

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

+ **ARB.P. NO.256/2010**

Date of Decision : 07.03.2011

Mr. Satish Kumar Bakshi

.....Petitioner

Through: Mr. Hemant Malhotra,
Advocate.

Versus

M/s Kohli Realtors Pvt. Ltd.

..... Respondent

Through: Mr. Dinesh Garg, Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | NO |
| 2. | To be referred to the Reporter or not ? | NO |
| 3. | Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J.

1. This order shall dispose of the Arbitration Petition filed by the petitioner Mr. Satish Kumar Bakshi against M/s. Kohli Realtors Private Limited, under Section 11 of the Arbitration and Conciliation Act, 1996.
2. Briefly stated, the facts of the case are that the petitioner is the owner of property bearing Plot No. A-304, Defence Colony, New Delhi, measuring 217 Sq. Yds. The petitioner entered into a collaboration agreement in respect of re-building of his entire property with the respondent M/s. Kohli Realtors Private Limited vide collaboration agreement dated 07.01.2008. According to the collaboration agreement, the

respondent agreed to pay a total consideration of ₹35 lakhs to the petitioner and also to bear the entire cost of construction to be raised on the said building in accordance with the sanctioned plan. The built-up portion of the area was to be shared by the parties in certain proportions after ear-marking common areas, the details of which are given in the agreement itself. The specifications for the construction were given in the collaboration agreement by way of Annexure 'A' which were broadly of class 'A' construction. The time for construction was also enunciated in the collaboration agreement. The relevant clause for our purpose, on the basis of which the present petition has been filed is contained in Clause 22, which reads as under :-

“That in the event of any question or dispute arising in connection with or incidental or in respect of interpretation or scope of this agreement or any part thereof then the same shall be referred to the arbitration who is mutually appointed arbitrator and the decision of the mutually appointed arbitrator will be binding on both the parties on this agreement.”

3. It is alleged by the petitioner that after the rebuilding of the entire property, he was put in the possession of his portion of the property in question except the first floor, with one servant quarter having common toilet both on the top terrace floor and one car parking space inside the building with undivided, indivisible, unpartable land rights underneath exclusively as it was to fall to the share of the respondent.

4. The petitioner alleges that after using the premises in question, he felt that the work which was carried out by the respondent was not in accordance with the terms agreed to, apart from the fact that certain deficiencies in the execution of the work were pointed out. These deficiencies which are enumerated by the petitioner are broadly given as under :-

- (i) *That as per clause 15 of the agreed specifications it was, inter alia, agreed and provided that the basement of the property will be water proofed by the process of guniting to avoid dampness and seepage. However, shortly after taking over the possession, the basement of the property showed signs of dampness and today the basement is totally damped clearly indicating that no guniting work has been done. Besides there are other structural defects also in the basement. As per the estimate obtained by my client, the present cost of redoing the basement is approximately Rs.7,00,000/- (Rupees Seven Lakhs Only).*
- (ii) *That as per clause 12 and 13 of the specifications you were required to make provisions of grills in the apartment and also make provisions of 300 sq. feet temporary cover on the terrace. The same has also not been done/provided. The estimated cost for providing the same is approximately Rs. 2,00,000/- (Rupees Two Lakhs Only).*
- (iii) *That vide clause 14 of the specifications it was, inter alia, agreed between the parties that a lift as per approved design would be provided by you for all the floors i.e. from basement upto the terrace. However, as already pointed out to you that lift provided by you covered only upto the terrace but has not covered the basement of the property. The present estimated cost of carrying out necessary rectifications and alterations etc. in respect thereof is approximately Rs. 15,00,000/- (Rupees Fifteen Lakhs Only).*
- (iv) *Payment of electricity bill pertaining to period August, 2009 to December, 2009 i.e. relating to the period of construction which amount/liability, as per the agreed terms, was to be borne by you. The said liability comes to Rs.14,600/- (Rupees Fourteen Thousand Six Hundred Only) which is to be borne by you.*

(v) *The parts of flushing cisterns have not been installed by you due to which water pipes are full of debris causing frequent malfunctioning of the said systems. The estimated cost of rectification/ replacement is Rs. 15,000/- (Rupees Fifteen Thousand Only).*

