

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

% *Judgment Reserved on: May 05, 2013*
Judgment Pronounced on: July 01, 2013

+ **Arb. Appeal No.8/2013**

CHANDER MOHAN LALL Appellant
Through Mr.Sandeep Sharma, Adv. with
Ms.Kanika Singh and Ms.Nancy Roy,
Advs.

versus

DLF COMMERCIAL DEVELOPERS LTD Respondent
Through Mr.B.B. Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. Present appeal has been filed against order dated 20th February, 2013 of learned Arbitrator passed on the application under Section 17 filed by the appellant.
2. By the impugned order, the learned Arbitrator has directed the appellant for depositing the holding and maintenance charges from 12th January, 2011 till actual holding over the possession of the said premises by the respondent to the appellant and further directs to deposit the FDR drawn on a nationalized bank in the name of the respondent with this Tribunal of an amount equivalent of the arrears of holding and maintenance charges demanded by the respondent from 1st May, 2009 during the pendency of the present proceedings.
3. The appellant had entered into four retail/commercial office space

buyer agreements all dated 31st May, 2006 for purchase of office space on the 10th floor bearing No.1001, 1002, 1027 and 1024 having super area of 7497 sq. ft. in shopping mall cum entertainment complex named as DLF Tower, Jasola on commercial plot of land bearing Plot No.11 admeasuring 6440 sq. meter situated at commercial centre, DLF Towers, Jasola, New Delhi. The schedule of payment for purchase of the aforesaid office space is given in Annexure-III to all the four agreements.

4. The total sale consideration for purchase of the aforesaid office space is stated to be ₹9,37,12,500/-.

5. The case of the appellant is that despite payment of an amount in excess of ₹6 crore to the respondent and despite repeated reminders by the appellant to the respondent to hand over possession of the plots in question, the respondent has failed to hand over vacant possession of the said space. It is also stated that the respondent is making unjustified demands in the form of penalty and fine etc. upon the claimant. It is stated that owing to the negligence of the respondent in not handing over possession of the said space, he has lost rental income as he has neither been able to use the said space for his own use nor put the property up for rent.

6. The claims of the appellant are handing over of possession, execution of sale deed and loss of rental income amounting to ₹7,49,700/- per month for the period commencing 1st June, 2009 totalling to ₹2,77,38,900/- on the date of claims and till handing over possession of the premises to the appellant.

7. The basis of his claims are that in terms of clause 10.2 of the retail/commercial office space buyer agreement, the respondent was obliged to hand over possession of the space to the appellant by 1st June, 2009. Vide

letter dated 20th October, 2008, the appellant received a communication from the respondent that the respondent had applied for the occupation certificate of the property in question and consequently the second last installment had become due and payable in terms of the Annexure-III of the agreement and it was requested that the due payment be made by 15th November, 2008. No intimation of receipt of occupancy certificate from the competent authority was received by him, an obligation on the part of the respondent.

8. It was alleged by him before the learned Arbitrator who has recorded his averments that he received an email from Ms.Shailaza K. Mithani of the respondent only on 12th January, 2011 informing him that a large sum of money was due from the appellant including holding charges and maintenance charges amounting to ₹1,88,66,156.63. The appellant replied to the said mail on the same day seeking an explanation why maintenance charges are being levied even though he has not been given possession of the space till date, which was to be handed over in the year 2009. On 21st January, 2011, the appellant received an email from Ms.Sahilaza K. Mithani of the respondent stating that the letters of offer of possession were sent to all the customers in June 2009 and that holding charges are applicable till the time he takes possession. In response to the said email of the respondent, the appellant by e-mail dated 21st January, 2011 denied having receipt of such communication with the requirement of taking over possession.

9. The learned Arbitrator has also recorded that on 24th March, 2011, the respondent offered to waive the holding charges as a special case but demanded payment of ₹1,30,16,692/- and reduced the rate of interest on

delayed payment from 15/18% to 12%. The appellant responded to the said email vide email dated 25th March, 2011 protesting levy of interest and sought to know when the letter of possession was sent to him. In response thereto the respondent, by email dated 26th March, 2011, reiterated reduction in rate of interest for delayed payment to 12%. On 28th March, 2011, the appellant sent another email stating that the last installment became due only upon receiving intimation from respondent that the occupation certificate has been received by them in terms of the agreement and since he had not received any such intimation therefore, he is not entitled to pay any interest. Respondent by email dated 30th March, 2011 stated that the last installment was payable on receipt of occupation certificate which was received by the appellant in June 2009. Again vide email dated 30th March, 2011, the appellant once again sought to know when the respondent communicated to him about the receipt of the occupation certificate on 18th March, 2011, the appellant served a formal notice to the respondent informing the respondent that the appellant is ready and willing to comply with the terms of the agreement executed by the parties but called upon the respondent to pay damages to the appellant for the delay in delivery.

