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* IN THE HIGH COURT OF DELHI AT NEW DELHI
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\+ O.M.P. 247/2015

OMAXE LTD. ..... Petitioner
Through: Shri Mukti Bodh and Mr. Shelendra Singh, Advocates.

versus

HARLEEN KAUR ANAND & ANR. ..... Respondents
Through: Mr. Gurinder Pal Singh, Advocate for Respondent No.1.

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **28.11.2016**

1. Omaxe Ltd. has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the Award dated 19th November 2014 passed by the sole Arbitrator.

2. The Respondent No.1 applied for property unit bearing No. TF-18, 3rd Floor, Pearl Omaxe, District Centre, Wazirpur, Delhi on 27th March 2006. Respondent No.1was the claimant before the learned Arbitrator. Respondent No.2 is stated to be owner/lessee of the plot of land on which the commercial complex has been developed by the Petitioner.

3. Respondent No.1 deposited a sum of Rs.10,18,453 on 29th March 2006. According to the Respondent No.1, the Petitioner had assured her that the property would be ready for delivery within 30 months or within a

reasonable extension of 6 months. Clause 18 of the proforma of application form stated that “the Developer shall endeavour to give possession of the unit to the applicant(s)/allottee(s) within 30 months with reasonable extension of six months from the date of commencement of construction, subject to force majeure circumstance and reasons beyond the control of developer”. Thereafter between May 2006 and June 2010 the Respondent No.1 made payments totalling Rs.1,43,50,190.90.

4. According to Respondent No.1 while the payments were being made, the Petitioner got signed from her an allotment letter dated 3rd March 2009 incorporating the terms mentioned in the application form. Clause 45 of the allotment letter contained the arbitration clause. Under Clause 10 it was acknowledged that the total consideration of Rs.1,43,05,014 including additional charges would be paid by the allottee to the Developer in instalments.

5. Under Clause 25(a), there was the assurance that the developer would complete the construction within 30 months from the date of sanction of the allotment letter or within an extended period of 6 months subject to force majeure conditions and subject to the allottee making timely payment and/or subject to any other reason beyond the control of the developer. It further stated that no claim by way of damages/compensation would lie against the developer in case of delay in handing over possession on account of any of the aforementioned reasons.

6. Clause 25(c) stated as under:

> “ Clause 25 (c) - Upon obtaining certificate for occupation &

> use from the competent authority(ies) by the Developer, the Developer and PGF shall offer in writing to the Allottee to take over, occupy and use the said unit within thirty (30) days from the date of issue of such certificate and the Developer and PGF shall hand over the said unit to the Allottee for his occupation and use subject to the Allottee having complied with all the terms and conditions of this Jetter of Allotment and is not in default under any of the terms and conditions herein and has complied with all provisions, formalities, documentation etc., as may be prescribed by the Developer and PGF in this regard."

7. Under Clause 27(a), the allottee was entitled to possession of the unit only after all the amounts in terms of the allotment letter was paid and the conveyance deed in respect of the said unit is executed and duly registered with the Sub-Registrar concerned. Under Clause 27(b), it was stated that upon taking possession of the unit, the allottee would have no claim against the developer as to any item of work, materials, installations etc. in the said unit or on any other ground whatsoever.

8. The case of Respondent No.1 was that in terms of the above allotment letter the unit TF-18 should have been delivered by the Petitioner before 3rd March 2012. In spite of the Respondent No.1 having approached the Petitioner time and again the possession of the unit was not delivered within the aforementioned time. Respondent No. 1 stated that she was shocked to receive an electricity bill dated 16th July 2011. A letter dated 25th July 2011 was handed over which stated that the shopping-cum-office was "on the verge of completion". The letter directed the Respondent No.1 to pay the balance dues towards the said unit without indicating when the actual possession of the unit would be handed over to her. The Respondent No.1 protested by sending an email on 2nd August 2011 as well as a letter dated

12th August 2011. It was pointed out that no formal letter calling upon the Respondent No. 1 to take over the possession of the unit had been issued. Even physical or symbolic possession has not been given. Consequently, the Respondent No.1 requested the Petitioner to cancel the electricity bill. Accordingly the said electricity bill was cancelled on 25th July 2011.

