

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

Judgment reserved on May 01, 2015

Judgment delivered on May 08, 2015

+ **O.M.P. 215/2010**

M/S. DEVIKA BUILDERS PVT. LTD. Petitioner

Through: Mr.Anil Kr.Aggawal, Adv.

versus

NATIONAL COOPERATIVE CONSUMERS AND ANR.

..... Respondents

Through: Ms.Anju Bhattacharya, Adv.

+ **O.M.P. 268/2010**

NATIONAL COOPERATIVE CONSUMER FEDERATION OF
INDIA LTD. Petitioner

Through: Ms.Anju Bhattacharya, Adv.

versus

M/S. DEVIKA BUILDERS PVT. LTD. ANR ANR.Respondents

Through: Mr.Anil Kr.Aggawal, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in these two petitions is to an award dated January 22, 2010 of the learned Sole Arbitrator, whereby, the learned Sole Arbitrator has allowed some claims/counter claims of the petitioners herein and rejected the rest. The challenge by the petitioner in OMP 215/2010 is to the extent, claims were rejected. Similarly, the challenge

by the petitioner in OMP 268/2010 is to the extent, the claim No. 41(ii) and 41(iii) of the respondent in the petition namely M/s. Devika Builders Pvt. Ltd. were allowed under issue No. 4 w.e.f. June, 2006 and the counter claim No. 9(A) towards rent and 9(B) expenses towards security, of the petitioner in this OMP were rejected. For the purpose of convenience, the parties shall be referred to as per their status in OMP 215/2010 i.e. M/s. Devika Builders Pvt. Ltd. shall be referred as the *petitioner* and National Cooperative Consumers Federation of India Ltd. as *respondent*.

The facts:

2. The Delhi Development Authority allotted plot No. B-19, Okhla Industrial Area, Phase I, New Delhi during 1976-77, admeasuring 5634.38 sq. yds. to the respondent at a cost of Rs. 3.15 lakhs. The possession of the plot was taken on March 23, 1976. The respondent executed a Perpetual Lease Deed on April 10, 1985. An agreement of collaboration dated October 14, 1996 was executed between the petitioner and the respondent herein for construction on the said plot. It was the case of the petitioner before the learned Arbitrator that as per the terms and conditions of collaboration agreement, the petitioner was to make construction through its own finances and was entitled to half portion of the said property i.e. 50% of the land and 50% of the building

thereon. It was the case of the petitioner that it got the plans approved from the competent authority. It had placed in possession about 30,000 sq. fts. of the roof structure within a period of four and a half months and before March 22, 1997, the date on which, DDA granted extension of the terms of lease deed of the said plot. It was the case of the petitioner that the construction of the building was to be carried out within a period of two years. According to the petitioner, the terms of the DDA lease are extendable to a maximum period of 20 years. The said 20 years lapsed on March 20, 1997. It was stated that on March 23, 1997 which was called as a first phase, the construction stopped, which was much before the date of October 14, 1998, the last date of two years for completion of the construction agreed between the parties. It was the respondent's liability to obtain extension of time from DDA before March 21, 1997 for the entire period of construction. Besides, investing the money, the petitioner was to apply and obtain C & D certificate after phase I of the construction and apply for completion certificate after building is completed in all respect.

3. The petitioner's case is, the respondent failed to obtain further extension of time for construction of building. In the absence thereof, the petitioner could not carry out further construction and on the default of the respondent, the petitioner was prevented from completing the

construction on or before October 14, 1998 as per the agreed schedule and the petitioner's plant, machinery, labour and supervisory staff employed at the site remained idle for a long period, incurring heavy expenditure and losses. However, to overcome the logjam and delay, being detrimental to the petitioner's own interest, who had heavily invested on partial construction of the building, obtained the loan from the Bombay Cooperative Mercantile Bank @ 18% interest compounded quarterly and recommenced the construction work. It was its case that the building was completed in all respect before June, 2000. On June 22, 2000, the petitioner in due discharge of its contractual obligation also filed for completion certificate under the signatures of respondent with the MCD. According to the petitioner, in terms of Section 346 of the Delhi Municipal Corporation Act, 1957, there is a provision for deemed completion of building. The notice in this respect was communicated to the MCD by the petitioner on June 22, 2000 but the same remained ineffective since the respondent had failed to obtain the extension of time from DDA and for want of extension of time from the DDA the requirement of completion certificate also remained unfulfilled. The same was required for obtaining permission for sewerage and water connection from the DJB and for conversion of property from leasehold to freehold from the DDA.

4. It was also the case of the petitioner that the respondent forcibly took possession of the entire building on June 30, 2000 and mischievously hindered the completion of remaining minor work of finishing and installation costing about Rs. 38 lakhs. It is also stated that even though the building was completed in June 2000, the respondent wrote to the DDA after delay of more than 3 years on April 21, 2002 and December 5, 2003, requesting for post facto extension of time for completion of building upto June 30, 2000. It was only on April 25, 2005, nearly 5 years after the building was completed in all respect in June, 2000, the respondent could obtain the extension of time from the DDA, that was required for obtaining completion certificate from the MCD. Thereafter on April 4, 2006, the MCD granted permission for obtaining water and sewerage connection. It was also stated that the respondent applied for conversion from leasehold to freehold on December 13, 2004, and the petitioner also took initiative in this regard and DDA allowed conversion on June 13, 2006.

