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

Decided on : 17.08.2015

+ **FAO(OS) 76/2015, C.M. APPL.2566/2015**

TODAY HOMES AND INFRASTRUCTURE LTD..... Appellant

Through : Sh. Sudhir Nandrajog, Sr. Advocate
with Ms. Pooja. M. Saigal, Sh. Akshay Gupta and
Ms. Jasmine, Advocates.

versus

JITENDER SINGH AND ORS. Respondents

Through : Sh. Siddhartha Tanwar, Advocate.

**CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA**

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The Appellant impugns a judgment and order of a learned Single Judge dated 11-12-2014 in OMP 13/2012, a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act").

2. Ludhiana Improvement Trust ("the Trust") is a body corporate established under the Punjab Town Improvement Act, 1922 for the planned development of the city of Ludhiana. The Trust invited bids for construction of a City Centre in Ludhiana ("the City Centre project"). Upon evaluation of

the bids, the appellant was declared successful. Consequently, a concession agreement was executed between Today Homes and LIT. Pursuant to the concession agreement, nearly 25.59 acres was handed over to Today Homes. A tripartite agreement was also executed between Today Homes, LIT and the HDFC Bank ("the Bank"), in terms of which the sale proceeds received on booking of saleable areas were required to be deposited in a escrow account, titled as : "*Today Homes Infrastructure Pvt. Ltd. - City Centre.*" The Trust, to enable the appellant to discharge its obligations, executed a power of attorney dated 29-08-2005 in its favour. As a consequence, the appellant, which had to develop, construct, market and sell the units / flats on the land concerned, *inter alia*, entered into an agreement with the respondent ("the claimant"). The claimant entered into an agreement to purchase property, dated 09.03.2006 (hereinafter referred to as "agreement to sell") with the Appellant. The latter did so, both for itself as well as the attorney of LIT.

3. Disputes arose between the appellant and LIT, which led to the cancellation of the power of attorney dated 29.08.2005. This cancellation was effected on 05.10.2006 and the event was not conveyed to the claimant. The appellant, at some time, sought appointment of an arbitrator in terms of the condition in the contract with LIT and approached the Punjab and Haryana High Court. Based on the petition, an arbitrator was appointed. LIT felt aggrieved and went in appeal to the Supreme Court which set aside the order of the Punjab and Haryana High Court by judgment dated 14.10.2008. The matter was remitted for fresh consideration. The Supreme Court accepted LIT's plea that the High Court had not dealt with its argument that

its agreement with the appellant was void, having been entered into in suspicious circumstances, and therefore, by logical corollary the arbitration agreement could not survive, independently, of the main agreement. Upon reconsideration, after remand, the High Court held that the Agreement dated 24.05.2005 (between LIT and the appellant) was neither legal nor valid and that their *inter se* disputes were not arbitrable. This order was appealed against. The Supreme Court, in this round, accepted the appellant's plea and set aside the order of the Single Judge of the Punjab and Haryana High Court, with a direction that the matter be considered *de novo*. It was held that the Single Judge exceeded his jurisdiction, in examining the legal validity of the main agreement.

4. In the meanwhile, before the Supreme Court made its order, the claimant's application for appointment of arbitrator had been accepted and disposed of on 26-04-2010, appointing an arbitrator in Arb. Petn No. 273/2009. At this point of time the Single Judge of the Punjab and Haryana High Court's judgment was operational. During the arbitration proceedings, the appellant's move to have the LIT impleaded as a party was unsuccessful; the arbitrator rejected this application on 21.04.2011. The proceeding sheet of this date shows that parties had carried out admission and denial of documents by employing the methodology of affidavits. The single issue framed by the arbitrator on 10.05.2011 was to the following effect:-

"Whether the claims of the claimant are tenable against the respondent? If so, to what extent?"

The same day, parties agreed that it was not necessary to lead oral evidence or, to file affidavit(s) of evidence since, the matter, could be decided based on pleadings and documents filed by them. Arguments were consequently heard, on behalf of the parties and award was pronounced and published on 26.08.2011.