10. Relying upon the said clause 7, the respondents alleged that since the appellant failed to pay the last installment, they were liable to pay holding charges and maintenance charges in terms of the agreement. The respondent also relied upon clause 8 of the agreement which inter alia stipulates that is agreed and understood by the parties that it shall not be obligatory on the part of the respondent/intending seller to demand/ notice/reminder regarding payment to be made by the appellant as per schedule of payment or obligation to be performed by the claimant/allottee. It is also stated that as

on 4th June, 2008, the appellant was duly informed that the completion certificate has been applied for and that he was at liberty to take possession for the purposes of carrying out interior and fit outs in the said premises.

11. The learned Arbitrator after hearing both parties passed the impugned order dated 20th February, 2013 by issuing certain directions to the appellant.

The operative portion of the order reads as under:

“Having heard both the counsel at length and having carefully perused the records, it is clear that there is no document on record to show that the respondent had offered possession to the claimant in June, 2009 or intimation of receipt of occupancy certificate. It is, however, not in dispute that on 12th January, 2011, the claimant came to know that the possession was being handed over and that the occupancy certificate had been obtained by the respondent but the claimant did not offer to pay the last installment even at that stage. The various terms of the agreement make it obligatory on the part of the claimant to pay the maintenance and holding charges even though possession has not been taken by him. The question inter alia that will need to be determined at the final stage would be whether holding charges and maintenance charges are liable to be paid by the Claimant to the respondent from June 2009 onwards or not ? The judgments relied upon by the learned counsel for the respondent, no doubt indicate that the interim mandatory injunction can be granted only in special circumstances but we cannot lose sight of the fact that except the last installment, the Claimant did made the entire payment on time and a substantial amount has already been paid by him and yet possession has not been received. This according to me is special circumstance entitling the claimant to take possession upon payment of the last installment at this stage. However, it is equally important to take into account that the respondent may be entitled to recover holding and/or maintenance charges etc. from the claimant. The question that remains to be adjudicated

is from which date is the respondent entitled to recover the said charges. This aspect and the aspect of the entitlement of the claimant to claim damages and execution of Sale Deed will be decided at the final stage.”

12. The appellant has challenged the said order passed by the learned Arbitrator to the extent of the certain directions inter alia on the following grounds:

- i) That the appellant submits that as mandated by clause 10.3 of the agreement dated 31st May, 2006 the respondent after obtaining occupation certificate was under obligation to offer the appellant in writing to take possession for occupation and use the said properties in terms of four agreements all dated 31st May, 2006.
- ii) In para 8 of the agreement under the heading “Time is the Essence”, even in this clause the schedule of payment under Annexure III is referred and it is categorically stated that amounts are payable “on or before due date or as and when demanded by the Intended Seller as the case may be”. The last installment on Annexure III read with Clause 10.3 is only payable when the Intending Seller makes a demand on the appellant. Admittedly, no such demand was made and hence the installment was not payable.
- iii) Even in paragraph 12 of the agreement, a default is only attributed to the appellant if he fails to “take over the said premises for occupation and use within the time stipulated by the Intending Seller in its notice” [Clause 12 (ix)] and failure to execute the conveyance deed or Deed of Apartments with the time stipulated by the Intending Seller in its notice.”
- iv) That the appellant submits that after the payments made in November, 2008 no letter was written by the respondent to the appellant. The respondent did not at any time inform the appellant with regards to the status of the occupation certificate and consequently no demand was made or could be made by the respondent. For the first time, much to the appellant’s shock, he received email dated 12.1.2011 was sent by the respondent

demanding the payments stated therein namely holding charges, maintenance charges as well as interest therein. When on 12th January, 2011 the respondent gave the appellant intimation for the first time, the handing over possession and executing sale deed was made conditional to appellant paying delayed interest, maintenance and holding charges from 2009 onwards.

