

Jawaharlal Wadhwa And Another vs Haripada Chakroberty on 14 October, 1988

Equivalent citations: 1989 AIR 606, 1988 SCR SUPL. (3) 513, AIR 1989 SUPREME COURT 606, 1989 (1) SCC 76, (1988) 4 JT 138 (SC), 1988 4 JT 138, 1989 (1) ARBI LR 403, 1989 (1) CIV LJ 340, 1989 (1) SCWR 5, (1989) 1 APLJ 18, 1988 RAJLR 636

Author: M.H. Kania

Bench: M.H. Kania, Sabyasachi Mukharji

PETITIONER:
JAWAHARLAL WADHWA AND ANOTHER

Vs.

RESPONDENT:
HARIPADA CHAKROBERTY

DATE OF JUDGMENT 14/10/1988

BENCH:
KANIA, M.H.
BENCH:
KANIA, M.H.
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1989 AIR 606 1988 SCR Supl. (3) 513
1989 SCC (1) 76 JT 1988 (4) 138
1988 SCALE (2) 1033

ACT:
Arbitration Act, 1940 --Sections 30,33 and 34--Award--
Setting aside--Only an error of law and not mistake of fact
committed by Arbitrator justiciable before Court.

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Transfer of Property Act, 1882-- Section 53--
Anticipatory breach of contract--Option to claim damages--
Otherwise keep contract alive by performing us its part of
contract and show readiness and willingness in order to
claim specific performance--Transferee in possession of
premises --Stopped paying monthly instalments--Could not
claim protection under section 53A.

HEADNOTE:

The respondent had taken a loan of Rs.15,000 from the Ministry of Defence for construction of a house on a plot allotted to him. As the amount of loan was insufficient to complete the construction, he took a loan of Rs.5,000 from Appellant No. 1 and on 6th September, 1973 he entered into an agreement to sell the house and the plot to Appellant No. 1. The aforesaid amount of Rs.5,000 was shown as advance of sale price. Clause 2(b) of the Agreement provided that the appellant purchaser shall pay to the seller/respondent a sum of Rs.105 every month against the sanctioned loan of Rs. 15,000 till the full amount is recovered from the respondent. The payment of Rs. 105 per month was made by the appellant only up to January 1976 and this payment covered upto 23 instalments, and more than 100 instalments remained unpaid.

On January 29, 1974 another agreement, for construction, was entered into between Appellant No. 1 and the respondent. Under this agreement, Appellant No. 1 was to complete construction of the house and after the completion of the house the respondent was to return the cost of construction amounting to Rs.1,15,000 including appellant's profit of Rs.20,000 and security amount of Rs. 15,000 deposited by the Appellant No. 1 with the respondent, within three years in a lump sum and on payment the Appellant No. 1 was to hand over the possession of the building and the plot to the respondent. Till that amount was paid, Appellant No. 1 was entitled to possess and occupy and enjoy the building

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The house was not completed but the appellants who are husband and wife were occupying the same.

According to the respondent this transaction was sham and bogus and he repudiated the same. Disputes arose between the parties.

The respondent filed a suit claiming for the return of possession of the said plot of land and house. The application of the appellant under s. 34 of the Arbitration Act was dismissed.

In the appeals preferred by the appellant the Additional District Judge, appointed a sole arbitrator with the consent of the parties. The arbitrator made and published his award which went against the appellants. The High Court dismissed the appeal filed by the appellants against the order of the District Judge dismissing their application challenging the Award.

This Court, in appeal, set aside the award of the Arbitrator and also the judgment of the High Court and appointed Shri A.C. Gupta, a former Judge of this Court as the sole arbitrator.

It was contended before the said Arbitrator that the agreement for sale was not registered and might not convey

any interest to appellant No. 1 in the property, but the appellants, who had been put in possession of the said land and construction. were entitled to retain possession under the protection afforded by S. 53A of the Transfer of Property Act. The arbitrator made and published his award which went against the appellants. The arbitrator held from the receipts filed, that the respondent paid only rent up to 100 instalments remained to be paid, and that there was no valid reason why the respondent should have failed to carry out his obligation under the contract. The arbitrator further held that the respondent could not, therefore, claim that his possession was protected, under s. 53A of the Transfer of Property Act and was, therefore, not entitled to retain possession of the disputed property beyond January 1976.

In the objection filed by the appellants challenging the award before this Court it was contended that the award is bad in law and liable to be set aside as there is an error of law disclosed on the face of the award as the statements contained in the award ran counter to the settled position in law that wrongful repudiation by the respondent of the contract by his letter dated 16 January, 1976, before mutual obligation under the contract were carried out, amounted to

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an anticipatory breach of contract by him and therefore the Appellant No. 1 is absolved from carrying out his remaining obligation under the contract, and could claim specific performance of the same even though he failed to carry out his remaining obligations under the contract.

Dismissing the objections and upholding the award, the Court,

HELD: 1. 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 contract unless he shows his readiness and willingness to perform the contract. [521B-C]

International Contractors Ltd. v. Prasanta Kumar Sur, [1961]3 SCR 579, distinguished.

2. 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. [521A]

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 correction by the Court. [522A-B]

Coimbatore District Podu Thozillar Sangam v.

