

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

Judgment reserved on March 25, 2015

Judgment delivered on April 06, 2015

+ **OMP 231/2015**

SMT. SURJIT KAUR

..... Petitioner

Through: Mr.Anil Sapra, Sr. Advocate with
Mr.Samrat Nigam, Advocate

versus

SHAH PURI CONSTRUCTION COMPANY AND ANR.

..... Respondents

Through: Mr.Sanjeev Sindhwani,
Senior Advocate with
Mr.Sunil Malhotra, Mr.Rajat
Malhotra, Advocates for R-1

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this petition is to the award dated December 19, 2014 passed by the learned Arbitrator whereby the learned Arbitrator has given a limited relief to the petitioner of rental amount at Rs.6,000/- per month from November 2009 to October 20, 2010 to be paid within a period of 30 days failing which, the amount was directed to be paid with interest @ 9% per annum. The learned Arbitrator has also disposed of the claim No. 15 whereby the learned Arbitrator directed the petitioner and the respondent No. 2 to fulfil their respective obligations i.e. the

execution of the sale deed of first floor and handing over of the possession thereof to the respondent No. 1 immediately on the respondent No. 1 paying them the requisite amount of Rs.10 lakhs and simultaneously, the respondent No. 1 also to restart the construction from the stage, it was stopped and complete the same in a swift manner.

2. The challenge in this petition by the petitioner is limited to claim No. 1, 7, 8 and to counter claim No. 15, wherein, the learned Arbitrator has directed the petitioner and the respondent No. 2 to execute the sale deed. Claim No. 1, 7, 8 and counter claim No. 15 are reproduced as under:

"CLAIM NO.1

Vide this claim, the claimant demands that the Respondents should be directed to compensate the claimant for the built-up area lost in the property by the claimant owing to her share therein being reduced by about 2000 sq. ft. by getting additional area to that extent on the Ground floor of the said property.

CLAIM NO.7

The claimant vide this claim states that the Respondent No.1 should be directed to pay to the Claimant a sum of Rs.50,000/- per month as penalty w .e. f. 1 0.06.2010 till date which according to him comes to Rs.6,00,000/- Rupees Six lacs only) and further states that the Respondent ought to continue to pay the said penalty amount till the Claimant is not able to occupy the said property and vacate the rented accommodation.

CLAIM NO. 8

Vide this claim, the claimant states that the Respondent No.1 should be directed to pay to the claimant the opportunity loss occasioned to the claimant. It is stated that if the said property were developed and completed on time, then; it would have been given on rent from 10.06.2010 on the offered rental of about Rs.14,00,000/- per month and thus the amount due till date would have been around Rs.1 ,68,00,000/- (Rupees One crore Sixty-Eight lacs only) and consequently the

claimant is now entitled to receive this amount from the Respondent No.1.

COUNTER CLAIM NO. 15

It has been stated that since the claimant had failed to perform her part of the obligation under the Collaboration Agreement dated 10.11.2008 to execute the Sale Deed despite repeated requests and reminders in respect of the First Floor of the property bearing Nos.B-1 /6348A, Janakpuri, New Delhi in his favour within 180 days in terms Clause 9(b) and (12) of the Collaboration Agreement Hence, directions have been sought for the purpose.

The facts:

3. The petitioner is the co-owner along with Mr.Mohinder Jeet Singh, respondent No. 2 herein, in respect of a freehold property admeasuring about 666 Sq. Meters at B-1/638A, Janakpuri, New Delhi, having inherited the same from her husband late Iqbal Singh. The petitioner and the respondent No. 2 were having equal shares in the said property in terms of the partition deed dated December 30, 2000, which demarcates the respective shares of the said property. In terms of the partition deed, the said property was partitioned in two equal halves i.e. eastern portion of 333 Sq. Meters which belonged to the husband of the petitioner and the western portion also of 333 Sq. Meters belonged to Mohinder Jeet Singh, the respondent No. 2 herein, with two drive ways existed on each side of the said property.