9. Again on 15th December 2011, another letter was issued to the Respondent No.1 stating that maintenance and electricity charges in the sum of Rs.1,82,998 were due from the Respondent No.1. Again the Respondent No.1 lodged the protest. Another invoice dated 17th May 2012 for a sum of Rs.3,53,723 against the unit was received by Respondent No.1 to which again she protested. Finally Respondent No.1 sent a notice dated 30th October 2012 demanding possession of the unit failing which she would cancel the entire transaction. She further demanded that the full amount paid by her should be refunded together with interest @ 18% per annum from the respective date of payment of instalments till the date of repayment. This was followed by a legal notice dated 12th January 2013 by Respondent No.1 to the Petitioner rescinding the contract and demanding the refund.

10. Before the Sole Arbitrator, there were four claims filed by the Respondent No.1 against the Petitioner and Respondent No.2. Claim No.1 was for refund of Rs.1,43,50,190.90 being the amount paid by Respondent No.1 for the unit in question. Claim No.2 was for interest @ 18% per annum calculated with effect from 29th March 2006 till the date of payment. Claim No.3 was for compensation for a sum calculated at Rs.10 per sq. ft. of super area per month beginning with the expiry of 30 months after the date of

booking i.e. 3rd March 2009 as damages in terms of clause 25(e) of the allotment letter for mental pain and agony. Claim No.4 was for costs of the proceedings.

11. By an order dated 16th September 2013, the learned Arbitrator framed the following issues for determination:

> "1) Whether the Claimant is entitled to refund of the amount paid by her, if so, is Respondent entitle to forfeit earnest money or any other amount, if any?
>
> 2) Whether the claim is barred by time?
>
> 3) Whether the Claimant is entitled to interest? If so at what rate and what period?
>
> 4) Whether there is no subsisting Agreement of Arbitration between the parties? If so to what effect?
>
> 5) Relief."

12. Respondent No.1 examined herself as PW-1 and also filed an affidavit. She was cross-examined by learned counsel for the Petitioner. Petitioner examined Mr. Praveen Kumar Gupta as DW-1. Respondent No.2 examined Mr. K.L. Bhatia, its authorised representative, as a witness.

13. At the outset the learned Arbitrator decided Issue No.4 in favour of the Respondent No.1 and held that there was a subsisting arbitration agreement between the parties.

14. As regards Issue No.2, the learned Arbitrator again found that the claim was not barred by time since the invocation of the arbitration clause was by

a letter dated 12th January 2013 which was within three years from the date on which the contract was to be completed i.e. 3rd September 2012.

15. The learned Arbitrator took up Issue Nos. 1, 3 and 5 together. Referring to Ex.PW-1/39 which was a letter issued by M/s. Shanvi Estate Management Services (P) Ltd., nominated by the Petitioner as maintenance agency, stating that they would commence services with effect from 16th July 2011 and bill the Respondent No.1. The learned Arbitrator after referring to the extensive correspondence between the parties held that " no material has been placed on record to show that unit was ready for delivery to the claimant." Instead the Petitioner created an alleged maintenance agency and started making alleged demands so as to deny the possession of the unit. In the circumstances, the learned Arbitrator held that Respondent No.1 was entitled to refund of Rs.1,43,50,190.90 as claimed.

16. As regards interest, the learned Arbitrator held that Respondent No.1 is entitled to interest @ 18% per annum with effect from 14th January 2013 till 10th May 2013 in terms of Clause 33 of the allotment letter. *Pendente lite* interest @ 18% per annum from 10th May 2013 till the date of Award was granted. Future interest at the same rate was also awarded. The learned Arbitrator further awarded Respondent No.1 Rs.50,000 as costs.

