

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 619 of 2012

Date of order: July 19, 2012

ADVENT HOSPITALITY PVT LTD Petitioner
Through Mr. Rajiv Nayar, Senior Advocate with
Mr. Amit Sibal, Mr. Vikas Mehta, Mr. Nar Hari Singh,
Mr. Jaffar Alam, Advocates.

versus

TRISTAR HOTELS PVT LTD Respondent
Through Mr. C.A. Sundaram, Senior Advocate with
Mr. Amar Gupta and Mr. Manish Jha, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
19.07.2012

1. The Petitioner, Advent Hospitality Pvt. Ltd. ('Advent'), filed this petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') seeking an order restraining the Respondent Tristar Hotels Pvt. Ltd. ('Tristar'), from creating any third party rights or transferring, alienating, encumbering or parting with possession in respect of the 'Svelte Business' comprising the freehold property situated in the building known as 'Select City Walk' situated at A-3, District Centre, Saket, New Delhi ('the property in question') and all appurtenant movable and immovable assets owned by Tristar.

2. An Agreement to sell ('Agreement') was entered into between the parties on 23rd March 2012 in terms of which Advent had agreed to purchase the property in question for a total sale consideration of Rs. 121.5 crores comprising Rs. 89 crores towards transfer of immovable property and the balance of Rs. 32.50 crores towards cost of movable assets,

equipment, inventories, rights and interest of running business. The business was to be sold on 'as is where is basis' subject to Tristar being bound by the representations made by it in respect of the extent and nature of title in the said property.

3. According to Advent, in the Agreement it was stated that property in question has a super area or total area of 1,23,377 sq.ft. comprising of 1st to 3rd basement floors, a service floor, 1st to 7th floors, the terrace rights to the terrace atop the 7th floor and the land underneath. Clause 12 of the Agreement stated that "the terrace and terrace rights, rights of further construction on and in the said property, if any, and the ownership of all the areas in the property shall belong to the Purchaser" i.e. Advent upon Advent paying the entire sale consideration of Rs. 121.5 crores and thereafter the Seller, i.e. Tristar, "shall have no right, title or claim thereon of any nature whatsoever." Further, Advent "shall have absolute rights to deal with the same in any manner it deems fit without any objection whatsoever from the Seller." Clause 6 of the preamble to the Agreement stated that "the Seller has provided the copies of title documents with regard to the said property to the Purchaser and the Purchaser has engaged an attorney for the due diligence of the title of Seller to the said property."

4. It is the case of Advent that the title documents were provided to it in bits and pieces by Tristar only from 10th April 2012 onwards and that too after reminders/emails from Advent. Tristar had purchased the property in question from Select Infrastructure Private Limited ('Select'). However it was only after the signing of the Agreement that Tristar furnished Advent a copy of the sale deed dated 3rd November 2009 by which it purchased the property from Select (hereafter "the Select sale deed"). According to Advent, when it commenced its due diligence exercise, the Common Area

Maintenance ('CAM') Bills raised by Select from time to time in respect of the property in question revealed that it had a super area of only 1,17,377 sq.ft., i.e., 6000 sq.ft. less than what was stated in the Agreement. Tristar was aware of the fact of the reduced super area even at the time of execution of the Agreement since much earlier to it Tristar got Select to rectify and reduce the area for the purpose of CAM charges. Tristar obtained from Select credit notes towards excess CAM charges paid by it for the period November 2007 to March 2010, aggregating to Rs. 23.5 lakhs.

5. The second serious objection raised by Advent was that although Clause 12 of the Agreement stated that the terrace rights for further construction on the property in question would stand transferred to Advent on payment of the entire sale consideration, the corresponding clause in the Select sale deed stated as under:

“1. Devolution of Hotel/Service Apartments

(iv) The Vendee (Tristar Hotels) hereby clearly understands that the Vendor (Select) shall have the full right to exploit, use, construct, own and transfer any areas/floors of Select Citywalk including any residual FSI and vertical or horizontal increase in FSI of Select Citywalk and/or Hotel/Service Apartments as may be allowed by the concerned authorities from time to time. In the event of vertical exploitation of additional FSI on the roof of the Hotel/Service Apartments by the Vendor the same shall be done with mutual consent of the parties.”