5. After dispute arose between the parties, the petitioner invoked the arbitration clause and made the following claims before the learned Arbitrator:-

“CLAIM STATEMENT –

41(i) on Rs.25 lacs, paid by DBPL to

*NCCF as advance on 14.10.1996, for
a period of 9 years 9 months from 14.10.1996
to June, 2006* *Rs.95,94,435.00*

*41(ii) Interest @ 16.5% compounded quarterly,
On the cost of construction in PhI, amounting
To Rs.1,23,28,000.00 for a period of 9 years and
3 months, from 14.10.1996 to 20.03.1997* *Rs.4,26,80,292.00*

*41(iii) Interest @ 16.5% on the cost of Construction
In Ph-II, amounting to Rs.3,23,56,983.00 for a
Period of 6 Years, from June 2000 to June 2006* *Rs.5,30,09481.00*

*41(iv) Ground Rent and House Tax, being
Demanded by NCCF to be borne by NCCF*

*41(v) Free Hold Charges being demanded from
DBPL by NCCF be borne by NCCF alone*

*41(vi) Value of short fall in Land, measuring
209.01 sq mts @ Rs.26,080.00 per sq. Mts based
on the Freehold Charges as declared by DDA for
conversion of Lease Hold Rights to freehold rights* *Rs.54,50,981.00*

*41(vii) The land rates as in para vi are old, DDA
has yet to declare the rates as as to dat. Search is being
made in the office of the Sub Registrar South Delhi/DDA
for the market price of such Industrial plots in Okhla
Industrial Area as will as in the Mohan Cooperative
Area after that the claim for short fall in land can be
Modified.*

Talks works out to Rs.11,07,35,189.00 say Rs.11,07,35,000/-

Prayer Clause

b) To direct respondent to register the sale deed with the Sub-Registrar South Delhi with respect to 15% share of the claimant in the property no.B-19 Okhla Industrial Area-1, New Delhi – 110020.

c) Such other or further relief.

d) Cost of Arbitration proceedings.”

6. The case of the respondent was that as per the agreement of collaboration dated October 14, 1996 i.e. clause XIII(2)(c), the building should have been completed within 2 years from the date of the agreement i.e. October 14, 1998. The petitioner failed to complete the building in time and the respondent imposed a penalty of Rs. 5 lakhs as per clause XII of the agreement of collaboration. That in order to settle the dispute of allocation of portion between the parties, the agreement of apportionment was executed on April 24, 2001 as per which, the petitioner was assigned eastern side and the respondent would retain and occupy the western portion. That in order to further clarify the points of dispute, further conditions of agreement to collaboration were executed between the parties on April 21, 2001

7. The respondent would also submit that a payment of Rs 5 lakhs vide cheque dated January 11, 2002 of Bombay Mercantile Cooperative Bank Ltd., Daryaganj was given to it towards penalty for delay and the

cheque got dishonoured when presented. The petitioner issued another post dated cheque of March 31, 2002 in lieu of the dishonoured cheque. The said cheque also returned back with the remarks “insufficient funds”. According to the respondent, on the request of the petitioner, it granted two loans of Rs. 38 lakhs and Rs. 37 lakhs respectively for completion of remaining items of work and for making 50% payment on behalf of the petitioner for making the property free hold, to the DDA. Two agreements dated November 25, 2004 and March 17, 2005 were executed between them in that regard. As per clause III of the agreement, the petitioner handed over post dated cheques of Rs. 38 lakhs and Rs. 37 lakhs respectively for the amounts due and payable. The said cheques got dishonoured. According to the respondent, on the request of the petitioner, the respondent also paid property tax to the MCD for the years 2002-2006, the 50% share of the petitioner amounting to Rs.15,74,793.50 paisa. It was the case of the respondent that it cooperated with the petitioner at every stage and made payment on their behalf for ground rent, property tax, free hold charges besides two loans of Rs.38 lakhs and Rs. 37 lakhs as mentioned above. According to the respondent, the petitioner has not made any payment to the MCD, DDA and any government agencies. It was also the case, as per books of account, an amount of Rs. 1.26 Crores was due from the petitioner. The respondent

would submit that they are ready to execute and register the sale deed for the eastern side of the portion of the property, provided the petitioner clears the abovementioned dues. To sum up, it was its case that the project should have been completed on October 14, 1998 whereas the same was completed by the petitioner in July 2006 when water, sewerage, electricity connection, fire fighting approval were restored by the petitioner from the concerned authorities. In the absence of such facilities, it was not possible to occupy the building. According to the petitioner, it had lost sizeable revenue by way of rent for basement and ground floor in its western portion due to delay in construction on the part of the petitioner. According to them, the rent for the year 1998-99 as gathered from the property dealers was Rs. 12 per sq. ft. for basement and for Rs. 15 per sq. ft. for the ground floor. It was also stated that it incurred heavy expenses for the security arrangement for entire building from June, 2000 onwards. The respondent was forced to intensify the security of the building due to threats from the petitioner. The respondent filed the following counterclaims:

“9. (A) RENT

*Rent for the Basement measuring
11353 sq. ft. @ Rs.12/- per sq. ft.
per month and rent for the Ground
floor measuring 11528 sq. ft. @ Rs.15/-
per sq. ft. per month for the period from
14.10.1998 to 30.04.2007 with escalation
in rent @ 15% after every three years* Rs.3,73,98,817.00

*Add interest @ 16.5 compounded quarterly
for the period from 14.10.98 to 30.4.07* Rs.3,60,06,703.00

Total: Rs.7,34,05,520.00

9.(B) EXPENSES TOWARDS SECURITY

*Payment to the Security Agency for the
Period from 1.6.2000 to 31.3.07* *Rs.10,48,519.00*

*Add interest @ 16.5 compounded
quarterly on the security expenses
paid by the Respondent for the period
from 1.6.2000 to 31.03.07* *Rs.7,75,055.00*

Total: Rs.18,23,574.00

9.(C) OUTSTANDING AMOUNT RECOVERABLE FROM M/S. DEVIKA BUILDERS PVT. LTD. UPT 31.3.2007

<u>Particulars</u>	<u>Amount recoverable</u>
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<i>Property tax paid to MCD on behalf Of DBPL</i>	<i>Rs.15,74,793.50</i>
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<i>Amount paid to DDA on behalf of M/s. DBPL towards free hold of property Including stamp duty</i>	<i>Rs.39,81,286.00</i>
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<i>Amount paid towards ground rent to DDA</i>	<i>Rs.64,622.00</i>
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<i>Loan/advance given to M/s. DBPL for Completion of remaining item of works</i>	<i>Rs.38,00,000.00</i>
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<i>Expenses and back charges towards dishonour of cheques of M/s. DBPL</i>	<i>Rs.3,190.00</i>
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<i>Interest debited to M/s. DBPL account as on 31.3.2007 @ 12% per annum.</i>	<i>Rs.26,58,853.00</i>
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<i>Others</i>	<u><i>Rs.4,96,746.00</i></u>
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<i>Total:</i>	<u><i>Rs.1,25,79,490.00</i></u>
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<i>Grand Total (A+B+C)= Rs.7,34,05,520.00 + 18,23,574.00 + 1,25,79,490.00</i>	<u><i>Rs.8,78,08,584.00</i></u>
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8. It is noted that during the arbitration proceedings, the respondent filed an application seeking permission of the Arbitrator to file supplementary defence statement/additional affidavit in order to bring out

the factum of the petitioner having taken over the possession of the eastern side of the building in June 2006. It was also stated in the said application that in the year 2006 itself, the possession was transferred by the petitioner to one International Refrigeration Corporation, a sole proprietary concern of one Mr. Kedar Nath Babbar and definitely for valuable consideration. It was also stated that respondent also rented out basement/western portion of the said building in 2007 to Mr. Babbar at a rent of Rs. 2.27 lakhs per month approx. and therefore, the petitioner must be getting more than Rs. 5 lakhs for the entire building which being occupied and used by Mr. Babbar. In other words, it was the case of the respondent, there is no issue of the petitioner claiming any compensation, damages on the plea that it could not utilize the building even after June 2006.

9. The learned Arbitrator has rejected and allowed the claim No. 41(ii) and 41(iii) granting interest @ 12% w.e.f. June 2006 on the 50% investment made by the petitioner excluding Rs.25,00,000/- non refundable deposit and counterclaims:

<u>Claim No.</u>	<u>Allowed & Rejected</u>	<u>If allowed, in what manner</u>
41 (i)	Rejected	
41 (ii) & (iii)	Allowed	Allowed in favour of the petitioner, whereby the learned Arbitrator granted interest limited to 12% pa in terms of the loan agreement dated November 25, 2004 and the said interest was to paid limited to 50% of the invested amount (excluding non refundable deposit of Rs.25

lakhs) which is the share of the petitioner in the subject property. The interest was directed to be paid from June 2006 till the date of actual payment by the respondent to the petitioner.

<i>41 (iv)</i>	<i>Rejected</i>
<i>41(v)</i>	<i>Rejected</i>
<i>41(vi)</i>	<i>Rejected</i>
<i>41(vii)</i>	<i>Rejected</i>

10. On the issue whether the respondent is bound to execute and register a sale deed as agreed with respect to 50% of the property is concerned, the same was allowed in favour of the petitioner, whereby direction was given to execute and register the sale deed within a period of three months from the date of the award. The said direction was subject to the counter claim of the respondent as decided by the learned Arbitrator.

11. Insofar as the counterclaims of the respondent are concerned, the counterclaim No. 9(A) was rejected. Similarly, the counterclaim No. 9(B) was also rejected.

12. The counterclaim No. 9(C) which have Sub-claims from (i) to (vii), the learned Arbitrator except (viii) had allowed the rest inasmuch as the learned Arbitrator has allowed and granted in favour of the respondent, the following amounts:

- 1. An amount of Rs. 15,74,793/- [claim No. 9C(i)] paid to the MCD by the respondent against property tax.*
- 2. An amount of Rs. 39,81,286/- paid to the DDA by the*

respondent on behalf of the petitioner.