17. This Court has heard the submissions of learned counsel for the parties.

18. Learned counsel for the Petitioner submitted that the Award was not based on the evidence on record; it was perverse and ought to be set aside by this Court in exercise of its powers under Section 34(1) read with 34(2) of

the Act. Learned counsel for the Petitioner in particular referred to the occupancy certificate and submitted that it was the best evidence to prove the fact that the unit in question was ready for delivery. Secondly, it was submitted that in terms of the allotment agreement, Respondent No.1 was at best entitled to claim the delay penalty @ Rs.10 per sq.ft. and not entitled for termination of the allotment agreement. According to Petitioner, there was no delay in construction and, therefore, there was no occasion for Respondent No.1 to rescind and terminate the allotment agreement. It was reiterated that the Petitioner had asked the Respondent No.1 to take possession of the unit on payment of the balance consideration. Consequently, there was no justification in directing refund of the amount paid by Respondent No.1 together with interest. It was further submitted that no opportunity was offered to the Petitioner as no effective questions were allowed to be put to Respondent No.1 during her cross-examination. It was submitted that the allotment letter dated 3rd March 2009 was unregistered and unstamped and, therefore, liable to be impounded.

19. As far as the last issue is concerned, no such plea appears to have been raised before the learned Arbitrator. Consequently, there was no occasion for the learned Arbitrator to deal with such issue. The Court, in the circumstances, does not permit the Petitioner to raise the issue at this stage. In any event, the allotment letter states exactly what it is. It cannot be read as an agreement to sell immovable property. The question of it not being properly stamped does not arise.

20. The crucial issue is whether the Petitioner at any point in time offered

possession of the unit that was booked. The letter dated 21st July 2009 has been perused by the Court. It cannot by any stretch of imagination be construed to be a letter calling upon Respondent No.1 to take possession of the unit on its completion. The first three paragraphs of the letter read as under:

> "This has reference to the captioned matter, we are pleased to inform you that the construction of our aforestated Shopping Cum Office Complex is on the verge of completion. Therefore, the temporary possession of your shop is offered to you to carry out the interior work/fit outs like, flooring, false ceiling, painting and other activities.
>
> Further, in terms of allotment, you are requested to make payment of your balance dues towards the sold shop as per the statement of account enclosed herewith as Annexure-A within 30 days from the date of this letter. Upon receiving the full and final payment, approvals and completion of the other codal formalities and receipt of stamp duty, registration charges, conversion charges and other expense, the company shall start the registration process of conveyance deed of the units in the commercial complex.
>
> Apart from this as per the terms of allotment you shall be liable to pay conversion charges from Lease Hold to freehold, payable to DDA or such other Govt./Local Body in proportion of Super area of the unit."

21. Learned counsel for the Petitioner was not able to explain how there could be an offer of "temporary possession" in the context of the allotment letter which did not speak of any such 'temporary possession' being given to the allottee. On the other hand, it was claimed in the above letter that as on

that date, the unit was not ready for being handed over to the Respondent No.1. Secondly, as rightly noted by the learned Arbitrator, the letter is silent on exactly when the unit was ready to be handed over. Consequently, the learned Arbitrator was right in coming to the conclusion that no document has been placed on record by the Petitioner to show that the unit was ready for delivery and possession within the stipulated time in terms of the allotment letter and further that Respondent No.1 asked to come and take possession of the unit.

22. With there being an obvious failure by the Petitioner to comply with the terms of the allotment letter, Respondent No.1 was justified in seeking refund of the entire amount paid by her. The decision of the learned Arbitrator in her favour in the impugned Award is not contrary to the terms and conditions of the allotment letter and, in the facts and circumstances of the case, not one which calls for interference under Section 34 of the Act.

23. The petition is accordingly dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

NOVEMBER 28, 2016
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