5. The Arbitral Tribunal allowed four out of the eight claims made, i.e Claim nos. I, II, VII and VIII. In claim no.1, rent for 32 months, with effect from 31.12.2007, at the rate of ₹ 1,43,570/- was awarded with interest at the rate of 10% p.a. from 09.01.2008 till realization. Claim no.II stood scaled down to grant of interest at the rate of 10% p.a., as claimed interest of 24% p.a., was thought to be excessive by the learned arbitrator. Claim No.VII, restricted *pendente lite* entitlement of the claimant to 10% p.a.

6. The appellant contends and its senior counsel, Mr. Sudhir Nandrajog, argues that the award and the impugned judgment suffer from ex facie errors in law. It is submitted that with the cancellation of the Power of Attorney in favor of the appellant, by LIH, the contract between the claimant and appellant could not be performed. The event of cancellation was a supervening event, which rendered the performance of obligations by Today Homes, envisioned under the agreement to sell, impossible. According to the appellant, it stood discharged of its obligation to perform the agreement with the claimant, due to frustration of contract. In support, learned counsel relied on clause 10 of the agreement between the claimant and the appellant as well as Section 56 of the Indian Contract Act. Counsel relied on the decision in *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Anr.*, (1954) SCR 310.

7. It was further contended that the main claim of the claimant based on which the award was rendered, was premised on a construction of Clause 57 of the agreement to sell. This had to be read in conjunction with clause 10. A joint reading of the two conditions disclosed that the appellant's promise to deliver the suit property within 22 months of the execution of the agreement to sell was premised on the eventuality of the construction being completed. The appellant, in terms of clause 10, was entitled to seek extension of time for delivery of possession of a flat to the respondent, *inter alia*, under various circumstances including for reasons, which were beyond its control. The learned arbitrator had failed to appreciate this aspect of the matter. Without completion of construction and after electing to wait (evidenced from the fact that specific performance of the contract was never claimed) the appellant could not be saddled with monetary liability for non payment of assured rent/charges. It was argued that property could be transferred only upon its coming into existence and no future property could be the subject matter of such transfer. The flats could not be built due to the imbroglio with LIT which cancelled the power of attorney; in these circumstances, the question of paying rent or assured amounts could not arise; at any rate that could not be the basis of a valid award or direction to pay.

8. The learned Single Judge noticed that the agreement to sell with the claimant was executed by the appellant. 'for self' as well as LIT's 'attorney'. Under clause 57, the obligation to pay rent, was a measure for an assured return on the investment made by the respondents- was undertaken by the 'company' (i.e., the appellant) upon its failure to deliver possession of the flat in issue for fit outs within a period of 22 months of the execution of the

agreement to sell. The Single Judge held that this condition was not restricted or inhibited nor was there any limitation or circumstances in which the obligation cast on Today Homes was in effect waived. It was held crucially, that cancellation of the power of attorney by LIH did not constitute "*a force majeure event.*"

"12.5 Therefore, the circumstances obtaining in the case, that is, the event of cancellation of power of attorney issued in favour of Today Homes by LIT has to be examined in conjunction with the second part of [Section 56](#). There is no denying that the cancellation of the power of attorney took place after the execution of the agreement to sell. But that by itself would not help unless it can also be shown that it rendered the performance impossible or, was an event which, Today Homes could not prevent.

12.6 As noted by me above, the agreement to sell was executed by Today Homes in two capacities. First, in its own capacity, and secondly, as a power of attorney holder of LIT. Therefore, the cancellation of the power of attorney did not prevent it from fulfilling the obligations it had undertaken qua the respondents. One of those obligations was to pay an assured return on their investment in the form of rent, if it failed to deliver possession within 22 months of the execution of the agreement to sell. The reasons for failure to deliver possession could be myriad but none of these limitations were factored in clause 57 of the agreement to sell."

