REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 692 OF 2016

Jagjeet Singh Lyallpuri (dead) Through Lrs. & Ors. .... Appellant(s)

Versus

M/s Unitop Apartments & Builders Ltd. .... Respondent(s)

J U D G M E N T

A.S. Bopanna,J.

1. The appellants are before this Court assailing the order dated 31.07.2015 passed by the High Court of Punjab and Haryana at Chandigarh in FAO No. 5704 of 2012 (O&M). Through the said order, the High Court has remanded the matter to the sole Arbitrator Mr. Justice Kuldip Singh, retired Judge, Supreme Court of India for

providing opportunity of leading evidence to both the parties and also grant opportunity to cross-examine the witnesses and thereafter decide each and every claim and counter claim separately on merits. The said order is passed in an appeal filed by the respondent herein under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act 1996' for short). The appellant herein who was the respondent in the said appeal is therefore before this Court claiming to be aggrieved by the said order.

2. The brief facts leading to the present situation is that the appellants herein are joint owners of the land measuring 14 Kanals and 3 Marlas (8560 Sq. yards) situate at village Sunet, Tehsil and District Ludhiana, State of Punjab. The respondent company through its representatives claiming to be well-versed with construction and development of properties approached the appellants for joint venture in constructing a residential-cum-commercial complex on the subject land. Accordingly, an agreement dated 14.12.1996 was entered into and among other terms agreed therein, the respondent had undertaken

to complete the construction of the building consisting of at least six floors within three years from the date of obtaining the sanctioned plan from the Ludhiana Municipal Corporation. The project was required to be funded by the respondent and a sum of Rs. 45,00,000/- (Rupees Forty-Five Lakhs only) was to be deposited with the appellant as a guarantee for completion of the project. In that view, the appellants were expected to retain the same if the building is not completed within the period of three years. The sale proceeds from the constructed building was to be shared in the ratio of 48:52 % between the appellants and the respondent.

3. Pursuant to such agreement the respondent secured the sanction of the building plan from the Municipal Corporation on 04.07.1997. The period of three years was to be computed from that point as per the agreement. Hence the construction ought to have been completed by 03.07.2000. According to the appellant, the respondent though commenced the construction during August, 1997, the activity was undertaken until 31.03.1999 and the

project was abandoned by them thereafter. Since the construction was not completed by 03.07.2000 and no further progress was made despite the appellant having waited beyond the said period, the appellants got issued a legal notice dated 01.11.2001 and terminated the agreement dated 14.12.1996. The respondent though issued reply dated 28.11.2001 did not proceed further to make progress in the construction.

4. The appellants further claim that in such circumstance the appellant and the respondent entered into a compromise and a cancellation agreement dated 26.10.2004 was executed due to which an amount of Rs. 40,00,000/- (Rupees Forty Lakhs only) from the amount which was received as security deposit was returned. Notwithstanding the same, since there was change of guard in the composition of the management, the respondent filed an application under Section 9 of the Act, 1996 seeking to restrain the appellants from damaging or demolishing the construction which had been raised by the respondents. Immediately thereafter a notice dated 23.11.2004 was

issued by the respondent invoking the arbitration clause for referring the matter to arbitration. The Arbitration Case No. 124 of 2006 under Section 11 of the Act, 1996 filed by the respondent was allowed on 03.07.2009 and Mr. Justice Kuldip Singh, retired Judge, Supreme Court of India was appointed as the sole arbitrator to resolve the dispute between the parties.

5. In that view the parties appeared before the learned Arbitrator and filed their respective claim, counter-claim and objection thereto. The evidence by way of affidavit and the documents of respective parties was also filed, where after the learned Arbitrator on hearing the learned counsel for the parties passed the award dated 13.01.2010 through which both the claim as well as the counter claim was dismissed. The respondent herein claiming to be aggrieved by the same filed a petition under Section 34 of the Act, 1996 in the Court of the Additional District Judge, Ludhiana which was registered in Arbitration Case No. 3 dated 29.01.2010. The learned Additional District Judge through the order dated 13.09.2012 affirmed the award by

dismissing the petition. It is in that view the respondent herein filed an appeal under Section 37 of the Act, 1996 before the High Court. The learned Single Judge of the High Court has arrived at the conclusion that the parties have not been granted appropriate opportunity by the learned arbitrator to tender evidence by examining witness and to cross-examine the witnesses, whose affidavits were filed. It is further held by the High Court that the learned Arbitrator has not considered the aspect relating to the extent to which the construction was put up and the amount that was expended by the respondent herein and no determination, in that regard has been made. The said observation was made after holding, though the time was not the essence of the contract but yet the long delay would not be justified. It was held, even in that circumstance the other aspects required consideration. In that background the matter was remanded to the learned Arbitrator for fresh consideration.