6. Advent states that Tristar was bound by the above clause and therefore, could not have represented to Advent that the terrace rights of the property would be transferred to Advent upon payment of the sale consideration. In terms of the Agreement, Advent was to pay Tristar a sum of Rs. 10 crores at the time of signing of the Agreement and pay a further sum of Rs. 10 crores on or before 20th April 2012. The balance consideration of Rs. 101.50 crores was to be paid at the time of execution of the conveyance

deed and Agreement for transfer of movables, which the parties were agreed to do on or by 6th June 2012. It is stated that Advent paid Tristar a sum of Rs. 10 crores at the time of signing the Agreement and a further sum of Rs. 10 crores on 30th March 2012 itself in order to facilitate Tristar obtaining Consent/No objection certificate ('NOC') from the consortium of Banks that had lent advances to Tristar. It is not in dispute that Advent has already paid Rs. 20 crores thus far to Tristar.

7. Advent states that Tristar has failed to perform its obligations under Clauses 1, 6 and 8 of the Agreement by obtaining the necessary NOC from the Banks, paying the outstanding air conditioning, electricity and CAM charges in the sum of Rs. 2.68 crores to Select and failed to furnish proof of cancellation of an earlier agreement with Troilus Hospitality Pvt. Ltd ('Troilus') towards full and final settlement of the latter's dues of Rs. 2.14 crores. On 21st April 2012 Advent wrote to Tristar seeking clarification on the above issues. Advent states that Tristar avoided giving any written response except saying that it was ready for a meeting with Advent.

8. On 19th May 2012 Advent sent a reminder. On 29th May 2012 the parties met but were unable to resolve their disputes. Advent states that although Tristar accepted that the super area it could convey was only 1,17,377 sq.ft., it insisted that in terms of the Agreement, Advent was obliged to purchase the property on "as is where is basis" Tristar said it would seek clarification from Select on the other issues raised by Advent. By an email dated 2nd June 2012 Tristar called upon Advent to execute the sale deed in terms of a draft sale deed sent to Advent and stated that if the transaction was not complete on or before 6th June 2012, the consequence as set out in the Agreement would follow. Advent states that the further meetings between the parties did not help to resolve the outstanding issues. Tristar

stated that it would forfeit the sum of Rs. 20 crores paid by Advent.

9. Advent invoked the arbitration proceedings under Clause 23 of the Agreement and nominated Mr. Justice S.K. Mahajan (retired) as its Arbitrator. Advent states that it made enquiries on or about 24th June 2012 and learnt that there was a proceeding involving Tristar which was pending in the Debts Recovery Tribunal ('DRT'), Bangalore. Advent learnt that Tristar had filed an appeal against the notice issued to it under SARFAESI Act by the Bank of India ('BOI'). Thereupon on 3rd July 2012 Advent filed an application seeking impleadment in the said proceeding. Before the DRT, Bangalore Tristar filed an affidavit dated 8th June 2012 stating that it had already forfeited the said sum of Rs. 20 crores and had adjusted the said sum against the loans owing to the consortium of Banks. Meanwhile, Tristar appointed Mr. Justice R.C. Lahoti, a former Chief Justice of India, as its Arbitrator. In the above circumstances, Advent filed the present petition seeking the reliefs as mentioned hereinabove.

10. At the first hearing of the case on 13th July 2012 Tristar appeared and accepted notice. The parties sought time to explore the possibility of amicably resolving the disputes. However, when the case was again heard on 16th July 2012 it was apparent that the parties were unable to agree on the terms and mode of settlement. The petition was with consent of the parties heard finally.