- v) The learned Arbitrator has held that though the respondent was under an obligation to intimate the claimant “in writing receipt of certificate of occupation and use from the competent authorities” and only “thereafter the claimant was entitled to take possession of the premises”. The learned Arbitrator has also held that “No letter is on record that the respondent sent such intimation to the claimant”. The learned Arbitrator has further held that on receipt of the occupancy certificate by the respondent they were “obviously” required to intimate the respondent of the same.
- vi) The learned Arbitrator despite of noting that there is no document on record to show that respondent had given any intimation in terms of clause 10.3 of the agreements has passed the aforesaid impugned directions. That even before this Court respondent has been unable to produce any such document, the learned Arbitrator has erred in holding that “Claimant did not offer to pay the last installment even after having come to know on 12th January, 2011 that the possession was being offered by the respondent and the occupancy certificate had been obtained by the respondent.” The learned Arbitrator has completely ignored the effect of the letter dated 18th May, 2011 of the appellant wherein it was stated that he is ready and willing to deposit a sum of ₹71,22,150/- as last installment. The appellant through this email of 28th March, 2011 mentioned that the intimation under Clause 10.3 has not been received “till date” to which the response was that the occupation certificate was received in June, 2008. An offer was made on 18th May, 2011 to deposit the last installment which was not deposited as the respondent insisted on charging maintenance and holding charges and interest.
- vii) The learned Arbitrator erred in directing appellant for payment of holding and maintenance charges from 12th January, 2011 when

admittedly holding charges of ₹38,06,376/- were also waived off by respondent and reference may be had of email dated 24th March, 2011 of the respondent and there was no basis for passing such direction.

- viii) That the impugned directions passed by the learned Arbitrator are beyond the pleadings of the parties as contained in statement of claim and its reply as well as Section 17 application and its reply. That the respondent had not made any averment in its reply to Section 17 application in terms of Order 38 Rule 5 CPC nor has it averred in the said reply that the amounts claimed as holding and maintenance charges need to be secured and in fact there is not even a whisper that the respondent may not be able to recover such an amount from the appellant in future if the arbitrator was to hold in its favour. Since the impugned order of the learned Arbitrator was limited to handing over possession of the premises and not execution of a sale deed, there was no occasion into insist on deposit of holding and maintenance charges and that too from 2009.
- ix) The maintenance charges are payable only once the possession is handed over and a separate maintenance agreement is entered into as per the contract.

13. Mr.Sandeep Sharma, learned counsel appearing on behalf of the appellant has referred clause 10.3 of the agreement in support of argument on behalf of the appellant. The extract of the relevant clause from the agreement is pasted below:

“Procedure for taking possession

The Intending Seller, upon obtaining certificate for occupation and use from the competent authority(ies) shall offer in writing to the intending Allottee to take over, occupy and use the said Premises in terms of this Agreement within thirty (30) days from the date of issue of such notice and the Intending Seller shall hand over the said Premises to the Intending Allottee for his/her occupation and use subject to the Intending Allottee

having complied with all the terms and conditions of this Agreement and is not in default under any of the provisions of this Agreement and has complied with all provisions, formalities, documentation etc. as may be prescribed by the Intending Seller in this regard. The Intending Allottee shall be liable to pay the operation/maintenance charges from the date of grant of the occupation certificate more fully described in clause 14 mentioned hereunder irrespective of the Intending Allottee taking possession of the said premises at a later date.”

14. It is argued by Mr.Sharma that as per Clause 10.3 the respondent was supposed to inform the appellant within 30 days of receiving notice from DDA, but the appellant had received no intimation of grant of such certificate to the respondent.

15. Reliance is placed by Mr. Sharma on Clause 14.4 of the Agreements to sell as per which the operation or maintenance charges are also liable to be borne by the appellant only from the date of issue of occupation certificate. The extract of the relevant clause referred by the appellant is pasted below:

“Fixation of total Operation/Maintenance Charges

The total operation/maintenance charges as more elaborately described in the Tripartite Maintenance Agreement (draft given in Annexure-VII) will be fixed by the maintenance agency on an estimated basis of the maintenance costs to be incurred for the forthcoming financial year. Maintenance charges would be levied from the date of issue of occupation certificate and the Intending Allottee undertakes to pay the same promptly. The estimates of the maintenance agency shall be final and binding on the Intending Allottee. The maintenance charges shall be recovered at 1.2 times the actual expenditure on monthly/quarterly intervals as may be

decided by the maintenance agency and adjusted against the actual audited expenses as determined at the end of the financial year and any surplus/deficit thereof shall be carried forward and adjusted in the maintenance bills of the subsequent financial year. The Intending Allottee agrees and undertakes to pay the maintenance bills charged at 1.2 times the actual expenditure on or before due date as intimated by the maintenance agency.”