6. Mr. Shyam Divan, learned senior counsel for the appellant while assailing such conclusion by the High

Court has taken us through the appeal papers and has referred to the agreement dated 14.12.1996 and the clauses governing the parties. It is contended that when a dispute is referred to the learned Arbitrator, Section 19 of the Act, 1996 provides that the Arbitrator can determine the rules of procedure. In that regard it is pointed out that in the hearing held on 28.11.2009 the learned Arbitrator has in the course of the proceedings finalised the procedure and recorded the same in the order. It is pointed out that the respondent was represented by a senior advocate in the arbitration proceedings wherein it has been agreed that the parties would rely upon the affidavits and documents that were filed and the procedure of cross-examination could be dispensed. In that background the learned arbitrator has referred to the materials on record in the background of the claim put forth and the affidavits filed in support thereof while arriving at the conclusion. Hence, he contends that the procedural lapse as attempted to be made out at this stage is not justified.

7. It is further contended by Mr. Shyam Divan that in a proceedings where the consideration ought to be limited to the extent provided under Section 34 of the Act, 1996 and when the learned Additional District Judge has in that light examined and confirmed the award, the consideration ought not to have been expanded by the learned Single Judge in a proceedings under Section 37 of the Act, 1996 wherein also the scope is limited. On the factual aspect it is contended that despite the terms agreed in the agreement dated 14.12.1996, no progress was made in the construction even until the point when the proceedings were initiated before the learned Arbitrator after it was abandoned in March 1999. In that circumstance when the learned Arbitrator has taken into consideration these aspects and arrived at the conclusion, the learned single judge could not have interfered with the award. The learned senior counsel in that regard has taken us through the award to point out that a detailed consideration has been made by the learned Arbitrator on all aspects including the fact that the cancellation of the agreement was agreed between the parties. On the contention urged

relating to the construction incurring an amount of Rs.1,22,00,000/- (Rupees One Crore Twenty-Two Lakhs only) said to have been made by the respondent also a consideration has been made. In that circumstance when the contention was adverted to and a view was taken by the learned Arbitrator based on a finding of fact, the learned Single Judge was not justified in commenting that the said aspect had not been adverted to by the learned Arbitrator. It is therefore contended that the award is liable to be sustained and the order passed by the learned Single Judge be set aside.

8. Mr. Shibo Shankar Misra, learned counsel for the respondent in his attempt to sustain the order passed by the learned Single Judge contends that the respondent had raised twelve claims before the learned Arbitrator and each claim should have been decided separately. It is his case that the learned Arbitrator has proceeded to reject the claim only on the conclusion that time is the essence of the contract. Though the terms as contained in the agreement dated 14.12.1996 is not disputed, the learned counsel

contends that the delay caused resulting in non-completion of the project is solely attributable to the appellant. The appellants had not parted with the title documents relating to the land in question due to which the respondent was not in a position to raise the funds from the bank by creating mortgage. Apart from the security amount the respondent has suffered loss to the extent of Rs. 1,22,00,000/- (Rupees One Crore Twenty-Two Lakhs only) being the cost of construction which was put up. Specific claim was raised under different heads before the learned Arbitrator. Despite such contentions and claims being put forth the learned Arbitrator has not considered the same. In that regard it is contended that clause 11 of the agreement which provides relating to the expenditure incurred has not been properly appreciated. The learned counsel contended that the learned Additional District Judge in the proceedings under Section 34 of the Act, 1996 has also not adverted to these aspects of the matter. However, the learned Single Judge taking note of these aspects and also keeping in view the decision in the case of ***Oil and Natural Gas Corporation Ltd. vs. SAW Pipes***

Limited 2003 (5) SCC 705 has arrived at the conclusion that an award of the present nature cannot be sustained and has accordingly remanded the matter to the learned Arbitrator to provide opportunity to the parties and take a fresh decision. It is contended that in such circumstance when both parties would have an opportunity, the appellant herein cannot make out any grievance. He therefore contends that the above appeal be dismissed.

