not decline the primary relief on the ground that the conduct of the claimant in the reference had been such as to disentitle it to the relief. But the arbitrator referred, in the context,

to the building plan having lapsed by efflux of time and the concession on the part of the claimant "that if a fresh plan is required to be submitted for sanctioning, what repercussions will follow cannot be foreseen." In the same breath, the arbitrator recorded the claimant's submission that there were "perplexed questions and it may be necessary for the parties to come before the Court and/or Arbitrator again and again, to seek its directions, for having (the) contract implemented." The arbitrator indulged in a bit of crystal-ball gazing in perceiving that the animosity of the original owner towards the claimant "will never permit... his sons and heirs to cooperate with (the) Claimant for sentimental reasons." However, in the light of the arbitrator's assessment of what could be and the claimant's acceptance of an element of uncertainty, there were plausible grounds for the arbitrator to decline the relief for specific performance of the agreement.

21. That the arbitrator found that it was lawful for the claimant in the reference to be granted the relief of specific performance was only a battle won by the claimant, not the whole of the war. The arbitrator perceived that the embittered relationship between the parties would make it difficult for the parties' obligations under the agreement to be discharged in true spirit and with the degree of respect due to the other party. The arbitrator may not have said as much in so many words, but that is the sense conveyed by the discussion and the conclusion in the closing paragraphs under the first issue framed in the reference. There are a few anomalies in the award, which either party herein suggests for varying purposes to be self-contradictory; but if it is for the Court to try and sustain an award rather than annul it, such minor contradictions ought to be overlooked as they do not have any material bearing on the larger issue which has been decided by the arbitrator. Every judgment or award that runs into several pages is capable of being faulted with a degree of contradiction in its different parts if gone through with a toothcomb. That may be recognised as the fallacy of communication through written words or the lack of felicity in the use of words: Judged in such uncharitable manner, the present judgment may also throw up some perceived contradictions. At the end of the day, however, the assessment calls not for picking on or pecking at a word here or an expression there, but for considering the sense of what is conveyed on a broader perspective.

22. The claimant in the reference has referred to a judgment reported at [Prakash Chandra Vs. Angadlal and Others](#),) for the principle that, ordinarily, specific performance of an agreement should be granted and it ought to be denied "only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief." The claimant in the reference has also relied on a passage from Snell's Principles of Equity (28th Ed) at page 577 thereof that though it was once thought that a contract to do continuous successive acts would involve constant and ineffective supervision by the Court and could not be enforced specifically, the position at law has transformed and the need for supervision is no longer considered a bar to the grant of the relief. It must be

confessed that in the light of the present liberal approach of Courts to grant specific performance of a contract and the age-old adage that a party to an agreement must be held to its bargain, it is tempting to revisit the arbitrator's reasoning on such account and grant the relief that the claimant in the reference was legally found to be entitled to; particularly, as the agreement envisaged the construction of at least one building for the exclusive use of the claimant in the reference. But to do that would be to go against the cardinal principle in this jurisdiction since the arbitrator's reasoning in the exercise of the discretion, albeit being somewhat disagreeable, is not altogether outlandish or perverse that would warrant a rejection thereof out of hand.

23. There does not appear to be any arbitrariness in the exercise of the discretion by the arbitrator in declining specific performance of the agreement to the claimant despite finding the claimant to be otherwise entitled thereto. The discretion was exercised on sound and reasonable principles in the arbitrator appreciating that there was an element of co-operation that was necessary for the agreement to be worked which could no longer be expected of the parties. The arbitrator perceived that it was more desirable to be safer in denying specific performance than to be sorry later in allowing such relief and sowing the seeds for future quibbles, recrimination and protracted action. The arbitrator was alive to the judicial principles that ought to guide the exercise of the discretion that was at large and the award cannot be faulted on such score.

24. The award is upheld to the extent that it found that the claimant in the reference was entitled to specific performance of the agreement but ought not be granted the same. The award is set aside, on the concession of the claimant in the reference, in its grant of damages in lieu of specific performance and the quantification thereof. It will be open to the claimant in the reference to seek compensation in lieu of specific performance in a further reference that it may initiate wherein the claim will be considered in accordance with law in the light of the finding that the claimant was otherwise entitled to specific performance of the agreement.

25. The grant of Rs. 2.5 lakh together with interest thereon at the rate of 12% per annum from October 15, 1993 till the date of the award and at the rate of 9% per annum from the day following the award till the date of the decree is upheld. The award of costs in favour of the claimant in the reference of Rs. 20 lakh with interest thereon at 12% per annum from April 2, 2009 till the date of the decree is also endorsed. Both heads of claim will carry interest at the rate of 12% per annum on the principal from today till the date of payment and there will be a decree accordingly for the amounts awarded, the interest awarded and further interest.

26. AP No. 229 of 2009 and AP No. 236 of 2009 are both allowed in part as indicated above with costs assessed at 15,000 GM to be paid by the owners to the claimant in the reference.

27. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Later:

The claimant in the reference seeks a stay of the operation of this order in so far as it goes against the claimant. Such prayer is declined.