3. *An amount of Rs.64,622, paid by the respondent to the DDA as ground rent.*

4. *An amount of Rs. 38 lakhs for the loan granted by the respondent to the petitioner.*

5. *An amount of Rs. 3190/- as the expenses and bank charges incurred by the respondent towards dishonour of cheques of the petitioner.*

6. *Interest @ 12% on the two loans granted by the respondent. The Arbitrator granted 12% interest on Rs.15,74,393.50 paisa.*

7. *Counterclaim was not granted.*

13. The learned Arbitrator has also granted interest of 12% on Rs.2,81,286/- and on Rs.64,622. In other words, the learned Arbitrator has granted interest @ 12% for counter claim Nos. 9(C)(i) to 9(C)(vi) w.e.f. March 31, 2007 till the date of payment. The learned Arbitrator directed the petitioner to pay the counterclaims amount within a period of three months from the date of the award. On receiving the counterclaims' amount from the petitioner, it was directed, the respondent should make the registration of the petitioner's share of property at B-19, Okhla Industrial Area, Phase I, New Delhi with the Registrar within a period of three months from the date of receiving the amount from the petitioner.

14. The contention of Mr.Anil Kr. Aggarwal, learned counsel for the petitioner is primarily that the learned Arbitrator has failed to consider

that the delay was attributable to the respondent on its failure to obtain extension of time for construction of the building inasmuch as the respondent could get the extension of time in the year 2005 w.e.f. June 2000. It was his submission that in the absence of extension of time, the completion certificate was not issued by the MCD. In the absence of completion certificate, conversion of property from leasehold to freehold also got held up. Without conversion of property from leasehold to freehold, the property could not be partitioned resulting in non execution of the sale deed of the portion falling to the share of the petitioner. It was also his submission that the respondent took forcible possession of the entire building and mischievously hindered the completion of remaining work of Rs. 38 lakhs. The learned counsel for the petitioner concedes that finally on January 24, 2001, the respondent agreed for apportionment in accordance with the agreement.

15. He would also submit that there was a fundamental breach of the agreement inasmuch as the respondent wrongfully promising to mortgage entire property to it, including the petitioner's share, got a loan of Rs. 5.50 Crores sanctioned from National Cooperative Development Corporation. He would also state, that despite apportionment, the respondent allowed the petitioner to take possession and move to its portion only on June 5, 2006. He has also stated that non execution of the

sale deed by the respondent in favour of the petitioner or its nominee was a continuing breach.

16. Insofar as the findings of the learned Arbitrator are concerned, on claim No. 41(i) which was a claim in the nature of damages by way of interest on non-refundable deposit of Rs. 25 lakhs made to the respondent is concerned, it was his submission that the learned Arbitrator has wrongly rejected the claim of the petitioner for interest on non-refundable deposit/licence fee when the delay was attributable to the respondent resulting in undue benefit to the respondent. On claim No. 41(ii) & (iii), it was his submission that the learned Arbitrator wrongly held that the building was completed in the year 2006, which is contrary to the record and incontrovertible admission of the respondent and wrongly did not allow interest w.e.f. June, 2000 as claimed by the petitioner, who otherwise is entitled to damages by way of interest on his investment from day one when first brick was laid by him on commencement of construction and at least from 14/10/1998, the stipulated date of completion of building. In doing so, the learned Arbitrator ignored the acts, omission, commissions and conduct and fundamental breaches of agreement committed by the respondent, which not only resulted in delay in construction but non-realization of the fruit of financial investments and inputs made by the petitioner for a long period of more than 9 years

and is continuing till date. In doing so, the learned Arbitrator misdirected himself in determining and fixing the date of completion of building for deciding the claims of the petitioner, when in fact, the same was entirely inconsequential. Further misinterpreting the clause 15 of the agreement and ignoring the specific terms of clause 15 the Indemnity Bond and Section 73 of the Indian Contract Act, whereby the petitioner is entitled to claim damages on the investments made by the petitioner and the benefits and profits therefrom blocked by the acts, omission, commission and conduct and fundamental and criminal breach and violation of the terms of agreement by the respondent, the learned Arbitrator wrongly restricted the claim of damages/interest only to 50% of the investment made by the petitioner. He would also submit that the learned Arbitrator, while determining the rate of interest payable to the petitioner, omitted to consider that the petitioner has claimed interest as damages suffered by it on the investment made by it not as the interest along with some principal amount payable by the respondent to the petitioner. According to him, it could not be simple rate of interest based on the rate of interest against soft loan extended by the respondent in its own interest. He would state that the rate of interest must commensurate to loss and damages suffered by the respondent as per actual market rate interest paid by the builder. He would state, the learned Arbitrator has ignored the fact that the