5. The case which has been set up by the petitioner now is that since the respondent has not carried out the construction in accordance with the terms and conditions of the collaboration agreement, he approached the respondent a number of times for rectification of deficiencies who assured him to rectify the same. Since the repeated attempts on the part of the petitioner to get the deficiencies rectified did not yield any fruitful result, he was constrained to issue a notice on 11.05.2010 to the respondent invoking the arbitration clause contained in Clause 22 of the collaboration agreement for reference of the dispute enumerated hereinabove for adjudication by a Sole Arbitrator to be appointed mutually.
6. The respondent replied to the said notice on 27.05.2010 and stated that the entire work of rebuilding was carried out to the full and final satisfaction of the petitioner, whereupon he had also taken the possession of his share and signed in token of having done the same. It is only after satisfying himself that the petitioner has now, with a view to coerce the respondent to agree to his unreasonable demands, issued a notice to him for rectifying the deficiencies and for raising the construction which would be unauthorized and not approved by the MCD. It was in this context that the respondent stated

that the lift could not go to the basement while as the petitioner wanted the lift to go right up to the basement.

7. The petitioner gave a response to the reply of the respondent vide letter dated 12.07.2010 denying the same and reiterated his plea of appointment of an independent arbitrator. Since this was not done, the petitioner was constrained to file the present petition for appointment of an independent arbitrator for adjudication of the disputes between the parties. It was contended that the respondent has now forfeited his right to appoint the arbitrator.
8. The respondent filed the reply to the petition and contested the prayer of the petitioner. It was stated in the reply that the present petition has been filed only for the purpose of black mailing the respondent to agree to the unreasonable demands of the petitioner. Apart from this, it was contended that the petitioner had received the possession of his share vide a written document on 24.12.2009 wherein he had specifically stated that the suit property had been rebuilt according to the terms and conditions of the collaboration agreement dated 07.01.2008 and the entire construction had been completed to his satisfaction. The petitioner also accorded his consent that all his bills were fully cleared and settled and, therefore, it was contended that there exists no live dispute between the petitioner and the respondent and the collaboration

agreement which contained the arbitration clause stood discharged. The petitioner filed his rejoinder to the reply and contested the claim and reiterated the points made in the petition.

9. I have heard the learned counsel for the parties and perused the record.
10. It has been contended by the learned counsel for the petitioner that merely because the petitioner has received and signed the possession letter wherein it has been observed that the entire work has been carried out in accordance with the terms and conditions of the collaboration agreement and the petitioner is satisfied, it does not mean that the petitioner cannot get the dispute adjudicated through the mechanism envisaged in clause 22. It was contended that the signatures of the petitioner on the possession letter were obtained under coercion and undue influence. Even otherwise, if the petitioner has signed the said letter, still the respondent could not be permitted to evade his duty of carrying out the requisite work with regard to seepage in the basement and removing other deficiencies as these deficiencies would come into notice after the actual user of the premises and not at the time of signing of the possession letter. The learned counsel stated that there was neither any intention nor any reason for the petitioner to sign the discharge document of

the collaboration agreement and, therefore, the dispute has to be necessarily adjudicated by the learned arbitrator. In order to support his contention that merely the signature of the petitioner on the letter of possession or a receipt would not be sufficient to absolve the respondent from the responsibility of getting the dispute adjudicated by an arbitrator, reliance was placed on the case titled **National Insurance Co. Ltd. Vs. M/s Boghar Polyjab Pvt. Ltd. AIR 2009 SC 170.**

11. The learned counsel for the respondent had taken the plea that the petitioner not only concealed the information with regard to having taken the possession but also did not reveal the exact contents of the said possession letter. It is stated that the possession letter dated 24.12.2009 specifically records the satisfaction of the petitioner, that the respondent had built the entire property on the plot of land in question in accordance with the collaboration agreement and the terms and conditions annexed thereto. The petitioner had satisfied himself regarding the quality of construction and only thereafter appended his signature. Once the petitioner signs the document of possession and records his satisfaction, the collaboration agreement under which the construction was raised, stands concluded and the petitioner after a lapse of 7-8 months could not be permitted to raise a dispute with regard to the interpretation of the collaboration agreement or the so-called deficiencies in the construction of the building.