16. The respondent has filed its reply, inter alia, referring certain following Clauses of the Agreement dated 31st May, 2006:

- a) The charges of the flat are not only the basic price what is recorded in Schedule to the agreement but also other charges including ground rent, property tax, government tax, maintenance security, maintenance charges and holding charges if possession is not taken, etc; for delayed payment, the interest is payable as per the agreement.
- b) Clauses 1.7 (ii), (v), 1.09; 4 (particularly 3rd sub paragraph authorizing the respondent to forfeit the amount without any notice); 7 (absolute power of the respondent to adjust/appropriate the payment on any account); 8 (not obligatory to the respondent to send the demand notices or reminders); 9.1 (schedule of payment may be changed by the respondent at its absolute discretion without reference to the allottee); 10.3 (procedure for taking possession as also allottee to pay maintenance/operation charges from the date of occupation certificate irrespective whether taking the possession at later stage); 10.4 (the right of the seller if the possession is not taken by the allottee which makes him liable to pay the holding charges @ 25 per sq. ft. per month of the super area); 11.3 (the rights of the allottee if the possession is not handed over in time); 11.4 (rights of the seller if unable to deliver the possession); 12 (events of defaults and its consequences which include even

non-payment of charges and taxes and completion of other formalities including the maintenance agreement as liable for termination of agreement); 14.1, 14.2, 14.3, 14.4, 14.5 and 14.6 (deal with maintenance and maintenance security as also fixing the maintenance charges by the maintenance agency of the respondent); and 25 (till the time the entire payment are made as demanded by the respondent the respondent will continue to have first charge/lien thereon).

17. In the reply, the respondent submits that as of now, the appellant owes to the respondent for the period from January 2011 till April, 2013, the following amounts excluding the interest on late payment:

Period from 12.01.2011 to 30.04.2013				
Property No.				
Particulars	DJ 1023	DJ 1024	DJ 1001	DJ 1002
Area (in Sq. ft.)	1684	2542	1447	1730
Basic Sale Price (Rs.)	160767	1027240	542415	772824
Increase in Area (Rs.)	0	0	0	0
Ground Rent (Rs.)	275874	416431	237047	283408
House Tax (Rs.)	49888	75321	42865	51265
Interest on Ground Rent (Rs.)	34561	52171	29697	35505
Stamp duty & registration charges (Rs.)	868100	1290200	750500	889600
Government Taxes (Rs.)	85564	129159	73522	87902
Holding charges (incl. service tax) (Rs.)	1322923	1996954	1136739	1359059
Payable to DLF Home Developers Ltd. (Rs.)	2797677	4987476	2812785	3577963
Interest bearing maintenance security (Rs.)	842000	1271000	723500	865000
Maintenance charges (Rs.)	836368	1262507	718673	859223
Payable to DLF Utilities Ltd. (Rs.)	1678368	2533507	1442173	1724233

18. The arbitration between the parties is admittedly pending. The appellant has a claim about loss of rental income amounting to ₹7,49,700/- per month for the period commencing from 1st June, 2009. Both parties have referred various clauses of the agreement, final interpretation of these clauses have to be arrived at by the learned Arbitrator in the light of

evidence produced by the parties who has to determine who was at fault at the relevant time.

19. Let me deal with the directions passed by the learned Arbitrator in the impugned order in view of such situation and facts and circumstances of the present case. The operative portion of the order is reproduced here below:-

“In the circumstances and to balance the equities it would be in the interest of justice that as an interim measure and without prejudice to the rights and contentions of the parties it is directed that the Claimant shall deposit with the respondent the last installment payable in terms of Annexure III to the agreements (schedule of payment) alongwith the holding and maintenance charges from 12/01/2011 till actual handing over possession of the said premises by the Respondent to the Claimant and to deposit a FDR drawn on a Nationalized Bank in the name of the Respondent with this Tribunal of an amount equivalent of the arrears of holding and maintenance charges demanded by the Respondent from 1/05/2009 during the pendency of the present proceedings. Subject to such payment being made and the FDR being deposited with this Tribunal, the Respondent shall hand over possession of the premises in question to the Claimant. The entitlement of the Respondent to claim the amount lying in the FDR shall depend on the final outcome of the present proceedings.”