petitioner has been deprived of the use of money due to the defaults and acts and omissions and fundamental breaches by the respondent and need to be compensated in terms of clause 15 of the agreement read with Section 73 of the Indian Contract Act. He would state that both the parties had claimed interest at 16.5% compounded quarterly in their respective claim statements. He states, the learned Arbitrator also ignored that on June 12, 2001, the respondent had demanded interest @ 16.5 %, thus, there is an agreement between the parties to that effect and extent. He would state, in view of this position, there was no discretion on the part of the learned Arbitrator to award 12% simple interest. He would rely upon “*O.P.Malhotra on the Law and Practice of Arbitration and Conciliation*”. He would also rely upon the judgments in the case of *Susaka Pvt. Ltd. Vs. Union of India and Ors., AIR 2005 Bombay 257, Mohinder Pal Singh Vs. Northern Railway, (2007) 143 DLT 634, Hyder Consulting (UK) Ltd. Vs. Governor, State of Orissa and Ors., 2014 (13) SCALE 169, the Managing Director, J& K Handicrafts, Jammu Vs. M/s. Goodluck Carpets, AIR 1990 SC 64*. He would also state, interest on interest under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 (Act, in short) is permissible.

17. On claim No. 41(iv), learned counsel for the petitioner would state, that the learned Arbitrator has omitted to consider that in terms of the

agreement during construction, the possession of the property remained with the respondent and even thereafter till today, the respondent does not recognise the possession of its portion by the petitioner and terms the same as Trespass and alleged breach of the agreement. Therefore, nothing is payable by the petitioner to the respondent against the claim of ground rent and house tax which is a statutory liability of the owner or the person in possession of the land. In the absence of a sale deed, the liability of the property tax and ground rent cannot be on the petitioner.

18. On claim No. 41(vi) on the shortfall of land, the learned counsel for the petitioner has during the course of the arguments not pressed it.

19. Similarly, learned counsel has also not pressed the award/conclusion of the learned Arbitrator on claim No. 41(vii).

20. On claim No. 41(v) and the counter claim of the respondent, his only submission was that the loans advanced by the respondent are not recoverable in an arbitration proceedings. According to him, the loan agreements creating charge on immovable property are in fact mortgage deeds and being unregistered, are hit by Section 59 of the Transfer of Property Act and are therefore, unenforceable and in terms of the judgment of the Supreme Court in the case of ***Booz-Allen and Hamilton Inc Vs. SBI, Home Finance Ltd. and Ors., AIR 2011 SC 2007***, wherein it has been held, the claims arising out of and based on mortgage deeds

are disputes in rem and cannot be decided in private forum such as arbitration and are non-arbitrable under Section 34(2)(b) of the Act.

21. On the other hand, learned counsel for the respondent would, at the outset, submit that the challenge to the award by the petitioner is totally misconceived as this Court under Section 34 of the Act has a very limited jurisdiction restricted to the grounds mentioned in Subsection 2 of Section 34. She would further submit that the award of 12% interest against claim No. 41(ii) and (iii) even for period post 2006 by the Arbitrator is also, contrary to the terms of the agreement. According to her, the learned Arbitrator overlooked the terms of the agreement. It is her submission that the petitioner was to construct the plot at its own cost. On account of the delay attributable to the petitioner, the respondent had also suffered loss by way of rent which was disallowed by the learned Arbitrator but claim Nos. 41(ii) & (iii) were allowed overlooking the fact that the petitioner was in breach as he completed the construction in 2006, whereas as per agreement, it should have been completed by 1998. She would also state that interest by way of damages cannot be granted without the actual proof of loss. According to her, admittedly, the respondent was in possession of its portion since 2006 and interest as damages, post 2006 is untenable. The Arbitrator being a creature of agreement must operate within the four corners of the agreement; he

cannot award any amount which is ruled out; the damages could only be claimed u/s 73 of the Contract Act for which burden of proof was on the petitioner to show that it had actually suffered damages or loss. She would also state, the agreement between the parties provided for execution of sale deed after dues were cleared. She would also state that the reliance placed by the petitioner on the judgment of the Supreme Court in *Booz-Allen and Hamilton Inc (supra)* is not applicable to the facts of this case. According to her, no such plea was ever taken by the petitioner before the learned Arbitrator. The plea is clearly an afterthought which is even otherwise, untenable.

22. Having heard the learned counsel for the parties, at the outset, I may state, that the challenge of the petitioner to the award is only to the extent, certain claims of the petitioner were rejected. This is clear from the averments made in para 1 to the petition. In other words, the petitioner has not challenged the award of the Arbitrator on the counterclaims granted in favour of the respondent. Be that as it may, since the parties have argued on all the aspects of the award, I proceed to consider as if the challenge to the award by the parties is to the rejection of their respective claims and counterclaims and also the award of the claim/counterclaims of the other party.

23. Before I proceed to deal with the submissions made by the learned

counsel for the parties, suffice to state as conceded by the learned counsel for the petitioner that the petitioner was in possession of its portion of the property since 2006. Now coming to the rejection of claim No. 41(i) by the learned Arbitrator is concerned, I note, the same relates to claim of interest on an amount of Rs. 25 lakhs paid by the petitioner to the respondent. As is clear from the claim itself, the said amount was a non-refundable deposit made to the respondent. There is no stipulation in the contract that the petitioner would be entitled to the interest on the said amount. On a specific query, no stipulation under contract was brought to my notice. The learned Arbitrator in the award has concluded as under:

“I find that there is no provision in the agreement of collaboration dated 14.10.1996 for the payment of any interest on this amount of Rs. 2500,000/- deposited by the claimant. Interest claimed on the non-refundable deposit is not admissible as per the terms and conditions of the agreement of collaboration. There is no merit in the claim and claim No. 41(i) is rejected”.

