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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
23.
\+ **O.M.P.(I) (COMM.) 355/2016**

GAUTAM SARAWGI & ORS. ..... Petitioners
Through: Mr. Yash Mishra and Ms. Srishty Kaul, Advocates.

versus

K.N. INFRACON PVT. LTD. ..... Respondent
Through: Mr. Saurabh Kirpal, Mr. Ruchir Midha, Mr. Karthik K.R. and Ms. Iggu Chittiappa, Advocates.

AND

42.
\+ **O.M.P. 520/2015**

GAUTAM SARAWGI & ORS. ..... Petitioners
Through: Mr. Yash Mishra and Ms. Srishty Kaul, Advocates.

versus

K.N. INFRACON PVT. LTD. ..... Respondent
Through: Mr. Saurabh Kirpal, Mr. Ruchir Midha, Mr. Karthik K.R. and Ms. Iggu Chittiappa, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **06.12.2016**

IA No. 11042/2016 (for condonation of delay of 174 days in re-filing the petition) in OMP (I) (COMM.) 355/2016

1. For the reasons stated in the application, the delay in re-filing the petition is condoned.

2. The application is disposed of.

IA Nos. 5033/2016 (for condonation of delay of 3 days in filing rejoinder) & 5034/2016 (for condonation of delay of 17 days in re-filing rejoinder) in O.M.P. 520/2015

3. For the reasons stated in the respective applications, the delay in filing and re-filing the rejoinder is condoned.

4. The applications are disposed of.

5. The next date fixed before the Joint Registrar is cancelled.

O.M.P. 520/2015 & O.M.P.(I) (COMM.) 355/2016

6. Both these petitions arise out of a common set of facts and are being disposed of by this common judgment.

7. While OMP 520 of 2015 is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), OMP (I) (COMM) 355 of 2016 is a petition under Section 9 of the Act. Both the petitions are by Gautam Sarawgi (Petitioner No.1) and 19 other Petitioners challenging as well as seeking interim protection from the Award dated 17th July 2015 passed by the sole Arbitrator in the disputes between the Petitioners and the Respondent K.N. Infracon Pvt. Ltd. (KNIPL).

8. The background facts are that the Respondent launched a project 'Spire

Central 106' in Gurgaon, Haryana for developing a multi-storey residential complex consisting of high end apartments with car parking spaces, recreational facilities etc. in 2010.

9. An initial deposit of Rs.2 lakhs was to be made towards the booking amount. Between March and November 2010, the Petitioners booked flats in the project and paid Rs.2 lakhs each which was duly acknowledged by the Respondent. The Petitioners were assured that the project would be completed in 36 months of the launch date.

10. It is stated that after lapse of over two years by a letter dated 9th November 2012 the Respondent informed each of the Petitioners that work could not commence on the site as the land on which the project was to come up was subject matter of Civil Suit No. 2233 of 2012 (Later re-numbered as 447 of 2012) in the Court of the Civil Judge, Senior Division, Amritsar, Punjab. That was a suit by M/s. Experion Developers Pvt. Ltd (formerly Gold Developers Pvt. Ltd.) on 14th February 2012 for recovery of Rs.2,21,67,08,598. It was a suit against various persons and entities including the Respondent. An injunction had been granted in the said suit on 1st September 2012 by the learned Civil Judge, Amritsar *qua* the project land.

11. On 27th November 2012, the Respondent informed each of the Petitioners that the Director General, Town and Country Planning ('DGTCP'), Haryana, Chandigarh had ordered cancellation of Licence No. 102/2010 that had been issued to the Respondent. As a result the Respondent had to abandon the project in terms of Section 8 of the Haryana

Development of Urban Areas Act, 1975 ('HDUA Act') and the Rules made thereunder.

12. According to the Petitioners, the Respondent did not have any intention to abandon the project. This was evident from the fact that it took measures to cure the cancellation of its licence by filing an Appeal No. 101 of 2012 before the Principal Secretary, Government of Haryana on 17th December 2012. The said appeal was allowed on 11th January 2013 subject to the conditions of the licence being fulfilled by the Respondent.

13. At this stage it is required to be noticed that under Clause 20 of the conditions attached to the application form, the liability of the Respondent was limited to refund the total amount received along with interest @ 9% per annum on the amounts paid. In terms thereof the Respondent did make the refund of the booking amount together with interest @ 9% per annum. The above action of the Respondent being unacceptable to the Petitioners, the Petitioners preferred Arbitration Petition No. 233 of 2012 in the Court of the District & Sessions Judge, Patiala House Courts, New Delhi. On 8th March 2013, the said Court was informed that the arbitration proceedings had already commenced before a former Chief Justice of the High Court of Himachal Pradesh. The Petitioners then prayed that the interim orders already passed by the said Court directing the Respondent not to alienate the flats meant for the Petitioners should be continued till the arbitral proceedings are concluded. The said prayer was acceded to with liberty to the parties to approach the Arbitrator for modification of the interim order if required.

14. On 17th July 2015, the sole Arbitrator analysed the clauses of the application form and came to the following conclusion:

(i) The allotment of the flat was at the discretion of the Respondent which had the right to reject the allotment without assigning reasons.

(ii) No right in the flat accrued in favour of any claimant until the final transfer/conveyance deed is executed and registered by the Developer in favour of the claimant.