11. Mr. Amit Sibal, learned counsel appearing for Advent, submitted that under Section 12 of the Specific Relief Act, 1963 ('SRA') the Court could grant mandatory directions for part performance of an agreement to sell, even at the stage of Section 9 of the Act, in respect of 1,17,377 sq.ft. of the property in question by requiring Tristar to correspondingly reduce the sale

consideration and execute a sale deed in favour of Advent to that extent. Mr. Sibal submitted that Tristar had misrepresented in the Agreement both as regards the extent of the property and as regards the terrace rights. On undertaking due diligence Advent realised that Tristar had title only as regards 1,17,377 sq.ft of the built up space and had no title to the terrace rights as was apparent from the Select sale deed. The sale consideration would have to be correspondingly reduced. He reiterated that Advent was ready and willing to perform its part of the contract and that Tristar should not be allowed to avoid its obligation under the Agreement and forfeit the amount already paid by Advent. He submitted that on a balance of convenience, and on equitable considerations, this Court should restrain Tristar from creating any further third party rights in respect of the property in question during the pendency of the arbitration proceedings.

12. Mr. C.A. Sundaram, learned Senior counsel for Tristar, submits that clauses in the Agreement make it clear that time was the essence of the contract. Mr. Sundaram further submits that while Tristar is prepared to reduce the sale consideration to the extent of 6000 sq.ft, there was no ambiguity that there was no offer of terrace rights to Advent. He disputed the contention of Mr. Sibal that copies of the title documents were not furnished till 10th April 2012 and submitted that Advent was precluded from questioning the title of Tristar. He submitted that there was no requirement of a formal termination of the Agreement as in any event the time by which the sale deed had to be executed had elapsed. He contended that the Petitioner could not seek part performance in terms of Section 12 of the SRA as there was no precise value for the terrace rights.

13. On a consideration of the above submissions, it appears *prima facie* to the Court that there was a misrepresentation made by Tristar in the

Agreement as regards the extent of the property in question. Tristar knew that the super area of the property was only 1,17,377 sq.ft. and yet as indicated in the Agreement, it was prepared to sell the property in question to an extent of 1,23,377 sq. ft. There is no satisfactory explanation offered by Tristar for this. Secondly, the relevant clause of the Select sale deed made it clear that Select retained the terrace rights. The corresponding clause in the Agreement could not possibly have been any different. Despite knowing this, Tristar held out to Advent in the Agreement that the terrace rights, “if any”, would also get transferred to Advent upon Advent paying the entire sale consideration. The mere use of the words ‘if any’ does not improve the situation for Tristar. It was obliged to use the same phraseology in relation to the terrace rights as was contained in the Select sale deed.

14. Advent relies on a valuation report to say that the value of the terrace rights would be much higher than Rs. 40 crores while Tristar seriously disputes this. While it is not possible to examine this issue at this stage, it cannot be said that the sale consideration for the property in question was agreed upon by the parties without reference to the terrace rights. Considering that Advent is prepared to and has expressed its willingness to perform its part of the Agreement by paying up the reworked sale consideration after accounting for reduction to the extent of 6,000 sq. ft and the terrace rights, this is a case where Advent can seek part performance of the Agreement on the strength of Section 12 SRA which reads as under:

“12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of

compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.”

15. In ***Rachakonda Narayana v. Ponthala Paravthamma (2001) 8 SCC***

173, the Supreme Court explained the rationale of Section 12 (3) as under (SCC, p. 177-178):

“8. A perusal of sub-section (3) of Section 12 shows that the first part of the said provisions mandates refusal of specific performance of a contract on certain conditions. However, the latter part of the provisions permits a court to direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all claims to the performance of the remaining part of the contract and all the rights to compensation for the loss sustained by him. If a suit is laid by the other party, the court may direct the defaulting party to perform that part of the contract which is performable on satisfying two preconditions i.e. (i) the plaintiff pays or has already paid the whole of the consideration amount under the agreement, and that (ii) the plaintiff relinquishes all claims to the performance of the other part of the contract which the defaulting party is incapable to perform and all rights to compensation for loss sustained by him. Thus, the ingredients which would attract specific performance of the part of the contract, are: (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party.”

