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

% Judgment Reserved on: 14th September, 2015

Judgment Delivered on: 05th October, 2015

+ **FAO (OS) 396/2015 & CM No.13106-07/2015**

M/S ARN INFRASTRUCTURE INDIA PVT LTD. Appellant

versus

AVATAR SINGH GILL (HUF) Respondent

Advocates who appeared in this case:

For the Appellant : Mr Arjun Singh Bhati, Advocate.

For the Respondent : None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The appellant has filed the present appeal under Section 37 of the Arbitration & Conciliation Act (hereinafter referred to as 'the Act') impugning the order dated 17.03.2015 whereby the learned Single Judge has dismissed the objections filed by the appellant under Section 34 of the Act.

2. The respondent had booked a unit measuring 1500 sq. feet approximately on the first floor of the IT/ITeS Complex called "GLOBUS" being constructed by the appellant. As per the MOU dated 22.04.2008, the

total consideration was fixed at Rs. 32,25,000/-. The complex was to be completed and the unit handed over by December 2009. The appellant undertook to pay a sum of Rs. 77,250/- per month to the respondent w.e.f. May 2008 up to the date of handing over of possession as the respondent had made a one-time payment of the entire amount in advance.

3. The respondent raised a claim on the ground that the appellant had failed to discharge its obligations to pay the agreed sum of Rs. 77,250/- w.e.f. August 2010. The respondent invoked the arbitration clause. Four issues were framed by the Sole Arbitrator. First being whether the respondent was entitled to recover the claim amount. Second and third issues were whether the respondent had performed its obligations under the MOU and whether the appellant had breached the terms of the agreement and the fourth issue was whether the appellant had complied with the terms of the agreement.

4. With regard to the issue whether the respondent had performed its obligations, the Arbitrator held that the entire consideration stipulated by the MOU had been paid by the respondent and the respondent was discharged of its obligations of any further payment. The appellant on the other hand demanded from the respondent alleged outstanding dues including the balance payment in terms of the MOU, preferred location charges (PLC), lease rent, electrification / meter charges etc.

5. The Arbitrator held that the clauses under the MOU concerning the expenses, charges and liens etc. stipulated that all such charges would be paid by the developer (appellant) till the date of execution of the sale/lease deed or the possession of the unit whichever was earlier and thereafter the charges would be borne by the allottee (respondent). It has been held that the appellant could not have asked for the lease rent from the respondent when, as per the MOU, it was the duty of the appellant to undertake the same.

6. Issues No. 3 & 4 were dealt with by the Arbitrator together and they pertained to whether the appellant had complied with the terms of the MOU. The Arbitrator held that the project was ready for occupation even according to the appellant only in July 2010 and the completion certificate was issued on 01.09.2010 and, accordingly, the Arbitrator held that the project was not ready for occupation or possession by December 2009, as undertaken in the MOU and, as such, it has been held that the appellant could not insist on the payments to be made by the respondent by its letter dated 25.09.2010 as a condition for handing over possession of the unit.

7. The Arbitrator has further noticed that the boundaries of the allotted unit were not earmarked to make the same as an identifiable and marketable unit and even before the Arbitrator, the appellant had failed to bring on record the site plan showing the earmarked unit allotted to the respondent. In these circumstances, the arbitrator held that merely requiring the respondent to take possession after making payments without the unit being identified was to no avail and further that the appellant was unable to show as to on

what basis the respondent was being asked to make further payments when the unit itself was not identifiable.

8. The learned Single Judge, in the above circumstances, did not find any error in the findings returned by the Arbitrator in his conclusion in respect of the issues 2 to 4 that while the respondent had performed its obligations under the MOU, the appellant was in breach of those obligations. The learned Single Judge has affirmed the findings of fact returned by the Arbitrator that the date of offer of possession has to be taken as 01.09.2010, the date on which the completion certificate was issued by the authorities.

9. The liability of the appellant has been divided by the Arbitrator into two parts. The first being monthly payments at the agreed rate of Rs. 77,250/- per month from the stipulated completion date till the date the project was completed and possession was offered. The second being towards the minimum guarantee amount for the first lease of the allotted unit for a period of three years.

10. The learned Single Judge has held that the decision of the Arbitrator that the appellant had to pay the minimum guarantee amount for three years commencing from October 2010 and ending September 2013 was justified and the interpretation of the clauses and the analysis of the evidence of the Arbitrator was not erroneous. The learned Single Judge has further held that a nominal rate of interest @ 8% p.a., on the balance amount, was not exorbitant.

11. Before us, the submission made by the counsel for the appellant is that the stipulation in the MOU that the developer (appellant) had assured the investor (respondent) to get the first lease done of the unit for a minimum period of three years @ minimum rental of Rs. 77,250/- per month from the date of possession could not be achieved as there was a slump in the market and, thus, the appellant could not have been held liable to pay the said amount.