9. In the light of the contentions put forth we have perused the appeal papers and made reference to the material on record. With regard to the agreement dated 14.12.1996 and the clauses contained therein to regulate the parties there is no serious dispute between the parties. The very fact that a contention has been raised by the respondent seeking to attribute the delay and the non-completion of the project to the appellant by contending that the non-furnishing of the title documents had prevented the respondent from raising loan would by itself indicate that no progress was made except putting up the initial construction and the project was not completed

within the period of three years or thereafter, though the building plan was sanctioned on 04.07.1997. In that light the appellant had issued a notice dated 01.11.2001 and terminated the agreement, which had resulted in a dispute between the parties. In that background the matter was placed before the learned Arbitrator who had been appointed in a proceeding under Section 11 of the Act, 1996. A perusal of the award dated 30.01.2010 available at Annexure P-12 to the appeal papers would indicate that a detailed consideration has been made by the learned Arbitrator on all aspects of the matter. In that background when the petition under Section 34 of the Act, 1996 was filed before the learned Additional District Judge, the learned Additional District Judge in fact has also adverted to all aspects of the matter and since no ground for interference as contemplated under Section 34 of the Act, 1996 was made out, the learned Additional District Judge through his order dated 13.09.2012 has upheld the award.

10. In that backdrop when the learned Arbitrator and the learned Additional District Judge have arrived at a

concurrent opinion, it is necessary for us to take note as to whether the learned Single Judge in an appeal filed under Section 37 of the Act, 1996 could have adverted into the merits of the contention beyond the scope available under Section 34 (2) of the Act, 1996 so as to set aside the award and remand the matter. In that regard whether the contentions which were put forth to assail the award by picking holes in the procedure adopted by the learned Arbitrator is to be accepted or not also requires examination, keeping in view the scope of Section 34 (2) of the Act, 1996 and determine as to whether such ground is made out.

11. Since the learned Single Judge has presently accepted the contention raised on behalf of the respondent herein that the procedure followed by the learned Arbitrator is contrary to law and has prejudiced the respondent herein since the witnesses were not cross-examined, this aspect of the matter is required to be noticed at the outset. As rightly pointed out by the learned senior counsel for the appellant, the rules of procedure to be followed by an

Arbitral Tribunal is flexible and can be agreed upon by the parties as provided under Section 19 of the Act, 1996 which reads as hereunder;

> 19. **Determination of rules of procedure** – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).
>
> (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
>
> (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
>
> (4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

12. Further, keeping in view that the contention put forth before the High Court by the respondent herein to assail the award was in the manner as noticed above with regard to the appropriate procedure not being followed and there being denial of opportunity and in that view the respondent not being able to put forth the case appropriately before the learned Arbitrator, the effect of the same is required to be examined. When a challenge is raised on that ground, in our opinion it would at best fall under Section 34 (2) (a) (iii) which reads as follows;

> "34. **Application for setting aside arbitral award** – (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) xxxxxxxxxxxxxxxx
>
> (ii) xxxxxxxxxxxxxxx
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or"
>
> (emphasis supplied)

Therefore, in order to consider whether the challenge is sustainable on the ground available in law, at the outset it is necessary to examine whether the procedural lapse if any is committed by the learned Arbitrator in unilaterally denying the opportunity to the parties so as to make the award invalid and to set aside the same exercising the power under Section 34 or in an appeal under Section 37 of the Act, 1996. In this regard as noticed, Section 19 of the Act, 1996 provides that the Arbitral Tribunal is not bound by the Code of Civil Procedure or the Indian Evidence Act. Further, it provides that the parties are free to agree on the procedure to be followed by the Arbitral Tribunal. In this back drop it is noticed that in the case on hand, in the proceedings dated 28.11.2009 (Annexure

P-15) before the learned Arbitrator, the procedure to be followed has been discussed and recorded, which reads as hereunder;

> "The parties and their learned counsel have been heard. Whatever further pleadings, documents and list of witnesses were to be filed by the parties in terms of the proceedings dated 10.10.2009, have been done. The evidence of the claimant as well as of the respondents was to be recorded today. Mr. Ram Lal, whom the respondents want to cross-examine, is present before the Arbitrator. The learned counsel for the parties have, however, agreed and consented before me they do not wish to cross-examine any of the witnesses whose affidavits have been filed by the parties concerned. In view of the consent of the learned counsel of the parties and parties themselves who are present, I close the evidence. The parties will rely on the affidavits already filed and the documents and other pleadings already placed on the record."
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> (emphasis supplied)

That apart by the very proceedings dated 28.11.2009 the points on which arguments would be addressed were also treated as the issues for consideration and has been formulated and recorded in the order sheet.