Balasubramania Foundary and Others, [1987] 3 SCC 723; Champsey Bhara and Co. v. Jivraj Balloo Spinning Weaving Co. Ltd., [1922-23] LR 50 IA 324, 1923 AC 480; Kanpur Nagar Mahapalika v. M/s Narain Das Haribansh, [1970] 2 SCR 28, 1969 2 SCC 620 and State of Orissa & Ors. v. M/s Lall Brothers, [1988] Judgment Today S.C. 552, referred to.

In this case, what the arbitrator has done is to set out in his award the relevant portion of s. 53A 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 no means certain, in

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the application of these principles in coming to the conclusion that, notwithstanding the repudiation of the said contract by the respondent, Appellant No. 1 was not absolved in the facts and circumstances of the case from his obligation to pay the remaining instalments of Rs.105 per month as provided under the contract. [521F-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2678 of 1985.

From the Judgment and order dated 30.4.1985 of the Delhi High Court in F.A.O. No. 270 of 1982.

M.C. Bhandare, Sandeep Narain and Shri Narain for the Appellants.

Dr. Shankar Ghosh and N.R. Choudhary for the Respondent. The Judgment of the Court was delivered by KANIA, J. The hearing before us now relates to certain objections filed to the Award made by Shri A.C. Gupta a former Judge of this Court who was appointed the sole arbitrator to adjudicate upon the dispute between the parties pursuant to the Order of this Court dated 18th November, 1987 in the circumstances as set out hereinafter. In order to appreciate the objections, it is necessary to refer to certain facts.

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.4,800. 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 a 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 upto 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.3,000 PG NO 517 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 No. I who advanced a sum of Rs.5,000 to him. In September, 1973 the Respondent entered into an agreement dated September 6, 1973 to sell the house and the said plot to the Appellant No. 1. The aforesaid amount of Rs.5,000 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 No. 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 Appellants 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 No. 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 No. I 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, this transaction was sham and bogus. Disputes arose Respondent was to return the amount of Rs.1,15,000 within three years in a lump sum and on such payment, Appellant No. I was to hand over the possession of the building and the plot to the Respondent. Till that amount was paid, Appellant No. 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 stay 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 PG NO 518 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 Counsel for the parties. in order to ensure fairplay in the 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 the order. Certain other conditions like payment of compensation and additional expense 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 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.58,498.60p and interest on this amount at the rate of 18 per annum from the date of the reference to the date of the award which worked out to a sum of Rs.3,510. Taking into account the amount paid by the Respondent initially towards the arbitrator's remuneration and others 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 the 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.

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 an 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. Ten earlier part of the agreement set out that the purchaser (Appellant No. 1) had paid to the seller (Respondent) a sum of Rs.5,000, the receipt of which was acknowledged by the Respondent and the balance amount payable was to be paid in the manner set out in 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 PG NO 519 amount of loan is recovered from the seller by the Government of India. The first instalment shall commence with effect from 5th October, 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."

It is a common ground that the sum of Rs. 105 per month referred to clause 2(b) of the said agreement was paid by the Respondent only upto January 1976 and that this payment covered upto 23 instalments 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 and interest to Appellant No. 1 in the property, the Appellants had 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 53A of the Transfer of 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 agreement for sale, claimed that his possession was protected Under Section 53A of the Transfer of Property Act

Section 53A 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 the 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 upto 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."

PG NO 520 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 16.1.1976 had repudiated the said agreement for sale by contending in his notice that it had been procured by fraud, undue influence and coercion practised by Appellant No. 1 and it was submitted that the said repudiation was wrongful and in view thereof Appellant No. 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. It was submitted by him that the aforesaid 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 S.C.R. 579. In that case the appellant had purchased the property in dispute from the respondent but soon thereafter there 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 tender 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 holding 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 16th January, 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 No. 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 contract unless he shows his readiness and willingness to perform the contract. The decision of this Court in *International Contractors Limited v. Prasanta Kumar Sur*, (supra), 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 specific performance of the said contract. Mr. Bhandare also referred to the decision of the Andhra Pradesh High Court in *Makineni Nagayya and Others v Makineni Bapamma*, AIR (45) 1958 A.P. 504. We do not consider it necessary to refer this decision as it 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. In the case before us, what the arbitrator has done is to set out in his award the relevant portion of Section 53A 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 no means certain, in the application of these principles in coming to the conclusion that, notwithstanding the repudiation of the said contract by the respondent, Appellant No. I was not absolved from his obligation to pay the remaining instalments of Rs.105 per month as provided under the contract.

In *Coimbatore District Podu Thozillar Samgam v. Balasubramania Foundary and others*, [1987] 3 S.C.C. 723 it has been held by this Court that it is an error of law and PG NO 522 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 corrections 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 S.C.R. 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 view 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; 1923 AC 480. This view was again reiterated and emphasised by this Court in *Kanpur Nagar Mahapalika v M/s Narain Das Haribansh*, [1970] 2 S.C.R. 28; (1969) 2 SCC 620 where Ray, J., as the learned Chief Justice then was, observed at page 30 of the Report relying on *Champsey Bhara* case:

"An error of law on the face of the award meant that one could find in the award, or in a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which was the

basis of the award and which one can say is erroneous."

In *State of Orissa & Ors v M/s Lall Brothers*, [1988] Judgment Today S.C. 552 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.* and of this Court in *Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji and Ors*, [1964] 5 S.C.R. 480.

PG NO 523 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. Poulse v. State of Kerala and Another*, [1975] 2 S.c.c. 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 error 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 the 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 .

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. N.V.K.