9. The impugned order held further that the obligation undertaken under clause 57 of the agreement to sell "*is, a stand alone*" obligation cast on the appellant and not dependent on a continued and subsisting relationship between the appellant and LIT. It was held that assuming it does arise, cancellation of the power of attorney even, according to Today Homes, has arisen on account of disputes which erupted between it and LIT. The learned

Single Judge ruled that the legality of the power of attorney was subject matter of arbitration and that in any event, it is not an event that the appellant could prevent; the question of who was responsible for the cancellation of arrangement between the appellant and LIT was a matter of dispute. The Learned Single Judge stated that *"...The doctrine of force majeure cannot be employed to destroy the vitals of a contract. It is not a doctrine which the court will allow a recalcitrant party to take recourse to so as to efface the rigour of an obligation undertaken under the contract, which may be otherwise "burdensome" or "onerous" or is even "unforeseen". (See Alopi Prasad and Sons Vs. Union of India, (1960) 2 SCR 793; Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, (1968) 1 SCR 821; Continental Construction Company Ltd. Vs. State of Madhya Pradesh, (1988) 3 SCC 82..."*

10. The Single Judge rejected the plea of impossibility in the following words:

"The learned arbitrator has not, by granting the reliefs which he has, created, as was sought to be contended on behalf of Today Homes, a relationship of a lessor and a lessee. There is no transfer of interest in property. All that the learned arbitrator has done is, to trigger the mechanism, which is provided in the agreement to sell itself, for payment of an assured return in the eventuality of Today Homes failing to deliver possession of the flat in issue for whatever reasons. The assured return, as I read it, has not been granted by the learned arbitrator, in perpetuity, as was sought to be contended before me. In the instant case, the relief was claimed by the respondent for a period of 32 months, which the learned arbitrator chose to grant having regard to the facts and circumstances obtaining in the case. Therefore, the argument that allowing claim no.I would tantamount to grant of

relief of specific performance, in my view, is a submission which is misconceived, in the facts of the present case."

11. This court sees nothing erroneous in the statement, appreciation, or application of law by the arbitral tribunal to call for interference on the question of impossibility or that the contract could not have been specifically performed because the subject matter related to future property. The reference to *Satyabrata Ghosh* (supra) is inappropriate, given the nature of the contract and the circumstances of the case here. In that decision, the agreement could not be performed by the promisor because of the supervening event of requisition due to war conditions- it was rendered illegal too. The promisor therefore offered the plaintiff, the refund of the amount or alternatively, the land itself, with an added obligation (spelt out in the original contract) that the development of the roads and amenities would be undertaken after the war ended. The plaintiff sued. The Supreme Court described discharge of contractual obligations on account of impossibility as

"The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement."

The defense of impossibility on various counts, including imposition of criminal sanctions in the event of performance, was overruled:

"In our opinion, the events which have happened here cannot be said to have made the performance of the contract impossible and the contract has not been frustrated at all."

If one applies the ratio of the above decision, it is apparent that the obligation which the claimant sought to enforce and sued for, was the assurance of completing the project in a given time frame or else paying a defined amount. Myriad possibilities, including lack or delay of regulatory clearances, other delays in procurement of material leading to delay in building could possibly have taken place. The possibility of disputes with LIT too was real given that the land had to be developed by the appellant, which was nevertheless undertaking the obligations (both as principal and on behalf of LIT); the parties did not provide for it. The fruition of one such eventuality- always connected with business or commercial considerations surely could not be characterized as a supervening impossibility. Consequently, the plea of impossibility was untenable. So also, the plea that without suing for specific performance (which was not possible given that it related to future property) the claimant could not have recovered damages has to fail. The latter contention was overruled- and quite correctly, by the learned Single Judge- who held that it was a stand alone stipulation. We are not unmindful of the fact that when a potential customer is given various choices, the attraction of an assured return is near irresistible and might compel her or him to accept one service provider (such as a developer/builder's offer) over another. That did happen in this case; the Appellant cannot shirk its responsibility and take shelter under the doctrine of frustration of contract or other ingenious arguments. The award was based on the arbitrator's interpretation of the contract and appreciation of law, which fell within his near exclusive domain; *sans* any patent illegality or breach of law (we discern none). The court lacks competence to re-appreciate the findings contained in the award.

12. For the foregoing reasons, the appeal is devoid of merits and is consequently dismissed. No costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

AUGUST 17, 2015