24. I agree with the aforesaid conclusion of the learned Arbitrator. It need no interference.

25. Insofar as conclusion of the learned Arbitrator on claim No. 41(ii) & (iii) with which both the parties are aggrieved with, the learned Arbitrator has in para 26 of the award, proceeded to decide the said

claims by posing himself a question with regard to the date of completion of the building. He on an interpretation of the provision of the agreement of the collaboration dated October 14, 1996 has come to a conclusion that the building was completed in June 2006 and not 2000. The basis for him to come to such a conclusion was the interpretation given by him by relying on Blacklaw Dictionary to the word “completion” to mean finish, accomplished that which one start out to do. He had further relied upon the agreement dated November 25, 2004 whereby the respondent had advanced a loan of Rs.38 Lakhs to the petitioner for completion of the remaining work in the building including installation of electric transformer and other allied matters, provided the petitioner refunds the amount along with interest at bank rates before execution of any document of transfer or part with possession of basement of the building falling to its share. He also relied upon the letter dated April 3, 2006 of the respondent addressed to the petitioner, wherein the respondent had called upon the petitioner to complete the remaining items of work as per Schedule-II of the agreement of collaboration dated October 14, 1996 and also letter dated May 8, 2006 on similar lines.

26. The challenge to the award on the premise that the petitioner is entitled to the damages w.e.f. June 2000, when the building was

completed is belied by the petitioner's own communication dated July 20, 2005 wherein the petitioner itself has stated as under:-

“With regard to completion of the Building on plot no.B-19, Okhla before 09.07.2005, I would like to bring to your kind attention that the delivery of a project and speed in its implementation, are directly related to CPM (critical path method) as per ground rules of Programming & Management Practices. Therefore, I will like to record for your kind consideration the steps we have already covered and the tracks/paths on which we have already covered and the tracks/paths on which we are moving. Soon we will be able to cover the problems to reach our goals.

- 1. DDA has agreed to permit Freehold of the Plot B-19, Okhla.*
- 2. DDA granted time extension of lease upto June 2000 so as to obtain completion, because of the two receipts one each for form C & form D. This has now opened up the tracks for completion of the building as per law.*
- 3. Application for power, water and sewage has been made by M/s DBPL. M/s. DBPL are pursuing in the matter vigorously at a considerable cost.*
- 4. Work on the Fire Fighting Installation will be over by next week. This will clear the grounds for obtaining completion certificate.*
- 5. Once completion certificate is granted then the order for the release of the Freehold documents/ Conveyance Deed can be obtained.*

6. Till such time we are able to get hold of the documents for Freehold we will be well advised not to occupy the building. This is necessary because of technical problems.

7. Knowing fully well, with regard to this entire situation and the complexities, we were in M/s DBPL never parted with the possession of, even one Inch out of the their share in the Agreement of Collaboration. M/s DBPL despite having all the authority as per the Agreement of Collaboration did not part with their share. This self control by M/s. DBPL has saved the situation.

Therefore NCCF will be well advised to wait for the receipt of the actual Conveyance Deed before occupying the building.

8. NCCF should not worry about M/s. DBPL. We have behaved till now and we shall behave in future as well. Both of the parties to the Agreement of Collaboration must honour the commitments they have made in the Agreement. All we request is grant properly the share your honour had agreed as per the terms of the Agreement of Collaboration.

9. M/s. DBPL have never been responsible for any delay this case.

10. M/s. DBPL will not part with any portion of their share in the Agreement of Collaboration, till all the dues payable to NCCF are cleared by M/s. DBPL.

11. M/s DBPL even in any difficult situation will never forget the goodwill of each and every Member of the

Board, the Managing Committee as well as the NCCF Staff.

Considering these facts, I shall be grateful, if NCCF can release Rupees Five Lakhs, deducted by NCCF as penalty as soon as possible to help achieve our common goal. This is necessary considering the necessary costs being incurred by M/s. DBPL to get out of its entire mess. This is in fact beneficial to both the partners to the Agreement of Collaboration, rather more so for NCCF being the owners of the land having executed with DDA, as Institutional Lease for the plot B-19, Okhla designated for extensive Industries.”

27. The aforesaid letter is a self speaking one which highlight the fact that the building was not complete as there was no power, water and sewerage facilities. Further, the work on fire fighting installation was incomplete which is a prerequisite for obtaining a completion certificate. This letter itself is in conformity with the conclusion of the learned Arbitrator that the building was completed only in the year 2006. Hence, the claim of the petitioner that the building was completed in the year 2000 falls flat and the petitioner could not have claimed the interest w.e.f. 2000.