16. The above decision was reaffirmed in ***Surinder Singh v. Kapoor Singh (2005) 5 SCC 142***. The Supreme Court in the latter decision reiterated the settled position that a plea of willingness to go in for part performance could be made by the purchaser even at the appellate stage. In light of the above legal position it appears to the Court that Advent has made out a *prima facie* case for grant of an ad-interim relief to seek part

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performance of the Agreement in respect of the property in question minus 6,000 sq. ft and the terrace rights both of which cannot possibly be conveyed by Tristar to Advent. This will require the sale consideration for the property in question to be reworked.

17. However, on the question of re-working the sale consideration, there is no agreement between the parties. Mr. Sibal states that according to the expert evaluation got done by Advent, the reworked sale consideration for the property minus 6,000 sq. ft would be around Rs. 115.59 crores. Further Advent estimates the value of the terrace rights to be more than Rs. 40 crores. He states that without prejudice to its contentions in regard to the value of the terrace rights, Advent is prepared to pay Tristar, after accounting for the Rs. 20 crores already paid, a further sum of Rs. 75.59 crores and furnish to Tristar a bank guarantee ('BG') for Rs. 20 crores which will become payable to Tristar in the event Tristar succeeds in proving in the arbitral proceedings that the terrace rights were not intended to be transferred to Advent under the Agreement. Mr. Sundaram disputes Advent's computation altogether and states that Advent should pay the sale consideration as agreed minus the amount calculated pro rata for the 6,000 sq. ft which cannot be conveyed. He submits that the question of compensating Advent, if at all, for the terrace rights should be left to the decision of the Arbitral Tribunal.

18. The Court is of the view that at this stage it may not be possible, in the absence of any agreement in that behalf between the parties, for it to determine the value if any to be placed on the terrace rights which cannot be conveyed to Advent and whether Advent should be accordingly compensated. The exact value of the 6,000 sq.ft. of space is also not possible to be determined. This will require a more detailed examination

which is best left to the arbitral Tribunal, which in all likelihood will be constituted in the near future. The balance of convenience in restraining Tristar from creating third party rights on the property in question is in favour of Advent, subject to Advent being put to terms to demonstrate its willingness and readiness to proceed with the purchase of the property in question minus the terrace rights and 6,000 sq. ft.

19. Advent claims that the reworked sale consideration for the property in question on minus 6,000 sq.ft. is approximately Rs. 115.59 crores and further that the value of terrace rights would be more than Rs. 40 crores. Without expressing any opinion on the correctness of these claims, leaving it to be determined by the arbitral Tribunal, and accounting for the sum of Rs. 20 crores already paid by Advent to Tristar, this Court directs that subject to Advent depositing in this Court a fixed deposit receipt ('FDR') in the sum of Rs. 75.59 crores on a nationalized Bank favouring Tristar, and furnishing a bank guarantee in the sum of Rs. 20 crores favouring Tristar, on or before 26th July 2012, Tristar shall be restrained from alienating, transferring, disposing of or creating any charge or third party rights over the property in question during the pendency of the arbitral proceedings. The said FDR will be initially for a period of not less than six months and will be kept renewed by Advent during the pendency of the arbitral proceedings. The amounts under the bank guarantee and the FDR will be disbursed in terms of the orders or the final Award of the arbitral Tribunal.

20. This order will not preclude either party from seeking its modification by filing an application before the arbitral Tribunal under Section 17 of the Act or for any other interim relief in accordance with law. It is clarified that

nothing in this order should be construed as an expression of any final binding view on the merits of the contentions of either party and is not intended to influence the outcome of the arbitral proceedings.

21. The petition is disposed of in the above terms.

S. MURALIDHAR, J

JULY 19, 2012

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