13. From a perusal of the proceedings dated 28.11.2009 it would be clear that both contentions raised by the learned counsel for the respondent herein and which were accepted by the learned Single Judge to ultimately remand the matter, would not be justified. Firstly, in the presence of the parties and their learned counsel it has been

recorded that they do not wish to cross-examine any of the witnesses whose affidavits have been filed by the parties concerned and one of the witness who was present was discharged without being cross examined and no grievance was made either by the parties or their learned counsel who were present. It is in that view the evidence was taken as closed on 28.11.2009 and the issues for consideration was settled for arguments on the same day. In that circumstance having consented to the said procedure, it would not be open for the respondent herein to approbate and reprobate so as to raise a different contention at this point. Having accepted the said procedure the respondent is estopped from raising such contention before the learned Single Judge that the arbitrator misconducted himself by not permitting the parties to cross-examine the witness and also that the learned Arbitrator being more than 70 years of age and suffering from knee problem has pressurized the respondent to speed up the matter and the evidence was closed. It is rather intriguing for us to note that such contention has not only been permitted to be raised, but

also accepted by the learned Single Judge to remand the matter, which is wholly unjustified.

14. We are of such opinion for the reason that the procedure to be followed in arbitration proceedings was settled by a separate order dated 28.11.2009 during the course of the proceedings before the learned Arbitrator. Thereafter the award was passed only on 13.01.2010. Though the respondent was represented by their learned counsel and the order dated 28.11.2009 was passed while recording the proceedings of that day, neither any application had been filed before the learned Arbitrator to recall the said order and provide opportunity to tender evidence or cross examine, nor was a challenge raised by initiating any other proceedings, before the award was passed. It is only subsequent to the award being passed such contention is being raised as an afterthought, which in such event cannot be accepted. That apart, the agreement being entered into on 14.12.1996 and the work not having progressed subsequent to March,1999 was not seriously in dispute and in that circumstance based on

the affidavit, the admitted documents have been taken note by the learned Arbitrator due to which the non-cross-examination in any event has not prejudiced the respondent herein. One aspect of the matter no doubt was with regard to the claim that was put forth by the appellant herein that a cancellation agreement dated 26.10.2004 was entered into and the security deposit of Rs. 40 Lakhs and the advance of Rs. 23 Lakhs has been re-paid to Mr. S. Surinder Singh which was disputed by the respondent. On that aspect the learned Arbitrator in any event has concluded that the said payment if any cannot be considered as a payment made to the respondent company but has been received by Mr. Surinder Singh who had made gain unto himself. In such event since the respondent has not filed the affidavit of Mr. Surinder Singh disputing the same, it is an inter-se matter to claim from Mr. Surinder Singh and therefore, the non-cross-examination on that aspect also has not resulted in any prejudice. Be that as it may, as already taken note, the procedure to be followed in the arbitral proceedings

has been agreed to by the parties. Hence the respondent cannot be heard to complain as and when it suits them.

15. Further, since through the very order dated 28.11.2009 the issues for consideration on which the arguments would be addressed was settled and the matter was proceeded on that understanding without raising any objection, the grievance put forth by the respondent and accepted by the learned Single Judge that the learned Arbitrator has not answered each of the claims separately in the award, cannot also be accepted. A perusal of the award would indicate that the learned Arbitrator has adverted to all aspects in a sequential manner and has recorded his conclusion in answer to the contentions that were put forth.

16. One other aspect which has been recorded by the learned Single Judge as the reason for which the matter requires reconsideration by the learned Arbitrator is that the claim put forth by the respondent that the sum of Rs. 1,22,00,000/- spent by them has not been considered by the learned Arbitrator. In that regard the learned Single

Judge has held that though the respondent herein would not be entitled to continue the project due to lapse of time the learned Arbitrator has not considered the right of the parties relating to the extent of the cost incurred for the existing construction and the manner in which it is to be dealt with. On this aspect, a perusal of the award passed by the learned Arbitrator would indicate that after having arrived at the conclusion that the respondent has committed the breach, the learned Arbitrator has also adverted to the said contention relating to the cost incurred for the extent of construction made, as claimed and has rejected the same. The consideration as made is as hereunder;

> "I may examine, at this stage the claimant's contention that construction worth about Rs. 1 crore 20 lacs has been done on the project. The claimant has primarily relied on the balance sheet of the Company for the relevant year in support of this argument. The balance sheet is Annexure-K at page 118-126 of the statement of Claim. In the schedule forming part of the accounts for the year ending 31st March, 1999, the balance sheet shows an expenditure of about 1 crore 20 lacs on the project in process. This includes Rs. 44 lacs as advance given to the respondents (land owners) as guarantee money. Expenditure incurred has been shown under various headings such as advertisement and publicity, salary, entertainment, iron and steel, cement, GC sheets, stand, bricks, marble, crusher, electrical, GI pipes, gate, professional charges, telephone expenses, electricity expenses, labour and construction charges. An amount of Rs. 56,58,530/- has been shown under the heading purchase. It is not indicted so as to what was purchased. All the items required for the construction of the