(iii) In terms of Clause 20 of the terms and conditions, the Respondent had the right to terminate the contract in the event of being unable to deliver the possession or in case of abandonment of the project.

(iv) In terms of Clause 20, apart from liquidated damages @ 9% per annum on the amount paid the claimant was not entitled to any compensation or damages.

(v) The learned Arbitrator also held that the terms and conditions were binding on the parties and were not challenged by them.

15. It was further held by the learned arbitrator that in terms of Clauses 10, 12 and 20, the contract is determinable contract. It is not a fit case for granting relief of specific performance because the Arbitrator cannot supervise the performance of the contract even if it is presumed that the Respondent has got restored the licence from DGTCP at any stage in future. Therefore, the bar under Section 14 of the Specific Relief Act, 1963 ('SRA') was attracted.

16. The learned Arbitrator noted that along with the letters dated 27th November 2012, the Respondent had already returned the amounts paid by

the claimants together with interest @ 9% per annum and this amount was already credited to the bank accounts of various claimants and, therefore, no further orders were called for in that regard.

17. As already noted OMP 520 of 2015 is filed under Section 34 of the Act challenging the Award. OMP (I) (Comm) 355 of 2016 has been filed seeking interim relief of restricting the Respondent from alienating the flats in question pending the decision in petition under Section 34 of the Act.

18. Although there were submissions made by learned counsel for both parties on the question of maintainability of OMP (I) (Comm) 355 of 2016, the Court proposes to first take up OMP 520 of 2015 for consideration.

19. The submissions of both counsel as regards the validity of the impugned Award have been heard.

20. Mr. Yash Mishra, learned counsel appearing for the Petitioner referred to the letter written by the Respondent to the Petitioners on 9th November 2012 whereby the Respondent only informed the Petitioners about the pendency of the Civil Suit No. 447 of 2012 in the Court of the Civil Judge, Senior Division, Amritsar, Punjab and the grant of interim injunction date 1st September 2012. It is pointed out that in the said letter there was no whisper of the licence issued to the Respondent having been already cancelled. This was informed only by a subsequent letter dated 27th November 2012 when refund was made. He submitted that a fraud had been practised by the Respondent on the Petitioners by collection of the booking amount by the Respondent, noting that the licence having been withdrawn made the entire

transaction illegal. Learned counsel for the Petitioners also submitted that the entity which filed the suit in the Court of the Civil Judge, Senior Division, Amritsar, Punjab was collusive in nature. Referring to Section 10 of the SRA, it was submitted that the presumption as to irreparable loss being suffered should be in favour of the Petitioners. He submitted that as far as an immovable property is concerned, the Court should presume that where there was a breach of contract to transfer an immovable property, such breach could not be adequately redressed by monetary compensation.

21. Learned counsel for the Respondent, on the other hand, supported the impugned Award and pointed out that the issues involved have been discussed in sufficient detail with reference to the facts on record as well as the applicable law. It is submitted that no ground is made out for interference under Section 34 of the Act.

22. At the outset the Court would like to observe that Clause 20 in the application form stated that if for any reason Respondent is unable to construct the project and give possession of the flat to the claimant then the Respondent's liability towards the claimant would be limited to refund of the total amount received from the claimant along with interest @ 9% per annum. This clause was not challenged by the claimant as being opposed to public policy.

23. The second issue is whether the decision taken by the Respondent to abandon the project in view of the cancellation of licence can be said to be illegal? In other words, whether the termination of the contract by the Respondent was justified? The learned Arbitrator has noted that on the day

the Respondent decided to abandon the project, it had acted consistent with Section 8 of the HDUA Act. It was noted by the learned Arbitrator that although the order cancelling the licence was appealed against by the Respondent before the Principal Secretary, Town & Country Planning, Haryana, the order passed by the Appellate Authority was only to remand the matter again before the DGTCP for reconsideration. It cannot, therefore, be said that on the day the contract was terminated by the Respondent, there was any illegality committed by it. If indeed the licence to develop the land was no longer in existence and even after the order by the appellate authority the licence did not get automatically restored, certainly specific performance could not have been sought of such a contract.

24. The Court does not find any legal infirmity in the impugned Award which has correctly held that there is a bar under Section 14 of the SRA in granting specific performance of the contract in question by ordering the Respondent to make available the flats as originally agreed between the parties. The Court also finds no error in the reasoning and conclusion of the learned Arbitrator as regards Clause 20 of the terms and conditions which undoubtedly restricts the claim for liquidated damages to what has been provided therein. None of the grounds under Section 34 of the Act are attracted in the present case. Consequently, the challenge to the impugned Award dated 17th July 2015 passed by the learned Arbitrator is hereby negatived. OMP No. 520 of 2015 is hereby dismissed.

25. In view of the dismissal of OMP No. 520 of 2015, the Court does not consider it necessary to examine whether the Petitioners would be entitled to

any interim relief in OMP (I) (Comm.) No. 355 of 2016. Clearly, there is no *prima facie* case in favour of the Petitioners for grant of any such interim relief notwithstanding the doubt as to the maintainability of such petition in view of the decision of the Division Bench of this Court in ***Nussli Switzerland Ltd. v. Organising Committee Commonwealth Games 2010, 2014 (4) ARB.LR 196 (Delhi)***.

26. The petitions are accordingly dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

DECEMBER 06, 2016
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