4. It is the case of the petitioner that she along with respondent No. 2 entered into a collaboration agreement dated November 10, 2008 with

the respondent No. 1, inter alia, detailing the obligation of the parties with regard to the re-development of the said property. The collaboration agreement stipulated that the respondent No. 1 was required to reconstruct the said property and provide a basement, stilt, ground floor, first floor, second floor and third floor and hand over the possession thereof to the petitioner and the respondent No. 2. The collaboration agreement also stipulated that in lieu of construction to be undertaken by him, he was entitled to get the first floor of the said property. It is noted from the award that plans were submitted by the petitioner and the respondent No. 2 to the MCD for approval and in terms of the said plans, the construction was to be made. It was her case that her signatures in the application were forged. Suffice to state, the said stand was not agreed to by the learned Arbitrator. It was also her case that during the course of construction, respondent No. 1 had erected pillars at a distance of 30 feet and not 35 feet so as to provide unequal built up area to the two separate owners of the said property and further, that the respondent No. 1 had also proceeded to raise a partition in the building in an unequal manner thereby, leaving a space of only 20 feet on the eastern side of the built up property and 30 feet on the western side of the built up property. This according to her, was contrary to the understanding between the parties. It was the also the petitioner's case that the respondent No. 1, on

one hand, had been seeking to remind the petitioner that in terms of the said collaboration agreement, the petitioner was to execute the sale deed in favour of the respondent No. 1 with respect to the first floor of the property, on the other hand, he himself had deliberately, overlooked his own obligations, as per which it was obligatory on the part of the respondent No. 1 to hand over the possession of the entire basement, ground floor, second floor, and third floor to the petitioner. It was her case that the respondent Nos. 1 and 2 are in connivance.

5. The findings of the learned Arbitrator on claim Nos. 1, 7 and 8 are as under:

Claim No.1

The Claimant in this claim has alleged that she has lost built-up area in her property and thus the same has been reduced by about 2000 Sq. ft., hence she has staked her claim for getting an additional area to that extent on the ground floor of the property. Here, it would be pertinent to mention that the rights of the Claimant as well as the Respondent No.2 with respect to the said property are governed only by the terms of the duly registered Partition Deed dated 30.12.2000 vide which the said property was portioned in two equal halves only.

However the plea of the respondents is, that, now, at this stage, fresh disputes raised by the Claimant with respect to their shares already defined vide the Partition Deed dated 30.12.2000 can not now be challenged in the present Arbitration reference, no disputes have ever been raised by the claimant thereby challenging the said Partition Deed. The respondents have thus very strongly argued that the adjudication of Claim No.1 is obviously outside the jurisdiction of this Tribunal. This argument of the Respondents in my view, can not be brushed aside lightly, rather, such arguments of the respondents make sense; when they state that the claimant and the respondent No. 2 had got prepared the Plan which was then submitted to the MCD, and according to the said Plan, the Driveway falls on the portion of the Claimant which she requires for better light, air; view, balconies and which she herself had opted for having the privilege to have open area towards her portion. Now, since the claimant in respect of this claim has,

besides· merely making only bald and un-substantiated assertions has gone not even a step further to substantiate her claim that she had either last any built up area in the property or that her share in the property had been reduced by about 2000 sq. ft. in violation of the terms of the Collaboration Agreement, so, under the circumstances, I am of the view that no orders as sought for by the Claimant in this claim can be passed in her favour.