20. With regard to the direction issued to the appellant to deposit FDR in the name of respondent from the period 1st May, 2009 till 11th January, 2011

In the impugned order the learned Arbitrator has directed the appellant to deposit with the respondent the last installment payable alongwith the holding and maintenance charges from 12th January, 2011 till actual handing over possession of the said premises by the respondent to the appellant. And to deposit FDR in the name of respondent from the period 1st

March, 2009 during the pendency of the proceeding despite of coming to the conclusion on the material place on record that there is no document to show that the respondent had offered possession to the appellant in June, 2009 or intimation of receipt of occupancy certificate. Prima facie the said directions to deposit a FDR in the name of respondent is not in consonance with Clause 10.3 of the agreement i.e. procedure for taking possession which mandates the respondents to take the steps to inform the petitioner about the receipt of the occupancy certificate and give the possession. Neither the respondent took such steps nor the appellant was given possession at the relevant time. Thus, the question of seeking deposit in the interim stage of the said amount relating to maintainance charges in the form of FDR towards June 2009 payment does not arise. It is altogether different matter that on 12 January 2011, the petitioner was alerted about the receipt of the occupancy charges and for the same the petitioner is agreeable to deposit the amount as dealt with under the head of the maintenance charges below. The dispute in this regard is, subjudice before the arbitrator therefore in my view the said direction is liable to be recalled with the liberty to the parties to raise their respective claims which would be decided by the learned Arbitrator after recording of evidence. The impugned order is accordingly modified.

21. **LAST INSTALLMENT**

There is no dispute in this regard on behalf of the appellant, who is ready to deposit with the respondent as indicated by him in his letter dated 18th May, 2011. Therefore, without any doubt before handing over the possession of the suit, the appellant is liable to deposit the said amount with the respondent.

22. **HOLDING CHARGES**

By e-mail dated 24th March, 2011, the respondent in view of correspondence exchanged between the parties from time to time has offered to waive the holding charges as a special case but demanded the payment on other heads which was not acceptable to the appellant. The learned Arbitrator has passed impugned order in this regard.

Learned counsel appearing on behalf of the respondent at the end of hearing upon instructions from his client is agreeable to raise the said claim before the learned Arbitrator and is not pressing the said amount of holding charges at this stage. Therefore, as agreed, liberty is granted to the respondent to raise said claim. The appellant would also be entitled to make his submission in this regard and learned Arbitrator would decide the said issue on merit after producing evidence of the parties. Therefore, the impugned order is accordingly modified in this regard.

23. **MAINTENANCE CHARGES**

Learned counsel appearing on behalf of the respondent argued that before handing over the possession of the suit property to the appellant, he must deposit the said amount with the respondent. The appellant, on the other hand, has given his offer to deposit the said amount with the Registrar General of this Court, without prejudice, from the period i.e. 12th January, 2011 till the actual handing over possession to the appellant. The said offer is not acceptable to the respondent. Learned counsel for the respondent rather has referred the schedule of payment due mentioned in the reply with regard to other heads. Learned counsel appearing on behalf of the appellant submits that the said submission is outside the scope of the impugned order. He further states that with regard to other heads of payment as alleged by the

respondent in its reply, the same has to be determined at the time of execution of the sale deed in favour of his client. At present, the respondent is ready for the same, therefore, the said argument of the respondent is without any force.

24. At this interim stage, no final finding can be arrived at otherwise the right of either of the parties would be prejudiced. It is also not denied that the appellant had paid more than 90% payment on time. He was/is prepared to deposit the last instalment as well. Thus, without deciding the rival contentions of the parties on merit, this Court is of the view that the appellant shall deposit the maintenance charges from 12th January, 2011 till actual handing over possession of the suit property, with the Registrar General of this Court, within one week by way of FDR in the name of Registrar General initially for a period of one year. The said amount would be disbursed immediately after passing the award in favour of either party as per the award. The appellant is also directed to deposit the last installment with the respondent within one week from today. The respondent shall hand over the possession to the appellant till 10th July, 2013 after the said deposit.

25. The impugned order stands modified to the extent stated above. The findings, arrived at in this order would be treated as tentative. Both parties are at liberty to raise their claims/counter claims before the learned Arbitrator who will decide the same without the influence of this order.

26. The appeal is accordingly disposed of. No costs.

(MANMOHAN SINGH)
JUDGE

JULY 01, 2013