28. Insofar as the stand of the petitioner that it could not carry out further construction after March 21, 1997 because of respondent's

inability to obtain extension of time from DDA is concerned, I note that no such case has been set up before the learned Arbitrator nor such a case has been set up in the petition filed by the petitioner i.e. OMP 215/2010. The learned counsel for the petitioner has also not shown me any communication/letter from the petitioner to the respondent of the year 1997-98, wherein, the petitioner had called upon the respondent to seek extension of time from the DDA so as to enable the petitioner to start the work. He has also not shown any communication/letter of the respondent calling upon the petitioner to stop the work after March 20, 1997. Rather, I find that because of short of money, the petitioner had approached HUDCO and the Bombay Mercantile Cooperative Bank Ltd. for loan to construct the remaining portion of the building. It is also noted that between August & October, 1999 after the loan was sanctioned by the Bombay Mercantile Cooperative Bank Ltd., the petitioner started the construction work, even though, there was no extension of time from the DDA. This submission also needs to be rejected. A further issue which falls for consideration is the one now raised by the counsel for the respondent whether the petitioner would be entitled to interest of even 12% for the period after June 2006. To answer this question, one must proceed keeping in view my above conclusion that the building was ready for occupation only in the year 2006 not before that. The right of

the petitioner to hold the property would only arise when there is a registered sale deed in its favour. The execution of the registered sale deed will surely depend upon the petitioner discharging its liability towards the respondent by paying the amounts as due to the respondent. In fact, it is precisely what was conveyed by the respondent to the petitioner vide its letter dated November 30, 2006, page 362 of the OMP 215/2010 wherein, the respondent has written to the petitioner as under:-

“We are in receipt of your letter dated 28.11.2006 regarding registration of your portion in the Okhla Building as per Agreement of Collaboration.

In the above context, please refer to our letters of even No. dated 3.4.2006, 24.4.2006, 8.5.2006 and 12.6.2006 and subsequent meetings held with you when it was requested to make the payment of Rs.1,17,25,698.00 as per our books of accounts for the expenses incurred by us on your behalf. A copy of amount recoverable statement is again enclosed. You are once again requested to remit the amount immediately to this office enabling us to register your share as per Agreement of Collaboration dated 14.10.1996 and Agreement of Apportionment dated 24.4.2001.”

29. In fact, I find, the award of 12% by the learned Arbitrator is contrary to what has been concluded by him at page 21 of (page 59 of the paper book) his award wherein he has directed the petitioner to pay the respondent the amount awarded against the counter claims within a

period of three months from the date of the award. It was only on receiving the counter claim amount from the petitioner, the respondent was called upon to make the registration of the petitioner's share of property of B-19, Okhla Industrial Area, Phase I, New Delhi with the Registrar within a period of three months from the date of receiving the amount from the petitioner. This part of the award of the learned Arbitrator recognises the right of the respondent to receive the payments as due to it from the petitioner before the execution and registration of the sale deed with respect to the petitioner's share of the property. Regrettably, the learned Arbitrator has overlooked this aspect before awarding the 12% interest against claim No. 41(ii) & (iii). To that extent, the award needs to be set aside. In view of my conclusion above that the learned Arbitrator could not have even awarded 12% interest w.e.f. June, 2006, it would not be necessary for me to deal with the judgments referred to by the learned counsel for the petitioner in *M/s Susaka Pvt. Ltd. (supra)*, *Mohinder Pal Singh (supra)*, *Hyder Consulting (UK) Ltd. (supra)* and *The Managing Director, J. and K. Handicrafts, Jammu (supra)* to support his submission that when the parties have agreed between them for interest @ 16.5%, no discretion vests with the Arbitrator to award 12% simple interest per annum.

30. Insofar as claim No. 41(iv) is concerned, the learned Arbitrator has

concluded as under:-

“Ground Rent and House Tax, being demanded by NCCF to be borne by NCCF.

The respondent had denied any liability for the payment of this claim amount and stated that the Agreement of Collaboration dated 14.10.1996 Clause-9 provides that the statutory tax liability would be pertaining to their respective shares in the property. Clause 18 of the Agreement of the Collaboration stipulates that the owner and the builder should pay taxes and other statutory liabilities in respect of their respective share and meet their respective liability in built of structure.

In view of the discussion I do not find any merit in this claim and therefore the claim that ground rent and house tax was to be borne by respondent NCCF is rejected.”

31. I agree with the conclusion of the learned Arbitrator. It is an accepted position that the petitioner has 50% share in the property. It is logical that the liability of ground rent and house tax qua the petitioner's share has to be the petitioner's liability. The petitioner cannot take recourse to non execution of a sale deed in its favour. The non-execution of the sale deed by the respondent has been justified by the learned Arbitrator on the inability of the petitioner to discharge its liability towards the respondent. The learned Arbitrator has rightly rejected the

claim.

32. Insofar as the claim No. 41(v) is concerned, the learned Arbitrator has held as under:-

“The respondent had denied any liability towards the payment of Rs.37,00,000/- freehold charge of the claimants share of the property which is the responsibility of the claimant to pay. The respondent vide counter claim statement at page XVII had stated that on the request of claimant DBPL, respondent NCCF granted two loans of Rs.35 lakhs and Rs.37 lakhs for completion of remaining itself of works at Okhla project and for making 50% payment to the DDA on behalf of DBPL for making the property freehold respectively. The agreements dated 25.11.2004 and 17.03.2005 were executed by the respondent NCCF and claimant DBPL in this regard. Both the agreements are on record.