It is alleged by the learned counsel for the respondent that if the petitioner was aggrieved on account of discharge of the agreement, he should have revealed in the notice that his signatures were appended on the possession letter by coercion or inducement or without prejudice to his rights. Since this has not been done, therefore, it is contended that there is no occasion for reference of the matter to arbitration as there is no dispute much less the same being a live dispute. Reliance in this regard has been placed by the respondent on ***Prime Engineers and Consultants Vs. Punjab National Bank, 103 (2003) DLT 133 and Pollytron & Fragrance Industries (P) Limited Vs. National Insurance Co. Ltd. 159 (2009) DLT 534.***

12. I have thoughtfully considered the submissions made by the learned counsel for the parties. There is no dispute about the fact that the consistent view has been taken by the courts that in order to get the dispute between the two parties adjudicated by an Arbitral Tribunal in terms of the arbitration clause, there must not only be an arbitration agreement but also a live dispute. Conversely meaning that the agreement which contained the arbitration clause should not have been discharged or come to an end on account of either cancellation or by its performance. In the instant case, the letter of possession purported to have been issued by the petitioner to the respondent clearly shows that the

collaboration agreement dated 07.12.2008 executed between the petitioner and the respondent has come to an end on account of its performance. Not only it has come to an end by the petitioner having taken the possession he has fully recorded his satisfaction to the effect that the construction has been raised in accordance with the terms and conditions of the collaboration agreement and the construction has been raised according to the specifications attached to the document. Once this has been done, the arbitration agreement between the parties ceases to exist and, therefore, the respondent is well within his right to contest the plea of the petitioner that there is no live dispute between the petitioner and the respondent for reference of the same to an Arbitral Tribunal. It does not mean that the petitioner may not have his remedy. He may have his remedy by either approaching a different forum or by using a different modality. But certainly the arbitration is ruled out on account of his signing the satisfaction agreement.

13. It has been contended by the petitioner during the course of the argument that his signatures on the possession letter were obtained by coercion and fraud and, therefore, in terms of the judgment of the Apex Court in case of **National Insurance Company's Case** it could not be said that the satisfaction of the petitioner could be the basis for ousting the jurisdiction of the Court for appointing an arbitrator.

14. I do not agree with the contention made by the learned counsel in this regard. The facts of the case which have been relied upon by the petitioner in **National Insurance Company's Case** are totally different from the facts of the present case. In the said case, there was a claim which was preceded by a certificate of satisfaction having been signed by him before he had actually received the claim. Further, this was his plea in the petition itself and, therefore, he had pleaded that his signatures on the satisfaction certificate or no claim certificate were obtained by fraud or undue influence which the Apex Court observed, has to be decided either by the Court which appoints an arbitrator or alternatively has to be left to be decided by the Arbitrator himself.
15. So far as the facts of the present case are concerned, the petitioner in his petition, has nowhere stated that he had received the possession of his share in terms of the collaboration agreement nor has he made any reference to the said letter having recorded his satisfaction. In other words, it could be said that the petitioner has tried to conceal this vital information from the Court that he was signatory to a certificate/letter purported to be issued by him where he has reiterated his satisfaction and this ground in itself will make the Court _ to exercise its discretion in his favour by appointing an Arbitrator.

16. Even otherwise, on the merits also, this has not been his case that his signatures on the possession letter were obtained by coercion or fraud. This is a point which should have been urged by the petitioner during the course of the oral submission whereas there is no plea in this regard. Therefore, I feel that the judgment which has been relied upon by the petitioner is not at all applicable to the facts of the present case. The submission made by the respondent that the notice issued by the petitioner for appointment of an arbitrator is on account of ulterior motives, cannot be said to be totally without merit. In any case, the point whether it was guided by ulterior motive or motive becomes irrelevant because the collaboration agreement having been acted upon and thereby having been discharged, on account of the project having been completed and the possession having been handed over to the petitioner, who has recorded his satisfaction, there is no live dispute between the parties which can be referred to an arbitrator.
17. Accordingly, I feel that the petition is totally without any merit and the same is dismissed. Parties to bear their own costs.

V.K. SHALI, J.

**MARCH 07, 2011
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