Claim No.7

Vide this claim, the Claimant has sought for the issuance of directions to the Respondent No.1 for payment of penalty of Rs.50,000/- per month from 10.06.2010 till date. On the contrary, the Respondent No.1 while contesting this claim of the claimant has rather attempted to shift the burden of payment of penalty upon the claimant alleging breaches of the Collaboration agreement on the part of the Claimant only and as such totally absolving himself on this count. Here in my opinion, though, Clause 13 of the Collaboration Agreement provides for the payment of Rs.50,000/- per month as the amount of penalty after the expiry of the grace period of 3 months after the completion of the period of 15 months from the date of taking over the possession in the eventuality of the construction being not completed, yet, in my view the fact cannot be lost sight of, that, the status quo order with regard to the Title and Possession of the property is still in vogue ever since 29.10.2010. And, further that it is the admitted case of both the parties 'that differences and disputes had arisen amongst the parties during the course of the construction activities only and thus it was only on account of such reason that the construction of the building has remained incomplete so far. Consequently, the question of handing over of the physical possession of the property after complete construction still stands in limbo. Hence, having regard to the totality of the circumstances, I hold that the Claim under question too is without any merit and hence is rejected.

Claim No.8

In this claim the claimant has requested that the Respondent No.1 should be directed to pay to the Claimant the opportunity loss occasioned to the claimant. It is stated by him that if the said property was developed and completed on time and given on rent from 10.06.2010, then the Claimant for his portion of building would have received the rental of about Rs.14,00,000/- per month and thus the said amount till date would have been accumulated to about Rs.1,68,00,000/- (Rupees One Crore and Sixty-eight lacs only). Hence, vide this claim, the said amount has been claimed by the Claimant. The Respondent on the other hand however has very forcefully denied and opposed this claim, it is stated by him that the complete structure was completed by him in less than one years' time from the date of signing of the collaboration Agreement, but it was the Claimant only who had failed

to execute the Sale Deed in respect of the First Floor of the property within the period of 180 days from the date of signing of the Collaboration Agreement. In this respect, it has been stated that the said Sale Deed has not been executed even till date, despite repeated requests and reminders. Hence, it has Very vehemently been argued on behalf of the Respondents that the delays, if any in the construction have occurred only on account of the breaches of the terms and conditions of the Collaboration Agreement on the part of the Claimant only. As such, this claim too has been opposed with full force at their command. Consequently, in the light of the highly conflicting versions of both the parties and also in view of the fact that the claims under this head are totally un-substantiated by any evidence whatsoever. I am inclined to reject this claim, as well.

6. The findings on counter claim No. 15 are as under:

“The respondent No.1, vide this claim has again drawn our attention to the relevant Clause No.12 of the Collaboration Agreement which stipulates for the execution of the Sale Deed in respect of First Floor of Property in his favour within a period of 180 days in view of the same, he now seeks the issuance of directions against the Claimant as also the Respondent No.2 for executing the Sale Deed of the said portion immediately on receipt of the balance consideration of Rs.10,00,000/- in performance of the Agreement. The Ld. Counsel for the claimant while contesting this claim of the Respondent as well has again argued . very vociferously that as a matter of fact it was the Respondent No.1 only who was under an obligation to complete the construction of the property by 10.02.2010 i.e. within 15 months from the date of signing the Collaboration Agreement, which he has failed to do so without any sufficient cause. And, In the same context it has been argued that the responsibility of the execution of the Sale Deed of the First Floor in favour of the Respondent No.1 is equally that of the Respondent No.2 as well, but, the Respondent No.1 has never called upon the Respondent No.2 to execute the said document and neither has the respondent No.2 offered to perform his part of the obligation, this according to him gives rise to an irresistible conclusion that the Respondent No.1 and the Respondent No.2 are acting in collusion with each other. Hence, it has been argued that under such circumstances the execution of the Sale Deed merely by the Claimant would not serve any purpose and he states that this relief as claimed is also misconceived. After carefully appreciating the rival arguments of the parties on this claim and after going through the Collaboration Agreement, it emerges that as per Clause 12 of the Collaboration Agreement dated 10.11.2008, the Respondent No.1 was required to pay a sum of Rs.10,00,000/- (Rupees Ten lacs) on or before 180 days of the signing of the said agreement but then equally it was the responsibility

