

*** HIGH COURT OF DELHI : NEW DELHI**

% Judgment decided on: 13.01.2012

+ Arb. P. No. 269 of 2010

SAPTRISHI BUILDERS PVT LTD Petitioner
Through Mr. Deepak Dhingra, Adv. with
Mr. B. G. Jha, Adv.

Versus

VEG SANCHAR VIHAR CO-OP. GROUP Respondent
Through Mr. Sunil Narula, Adv.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. This petition has been filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator in terms of clause No.43 of the tender document dated 31.05.2002 to adjudicate upon the claims of the petitioner against the respondent.
2. The brief facts of the case leading upto the filing of this petition are that by contract agreement dated 31.05.2002, the petitioner/Contractor was appointed by the respondent to construct 68 flats in the society complex at Plot No.19-B, Sector 6, Dwarka, New Delhi. The said

agreement provided the entire scope of contract, the deposits, the preparation of drawings, inspection of sites etc.

3. The total cost of the project was stated at Rs.6,82,55,862/-. In June, 2002 the petitioner was handed over the site after the site plan had been approved by the competent authority i.e. Delhi Development Authority and then the petitioner started the construction work.

4. As per the contract, the total buildup area was 1,06,468 sq. ft. excluding the area of community facility and the area for development work was to be constructed at site at the rates mentioned.

5. It is stated by the petitioner, that after the work started, the petitioner raised six bills against the works done, the sixth bill dated 29.05.2008 was the final bill and was for a sum of Rs.1,74,45,783.43/. Despite of various representations made by the petitioner, the respondent did not pay the amount of the final bill and after seven months the respondent raised queries by sending a letter dated 27.12.2008 to the petitioner in order to delay the payment.

6. Thereafter, more correspondence was exchanged and various meetings also took place between the parties however, the payment was not made by the respondent. Thus, the petitioner filed a suit for declaration

and injunction against the respondent which is pending before this court, however, as per the petitioner, issue raised in the said suit does not restrict the appointment of an arbitrator in any manner whatsoever.

7. The case of the petitioner is that after the construction completed in the year 2008, the respondent forcibly took possession of the site, after removing the petitioner's material from there and since then all the 68 residential flats have been in possession of its members.

8. Thereafter, the petitioner sent a legal notice dated 14.07.2010 to the respondent in respect of the payment of the outstanding amount of the final bill and in the said notice, clause No. 43 which is the arbitration clause of the agreement dated 31.05.2002 was also invoked proposing the name of Mr. P. Bhatia, Chartered Engineer, New Delhi who is also a panel arbitrator for the Institute of Architect (India).

9. The claims of the petitioner against the respondent are as follows:

- (i) An amount of Rs. 1,74,45,783.43/- towards the final bill dated 29.05.2008.
- (ii) Damages towards illegal occupation of the units being 68 flats constructed on Plot No.19-B, Sector 6, Dwarka,

New Delhi as also for the amount towards material misappropriated by the respondent.

(iii) Other damages sustained by the petitioner which shall be quantified before the learned arbitrator.

(iv) Interest on outstanding amount and costs.

10. The respondent has filed its reply. The only point argued by the learned counsel appearing on behalf of the respondent is that the present petition is pre-mature and the petitioner has not followed the requisite steps as envisaged in the agreement dated 31.05.2002. The petitioner cannot seek appointment of an arbitrator without following the due procedure as provided in Clause-42 of the said agreement. The respondent is relying upon Clause-43 of the said agreement. Both the clauses read as under:

“42. **Settlement of disputes and differences:**

- a. The contractor shall try to settle all the matters pertaining to this contract 1st with the Employer/architect. The decision of the Architect may be in the form of a certificate, instruction or otherwise. The decision, opinion, direction, certificate for payment with respect to all or any of the matters under clause 20,21,22,23,24,26,27 hereof (which matters are hereinafter referred to as excepted matters) of the Architect/Employer shall be final and conclusive and binding on the contractor and shall be without appeal. B. All other disputes or difference of any kind whatsoever between the Contractor and Architect and the Employer arising out of or in connection with the contract or carrying out of the works

(whether during progress of work or within defects liability period and whether before or within 365 days of determination/abandonment/breach of the contract) shall then be referred by the Contractor or the employer giving entirely full details of the matter under dispute and the reasons thereof. The employer shall within a period of 60 days from the receipt of such reference from the Contractor shall give his decision writing. If the Contractor is dissatisfied with the decision of the Employer, he can refer the matter to the arbitration by serving a written notice to the employer through the Architect within a period of 28 days of such decision. The notice shall specify the matter with full details and amounts which are in dispute and referred for arbitration.

43. **Arbitration:**

All matters in dispute between the parties arising out of these works shall be referred to the arbitration by a mutually appointed arbitrator or a panel of 3 arbitrators in accordance with the provision of the Arbitration and Conciliation Act, 1996 and all statutory modification thereof for time being in force shall apply to all such arbitration which shall be held in New Delhi. The arbitrator or presiding arbitrator shall be fellow of Institute of Engineers (India) or Institute of Architects (India). The award of the arbitrators as the case may be shall be final and binding on the parties.

The arbitrators shall have power to open up review and revise any certificate, opinion, decision, requisition or notice and any matter required in his opinion, save in regard to excepted matters referred as to above and to determine all matters in dispute which shall be submitted for arbitration.