I find that the agreement dated 17.03.2005 provide that the 50% share of the claimant amounting to Rs.37,00,000/- towards the fees/charges for conversion of the aforesaid property from leasehold to freehold would be paid by the builder/claimant. The claimant had agreed that the basement floor of the building would be the first charge as a collateral security for this loan amount. In view of the discussion I do not find any merit in this claim. Therefore I reject this claim under para 41(V).”

33. I agree with the above conclusion of the learned Arbitrator and the

same was rightly rejected by the learned Arbitrator. That apart, insofar as the reliance placed by the learned counsel for the petitioner on the judgment of the Supreme Court in ***Booz-Allen and Hamilton Inc (supra)*** is concerned, suffice to state, that, no such plea was raised before the learned Arbitrator and hence, there was no occasion for the Arbitrator to look into the said claim from the perspective as being contended by the learned counsel for the petitioner. Even otherwise, the said judgment would not be applicable in the facts of the present case. The Supreme Court in the said case was concerned with an issue of arbitrability of certain disputes arisen between the parties in the context of an application under Section 8 of the Act. This was seen in the perspective that whether, disputes having regard to the nature could be resolved by a private forum chosen by the parties, the Arbitral Tribunal or whether they would exclusively fall within the domain of public fora. The Supreme Court was of the view that an issue relating to enforcement of a mortgage being a suit for enforcement of right in rem has to be tried by the Court not by the Arbitral Tribunal as it is not a mere money suit. This, according to the Supreme Court, is because third party rights also get intervened. Such is not the case here. Even assuming that the basement was kept in charge against the loan advanced, still the dispute with regard to the loan advanced was an inter se dispute between the parties herein.

In any case, no third party had sought an intervention in the adjudication before the learned Arbitrator. The judgment has no applicability in the facts of this case.

34. Insofar as rejection of counter claim No. 9(A) & 9(B) of the respondent are concerned, I note, the learned Arbitrator while rejecting the said counter claim has concluded as under:

“9.(A) RENT

<i>Rent for the basement measuring 11353 sq. ft. @ Rs.12/- per sq. ft. per Month and rent for the ground floor measuring 11528 sq. ft. @ Rs.15/- Per sq. ft. per month for the period From 14.10.1998 to 30.04.2007 with escalation in rent @ 15% after every three years</i>	<i>Rs.3,73,98,817.00</i>
<i>Add interest @ 16.5 compounded quarterly for the period from 14.10.98 to 30.04.07</i>	<i>Rs.3,60,06,703.00</i>
<i>Total</i>	<i>Rs.7,34,05,520.00</i>

The claimant had denied any liability towards this counter claim. He stated that the building could not be completed in time because of the problem of the Institutional lease of the property executed by the respondent with the DDA. The respondent in fact had requested the DDA for the grant of time extension for the completion of the building vide letter dated 05.12.2003 and also for exemption of penalties for the delayed construction. DDA had granted time extension from

21.03.1997 to 30.06.2000 and exempted penalty for the grant of freehold rights on the recommendations of the respondent. The respondent also had granted loans to the claimant for the completion of the building and payment of claimant's share of freehold charges paid to DDA. From this action of the respondent I come to the conclusion that the respondent had waived the right and condoned the delay in construction of the building. Therefore, there is no justification for the claim of interest in this counter claim. I do not find any justification for this counter claim of rent together with interest etc. The same is rejected.

Counter claim No.9B.

9(B) EXPENSES TOWARDS SECURITY

<i>Payment to the Security Agency for the period from 01.06.2000 to 31.03.07</i>	<i>Rs.10,48,519.00</i>
<i>Add Interest @ 16.5 compounded quarterly on the security expenses paid by the Respondent for the period from 01.06.2000 to 31.03.07</i>	<i>Rs.7,75,055.00</i>
<i>Total</i>	<i>Rs.18,23,574.00</i>

It was the responsibility of the respondent as the owner of the property to protect the same. I, therefore, find no justification for the counter claim of Rs.18,23,574.00. This counter claim is rejected.”

35. I agree with the above conclusion, which is a finding of fact and plausible reasoning with which this Court would not like to interfere.

36. In view of my above discussion, the petition filed by the petitioner

i.e. OMP 215/2010 is liable to be dismissed. I order accordingly.

37. Insofar as the petition filed by the respondent i.e. OMP 268/2010 needs to be allowed, to the extent that the award of the learned Arbitrator allowing the claim of the petitioner to the extent he has granted damages as simple interest @ 12% p.a. on the 50% of the investment amount, excluding the non-refundable deposit of Rs. 25 lakhs w.e.f. June 2006 till the date of actual payment, is set aside. The award is modified to the aforesaid extent. The claims of the petitioner are liable to be dismissed and the counter claims as awarded by the learned Arbitrator are upheld without any modification. The OMP No.268/2010 is disposed of accordingly.

(V.KAMESWAR RAO)
JUDGE

MAY 08, 2015/akb