12. The Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors: (2006) 11 SCC 181** held as under:

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

13. Where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an

award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.¹

14. A Division Bench of this Court in **National High Authority v. Italian Thai Development Public Company Limited: 2014 (1) Arb.LR 41 (Delhi) (DB)** held as under:

“We do not find any error in the reasoning adopted by the learned single Judge or the conclusion arrived by him. The findings of the Tribunal fall within the realm of pure findings of fact. There is nothing on record to establish that the findings were of such a nature as would move the conscience of the court or that there was any error of fact which would result in a monumental miscarriage of justice. We may refer to the decision of a Division Bench of this court in the case of **Food Corporation of India v. Shanti Cereals Pvt. Ltd., 2010 (3) ARB. LR 296 (Del.) (DB)**. In the said decision the Division

¹ *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: 202(2013) DLT 218.*

Bench of this court, in the context of examination of factual pleas raised before the court, observed as under:-

“7. Further, the argument of learned senior counsel for the appellant that the rice supplied by FCI to the respondent was not damaged and, in fact, was of a fine quality, cannot be sustained by us. As has been consistently held by this court, as well as the Hon'ble Supreme Court, the forum to raise factual pleas and contentions in an arbitration matter is only the arbitral tribunal. It is against the propriety of the legal regime, as well as the mandate of law set out in Section 34 of the Arbitration and Conciliation Act, 1996 that the courts in objection (and more so in appeal under Section 37) should entertain the arguments that are purely factual in nature. There is no gainsaying that the arbitral tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice.”

(underlining added)

15. This Court in **National Highways Authority of India** (*supra*) has laid down that the Arbitral Tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice. The court would not, in objections under section 34 and more so in an appeal under section 37, entertain arguments that are purely factual in nature.

16. Further, in *Steel Authority of India v. Gupta Brothers Steel Tubes Limited: 2009 10 SCC 63*, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

17. As noticed by us hereinabove, the findings returned by the Arbitrator and, as affirmed by the learned Single Judge, are purely factual and based on the appreciation of evidence and interpretation of the clauses, which is within the domain of the Arbitrator.

18. On examination of the same, we do not find any error in the factual findings returned by the Arbitrator or the interpretation of the various clauses by the Arbitrator or any infirmity in the impugned judgment of the learned Single Judge.

19. The relevant clauses of the MOU stipulate as under:-

“That the Developer has assured the investor to get the first lease done of the unit for a minimum period of 3 years period @ minimum Rs.77,250/- (Rupees Seventy Seven Thousand Two Hundred and Fifty Only) per month from the date of possession.

In case the lease rent fetched is more than Rs.77,250/- (Rupees Seventy Seven Thousand Two Hundred and Fifty only) per month then the surplus amount will be divided into both the parties equally for a maximum period of three years after which the entire rent would be given to the investor.

That the Developer will give monthly cheques to the Investor in individual names for every year till date of possession or further subject to deduction of TDS as per rates described in Income Tax Act, 1961 in the relevant period.”

20. The clauses of the MOU clearly spell out an assurance by the appellant that the unit would be completed and handed over by December 2009 and since the respondent had paid the entire amount of allotment, the appellant undertook to make a consolidated payment of Rs. 77,250/- every month as the committed sum w.e.f. May 2008 up to the date of handing over of possession to the respondent. In case the appellant handed over the possession before December 2009, the respondent undertook to return the said sum per month from the date of possession to December 2009. The appellant further assured the respondent to get the first lease done for a minimum period of three years @ minimum Rs. 77,250/- per month from the date of possession. It was also agreed that in case the lease rent fetched was more than Rs. 77,250/- per month then the surplus amount would be divided between both the parties equally for a maximum period of three years after which the entire rental would be that of the respondent.

21. The above clauses of the MOU very clearly indicate the intention and agreement of the parties which was that the appellant had given a promise of an assured return to the respondent of Rs. 77,250/- w.e.f. May, 2008 up to the date of handing over of possession and for a further period of three years by ways of lease rental of the same amount from the date of possession.

22. There is no infirmity in the finding returned by the Arbitrator that the date of possession has to be taken as 01.09.2010 when the completion certificate was issued in respect of the said property. The respondent has rightly been held to be entitled to the said fixed assured sum of Rs. 77,250/- from the stipulated completion date of May 2008 until the date of handing over of possession and further for three year period, which was the assured period covered by the first lease thereafter. The submission of the counsel for the appellant that the premises could not be let out for the said assured amount as there was a slump in the market is of no avail. The clauses in the MOU are not dependent on the market forces. If the same was depended on any market forces, then there was no question of any assurance of a minimum guaranteed amount of rental. Further, the fact that the clause also caters for a contingency division of surplus of rental between the parties of any excess amount received further fortifies the fact that the same was independent of any market forces. It may be noticed that the appellant had guaranteed the payment by issuance of cheques.

23. Further, we agree with the learned single judge that the award of simple interest at 8% p.a., is not unreasonable or exorbitant and does not call for any interference.

24. In view of the above, we find no infirmity either with the award or with the impugned order. The appeal is, accordingly, dismissed with no order as to costs.

CM No.13107/2015 (for condonation of delay in filing of the appeal)

By this application, the appellant seeks condonation of delay of 47 days in filing of the appeal.

Since we have already considered the appeal on merits and found the same to be devoid of any merit, no further orders are called for in the application.

The same is, accordingly, also disposed of.

SANJEEV SACHDEVA, J.

BADAR DURREZ AHMED, J.

October 05, 2015
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