In case during the arbitration proceedings the parties mutually settle/compromise or compound their dispute or differences, the reference to the arbitration and the appointment of the arbitrator shall deem to have been revoked and the arbitration proceedings

shall stand with drawn or terminated with effect from the date on which the parties file a joint memorandum or settlement thereof with the arbitrators.

This submissions shall be deemed to be a submission to the arbitration within the meaning of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof.

It is agreed that that Contractor shall not delay the carrying out of the works by reason of any such matter, question or dispute being referred to arbitration, but shall proceed with the works with all due diligence and shall until the decision of the arbitrator is given, abide by the decision of the ARCHITECT and no award of the arbitrator shall reveal the CONTRACTOR office obligations to adhere strictly to the ARCHITECT/EMPLOYER'S instructions with regard to the actual carrying out of the works. The EMPLOYER and the CONTRACTOR hereby also agree that arbitration under this clause shall be conditional precedent to any right of the action under the contract.”

11. It is alleged by the respondent that in terms of clause 30(i) and clause 41(iii) (a) & (b) of the agreement dated 31.05.2002, the petitioner contractor was required to get the final completion certificate by submitting an application with the architect/Employer and only then it could submit the final bill within 60 days of the date of completion certificate. In reply, it is submitted by the petitioner that the completion certificate from the Delhi Development Authority has not be obtained as the final bill has not been settled. It is submitted by the petitioner that there was no necessity to approach the architect first for raising the final bill as the architect

M/s. Vidyarthi Associates had resigned and, particularly, when the claims were raised in the form of bills there was no architect of the society. Even otherwise the bills were duly raised upon the respondent named as “Employer” in the agreement. The petitioner has referred the letter dated 23.11.2008 as filed by the respondent in which the respondent associate asserted as under :

“This has reference to our letters dated 14.08.2008 and 30.10.2008 regarding settlement of your bill. In this connection you may recall your meeting with the Management Committee of this society wherein you informed the Committee that there is some discrepancy in the bill and the revised running bill will be submitted in a weeks time after necessary rectification but we are sorry to state that you have not submitted the revised bill in the absence of which we are not able to process the bill for payment. You are, therefore, once again requested to submit the revised bill so as enable this society to settle the same.”

12. The petitioner’s counsel has argued that a bare perusal of Clause 42 reveals that with respect to the bills raised by the petitioner upon the respondent, after completing the work in finality, the petitioner had to approach the employer/Architect. Since the Architect was not available in the Society, the petitioner by issuing letters dated 23.11.2008 and 9.12.2008 under the cover of letter addressed by the petitioner, the final bill was submitted with the respondent against receipt. By letter dated

27.12.2008 written by the respondent to the petitioner, the respondent acknowledged the receipt of the final bill and intimated to the petitioner about the observations made by the architect and asked for clarification. The petitioner has filed the copy of the letter dated 19.01.2009 which shows its reply to the clarifications to the respondent. Thereafter, as per record, various letters were sent to the respondent requesting for the release of payment not received as per the case of the petitioner.

13. The petitioner thereafter, filed the suit against the respondent in February, 2010 seeking restraint against the respondent from conducting draw of lots with respect to the flat constructed by the petitioner. The respondent had become aware of the suit filed by the petitioner. A legal notice was also sent to the respondent dated 14.07.2010 by the petitioner.

14. No doubt, the petitioner has filed the present petition for appointment of arbitral tribunal. Admittedly, claims have been raised by the petitioner against the respondent and disputes have arisen with respect to the said claims which need adjudication by the arbitrator.

15. It is true that at this stage, it is not necessary to go into each allegation raised by the respondent, as it is for the arbitral tribunal to

adjudicate the dispute between the parties. Now, the only issue left in the matter is, as to whether as per arbitration clause, the disputes amongst the parties could be referred for adjudication.

16. In view of the aforesaid reasons, this Court is not agreeable with the submission of the respondent that the petitioner has failed to comply with the specific stipulations contained in the agreement and thus, no claim can be referred for adjudication.

17. The petitioner submits that even if there was any requirement which was applicable to the petitioner to submit the bills with the architect then the said condition is also not applicable now, as the architect was aware about the final bill submitted by the petitioner and his clarifications are also fulfilling and in case any dispute is still left, the same can be adjudicated in terms of Clause-43 by the arbitrator and even otherwise, clause 42 of the arbitration clause refers to word “employer/architect”. Thus, petitioner submits that there was no requirement of the bills to be submitted only with the architect. The petitioner has submitted that at the relevant time the society had no Architect. Therefore, under no circumstances, it could have been submitted before him. Therefore, there was no breach on the part of the petitioner as alleged. The petitioner

stated that the final bill had been raised in accordance with the procedure laid down in the tender documents. Since, now the respondent is not prepared to clear the final bill, therefore, the present petition has been filed for appointment of the arbitrator.

18. Considering the rival submissions of the parties and the respective pleadings in the matter, I am of the view that it is a fit case for allowing the present application for appointment of sole arbitrator.

19. Mr. Vivekanand, Adv., L-II/55, Lajpat Nagar, New Delhi-110024, (Mob. 9810149231) is appointed as the sole arbitrator to adjudicate the disputes between the parties. The fees of the learned arbitrator shall be payable according to the schedule of fees fixed by Delhi High Court Arbitration Centre under its rules. The parties shall appear before the learned Arbitrator as and when the first of sitting is fixed by him.

20. The petition as well as pending application, if any, stand disposed of. A copy of the order be communicated to the learned arbitrator.

21. A copy of the order be given Dasti to both the parties.

MANMOHAN SINGH, J.

JANUARY 13, 2012