of the Claimant as also the Respondent No.2 to execute all the transfer Documents/ Sale Deed regarding the entire floor rights as envisaged in the said Clause in favour of the respondent No. 1. Not only this, the Clause No. 12 of the Collaboration Agreement further enjoins upon the Respondent No.1 the responsibility of completing all the construction work and then hand over the physical possession of the premises to the Claimant as also the Respondent No.2 within the stipulated period of . 15 months from the date of taking over of the possession by the Respondent No. 1 though further 3 months grace period too had been granted to the Respondent No.1 so as to save himself from paying the incidence of penalty amount, yet, admittedly, both the deadlines i.e. either (i) the execution of the Sale Deed by the Claimant & the Respondent No.2 in favour of the Respondent No.1, or (ii) the period of the completion of the entire construction work of the building by the Respondent No.1 too have expired long back. Though, both the parties have all along been blaming each other for the missing the deadlines, yet, having regard to the totality of circumstances, none of them can be absolved of their respective responsibilities. All said and done at least now even at this much belated stage, it would be only in the fitness of things that now without any moment of delay, both the parties at least join hands of each other and start working together so as to accomplish the unfinished tasks at the earliest i.e. the claimant & the Respondent No.2 shall fulfil their respective parts of obligations i.e. the execution of the Sate Deed of First Floor and the handing over the possession thereof to the Respondent .No.1 . immediately on the Respondent No.1's paying them the requisite amount of Rs. 10 Lakhs and simultaneously the Respondent No.1 also to restart the construction work from the stage it was stopped and then complete the same in a swift manner in accordance with the terms and conditions of the Collaboration Agreement and then immediately hand over the possession thereof to the Claimant as also the Respondent No.2. Hence, the issue No.15 is decided in the aforesaid terms”.

7. It is the submission of Mr. Anil Sapra, learned Senior Counsel appearing for the petitioner that the learned Arbitrator could not have modified the partition deed by giving a lesser portion to the petitioner. According to him, he should have ensured a proper demarcation of the construction made in equal portions. According to him, the construction was made in such a way that the petitioner would get a lesser area than

the respondent No. 2, which is contrary to the spirit of understanding between the petitioner and the respondent No. 2 inasmuch as there would be equal distribution of the constructed portion. It is also the case of the petitioner that the respondent No. 2 has failed to adhere to the time period of 15 months in the collaboration agreement to construct the property and the respondent No. 1 is liable to pay Rs.50,000/- per month as penalty. The said penalty is payable immediately on the expiry of 15 months. Further, he would state the direction of the learned Arbitrator to execute the sale deed is not tenable.

8. On the other hand, Mr.Sanjeev Sindhwani, learned Senior Counsel appearing for the respondent No.1 states, the petitioner has concealed the relevant facts in this petition. He would submit that the construction has been made by the respondent No. 1 in terms of the sanctioned plan. He would also submit that the petitioner's attempt has been to claim area which she was not entitled to. He states that the partition effected between the parties was with respect to the land and the same has not been effected in any manner. According to him, the structure was completed by the respondent No. 1 in time. Despite reminders to execute a sale deed with regard to the first floor, the petitioner has not complied with the said condition of the agreement till date. He would also state, the delay if any, was not attributable to the respondent No. 1.

He states that the petitioner was required to prove damages which she has not. It is because of petitioner, the work got stalled. He would justify the award of the learned Arbitrator.

9. Having heard the learned counsel for the parties and noted the findings with respect to the claims under challenge, I note, insofar as the claim No. 1 is concerned, the learned Arbitrator was of the view that the rights of the petitioner and the respondent No. 2 with respect to the property are governed by the partition deed dated December 30, 2000, whereby the property was portioned in two equal halves. The learned Arbitrator was of the view that the challenge to the partition deed was outside the jurisdiction of the Arbitral Tribunal. He agreed with the submissions made on behalf of the respondent No. 1 that the petitioner and the respondent No. 2 has got prepared the plans, which were then submitted to the MCD and according to the plans, the drive way falls in the portion of the petitioner as she required better light, air, view, balconies. The learned Arbitrator has also come to a conclusion that the petitioner could not able to prove that her share in the property has been reduced about 2000 Sq. Feet in violation of the terms of the collaboration agreement.