> project have been shown separately but it is not clear on what purchase/purchase this amount was spent. No explanation is forthcoming from the claimant in this respect. Mr. Mahajan while controverting the argument of Mr. Lekhi has stated that Local Commissioner's report Annexure-W makes it clear that the amount which may have been spent on the construction was much less. Be that as it may there is no expert evidence on the record to show as to how much money was spent on the construction. The claimant company did receive some money as advance against flats and offices to be constructed. It is in the evidence that Rs. 23 lacs was received by the Company in this respect. The balance sheet as on 31st March, 1999 at page 121 shows that the Company received Rs. 19,79,488/- as advance against flats and offices. In the absence of reliable evidence on the record, it is not possible to accept the argument of the learned counsel for the claimant."

17. In that circumstance when the learned Arbitrator has noticed the contention and recorded a finding of fact it cannot be accepted that the learned Arbitrator has not adverted to the same so as to require reconsideration. To be fair to the learned Arbitrator, it has in fact been noticed by the learned Arbitrator relating to the change of Directors and shareholders of the company in 2007 as against the shareholders who existed as on 30.09.2005 and also that the erstwhile Directors/shareholders who had personal knowledge have not been examined by filing their affidavits and even though an application dated 12.09.2009 for summoning them as witnesses was filed, the same was not pressed and the evidence was closed on

28.11.2009 with the consent of the parties. The learned Arbitrator has in fact recorded that none of them have come forward to render assistance in the proceedings. In such circumstance when the respondent herein, who were themselves the claimants before the learned Arbitrator have not conducted the matter in an appropriate manner by securing affidavit evidence of the erstwhile directors / shareholders, they cannot at this stage turn around and contend that the learned Arbitrator has misconducted himself. In any event the challenge to the award does not fall under any of the clauses of Section 34 of Act, 1996. In such circumstance the reliance placed by the learned Single Judge on a decision in the case of ONGC (supra) is highly misplaced. Therefore, the order dated 31.07.2015 passed by the learned Single Judges is not sustainable and the same is liable to be set aside.

18. During the course of hearing we had also made an endeavour to see that the parties amicably settle the matter by enabling the respondent herein to receive some amount towards the expended portion, also by not

ignoring the loss suffered by the appellants due to delay. From the photographs produced before us we have noticed that except raising some columns, there is no major construction that is put up. In so far as the expense as claimed by the respondent, as indicated by the learned Arbitrator as extracted above, there is no conclusive evidence to that effect. Though such columns are raised, admittedly construction activity has not taken place beyond March, 1999 and already two decades have elapsed. In view of the breach and the respondent herein failing in the present lis there would be no absolute right in their favour since the inevitable loss suffered by the appellants by not being able to enjoy the property for the last more than two decades also cannot be lost sight. The appellant herein who is the owner of the property will have to enter into a fresh contract and the need and manner of development may not be the same at this point and in such event the appellant herein also would be put to some loss to undertake the demolition process themselves or there would be reduction that would be made by the alternate developers who would undertake the project.

Further, the actual quantum in any event cannot be determined and also when a breach has been committed through the predecessor directors / shareholders of the respondent company and when the present directors / shareholders have entered the scene in the midst of the breach they would have to bear the loss, if any, to that extent. Therefore, without reference to the actual loss suffered by the parties, while putting an end to the litigation between the parties, in the peculiar circumstance and in the interest of justice, notwithstanding the fact that we have held the order of the learned Single as not sustainable, in exercise of our power under Article 142 of the Constitution of India the appellant is directed to pay the sum of Rs. 45,00,000/- (Rupees Forty-Five Lakhs only) to the respondent whereupon they would be entitled to assume possession of the subject land and proceed to enjoy the same in accordance with law.

19. In the result the appeal is disposed of with the following order:

(i) The order dated 31.07.2015 passed by the High Court of Punjab and Haryana in FAO No. 5704 of 2012 (O&M) is set aside. Consequently, the award dated 13.01.2010 passed by the learned Arbitrator is restored.

(ii) The appellant is directed to pay the sum of Rs. 45,00,000/- (Rupees Forty-Five Lakhs only) in full quit of all claims, to the respondent within three months.

(iii) Immediately on payment of the said amount the appellant shall be entitled to resume possession of the subject land in the status as it exists and enjoy the same in accordance with law.

(iv) Parties to bear their own costs.

.....J.
(R. BANUMATHI)

.....J.
(A.S. BOPANNA)

.....J.

(HRISHIKESH ROY)

New Delhi,
December 03, 2019