10. I agree with the aforesaid conclusion of the learned Arbitrator. The partition deed divides the whole property into two equal halves.

None of the parties have questioned the partition deed. In fact, the partition deed was never been a part of the arbitration. In fact, there was no dispute regarding that. The dispute, if any, was the making of the petitioner that her share in the built up area has been reduced by 2000 Sq. Feet. A distinction has to be made between the rights arising from the partition deed and the rights in terms of the collaboration agreement. It is not the case of any of the parties that the property has not been built in accordance with the sanctioned plans. The sanctioned plans were submitted by the petitioner and the respondent No. 2. The parties very well had an idea of the structure to come up on the land. It was her own desire, to have an open area for a better lighting, view, the drive way was given towards the portion owned by the petitioner which may have resulted in less constructed area. The learned Arbitrator has rightly rejected the claim of the petitioner, as any direction would have been beyond collaboration agreement/sanctioned plans.

11. Insofar as claim Nos. 7 and 8 are concerned, the learned Arbitrator noticed that the parties were blaming each other for the delay in completion of the construction. The submission of the learned Senior Counsel for the petitioner that on expiry of 15 months' period, the petitioner would be automatically entitled to penalty of Rs.50,000/- per month is concerned, the same is liable to be rejected as clause 13 of the

collaboration agreement did stipulate that the petitioner would be entitled to the said penalty after the expiry of period of 3 months grace time, beyond 15 months (original period of construction), for the delay. The clause does not stipulate that the same is automatic. The word 'delay' in the clause does signify, the penalty was payable for delay. The reasons for delay need to be ascertained. The learned Arbitrator's view was, both parties were responsible for the delay. When the parties were at logger heads, blaming each other for not performing their reciprocal promises, during the course of construction, thus for such reasons the construction of the building remained incomplete, the learned Arbitrator has rightly rejected the claim of the petitioner.

12. Insofar as the counter claim No. 15 by the respondent No. 1 is concerned, it primarily pertains to a direction for execution of sale deed in respect of the first floor of the property immediately on receipt of balance consideration of Rs.10 lakhs in performance of the agreement. The plea on behalf of the petitioner was primarily, the delay. It was also contended on behalf of the petitioner that an obligation rests on respondent No. 2 as well for execution of sale deed. According to her, the respondent No. 1 has never called the respondent No. 2 to execute the sale deed. The learned Arbitrator after referring to clause 12 of the collaboration agreement and noting that a sum of Rs.10 lakhs was

required to be paid on or before 180 days of the signing of the agreement, has found that there was a corresponding obligation on the part of the petitioner towards execution of all documents/sale deed. I do not find any illegality in the learned Arbitrator giving directions to both the parties to fulfil their obligations. The directions as given are justifiable including the direction for execution of the sale deed upon the respondent No. 1 paying the requisite amount of Rs.10 lakhs to the petitioner and the respondent No.2.

13. The impugned award relating to the claim Nos. 1, 7 and 8 and counter claim No. 15 is justified. This Court is conscious of the fact that it is exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 and is not sitting as an Appellate Court to re-appreciate the evidence and the conclusion arrived at by the learned Arbitrator, nor, this Court can arrive at a different conclusion other than the one arrived at by the learned Arbitrator on an interpretation of the provisions of the contract, more specifically, clause 12 and 13 of the collaboration agreement.

14. I do not see any merit in the petition. The same is dismissed.

(V.KAMESWAR RAO)
JUDGE

APRIL 06, 2015/akb