$~
* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
31
\+ **O.M.P. 675/2013 & IA Nos. 17162/2015, 17445-17446/2015**

OZONE BUILDERS AND DEVELOPERS PVT LTD ..... Petitioner
Through: Mr. Tarun Singla, Advocate.

versus

OMWAY BUILD ESTATE PVT LTD & ORS ..... Respondents
Through: Mr. J.P. Sengh, Senior Advocate with Mr. Manisha Mehta, Advocates.

CORAM: JUSTICE S.MURALIDHAR

O R D E R
% **07.12.2016**

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, Ozone Builders and Developers Private Limited ('OBDPL') against Respondent No. 1, Omway Build Estate Private Limited ('OBEPL') and four other Respondents challenging the impugned Award dated 1st April, 2013 passed by the learned sole Arbitrator in the disputes between the parties arising out of the Memorandum of Understanding ('MoU') dated 2nd August, 2006 entered into between them.

2. The case of the Petitioner is that sometime in October 2005, the Petitioner, Respondent No. 1 and M/s. Unison Estates Private Limited ('UEPL') i.e., Respondent No. 3 entered into an oral agreement for developing and marketing a Township on land measuring about 100 acres in Village Belaka, Alwar (Rajasthan). According to the Petitioner, it was a

partnership firm for the purpose of executing the project and that it was agreed that the land for the partnership project would be purchased in the name of Respondent No. 1 and all the three partners would share the profits and losses in equal ratio.

3. It is claimed by the Petitioner that at that relevant time, the land contemplated for the project was under acquisition by the Government of Rajasthan. However, the possession of the said land had not been taken by the State Government. It is stated that despite the land acquisition proceedings, the land measuring about 32.202 acres for the project was purchased in the name of Respondent No. 1. It is claimed that a plot measuring about 3.064 acres falling in the middle of the project was in the name of Respondent No. 1 but it was finally purchased in the name of the Petitioner. It is further stated that around 33.903 acres was purchased in the name of Respondent No. 5, Mr. Ghanshyam, who was working with Respondent Nos. 1 & 2 as Peon and a power of attorney (PoA) dated 21st June, 2006 was taken from him authorising Respondent No. 2 to act on behalf of Respondent No. 5.

4. The Petitioner claimed that purchase of lands in name of Respondent No. 5 was in fiduciary capacity towards the partnership and was acting for the benefit of partnership and that he was not the owner of the land purchased in his name. It is stated that apart from the above, an agreement for purchasing of lands measuring 11.555 acres had also been executed in the names of Respondent Nos. 1, 5 and the Petitioner. It is thus claimed that all lands for the project in the above manner belonged to the partnership of the Petitioner,

Respondent Nos. 1 and 3. It is claimed that the partnership initially operated from 103, Hemkunt Towers, 98, Nehru Place, New Delhi and subsequently from 3, LSC, Sharda Chamber, K-Block, Kalkaji, New Delhi.

5. It is further claimed that a Havan ceremony was performed on 30th April 2006 for the aforesaid new office which was attended by friends and relatives of the Directors of all the partners with the rites and ceremonies of the Havan being performed only by the Directors of all the three partners and their spouses. It is further stated that the Petitioner contributed a sum of Rs. 2.05 crores between November 2005 to July 2007. Its case is that Rs. 85 lakhs was contributed through cheques and Rs. 120 lakhs in cash. Since the land for the project was to be purchased in the name of Respondent No. 1, cheques for Rs. 85 lakh, according to the Petitioner, was drawn in the name of Respondent No. 1.

6. The Petitioner claimed that in April/May 2006 there was a pre-launch of the project and a sum of Rs. 5.38 crores were collected from the public towards booking of plots. The Petitioner acknowledged that the partnership paid a sum of Rs. 25 lakhs to Petitioner on 6th May 2006 for purchasing the plot measuring 3.064 acres in its name. It is further claimed that on 2nd September 2006 a further sum of Rs. 25 lakhs was paid to the Petitioner. This payment is stated to have been received from 'partnership' which was acknowledged in its balance sheet for the year ending on 31st March 2006 and the Petitioner has treated the amount paid to Respondent No. 1 through cheque as 'investment'. However, in the schedule appended to the balance sheet this amount has been shown as 'advance against plots'. In its balance

sheet for the year ending on 31st March 2006, the Respondent No. 1 has treated the amount received from the Petitioner through cheque as 'advance from business associate'. In its balance sheet for the year ending on 31st March 2007 Respondent No. 1 has showed the amount received from the Petitioner through cheque as 'advance from customers/others'.

7. The case of the Petitioner is that the MoU executed between the parties on 2nd August 2006 "is nothing but a partnership deed." According to the Petitioner, the above factors taken together would substantiate its plea that the MoU is a partnership deed. It is pointed out that the Respondent No. 1 had made numerous representations to the authorities for release of land from acquisition and a NOC for development of the said land and that all such representations made prior to 15th November 2006 contained the details of the land purchased in the name of Petitioner as a part of the project land. It is claimed that an Escrow account was opened in the furtherance of the MoU.

8. According to the Petitioner, *vide* a notice dated 15th November 2006 the Respondent No. 1 withdrew from the oral understanding which had been reduced in writing in the form of MoU on the alleged failure of the Petitioner to contribute Rs. 15 lakhs mentioned in the MoU. According to the Petitioner, it replied to the said notice on 2nd January 2007 accepting the dissolution of the partnership and further sought its share in the profits and assets in the partnership. Thus lands measuring a total of 80.724 acres were claimed by the Petitioner. It has been further pointed out that the land to the extent of 37.015 acres had been released from acquisition and from the said

released land, approvals to develop residential colony was obtained only for 31.678 acres of which 23.153 acres were in the name of Respondent No. 1 and 8.524 acres in the name of Respondent No. 5. The Petitioner requested the Arbitral Tribunal (AT) to dissolve the partnership or in the alternative declare it dissolved when the Respondent No. 1 gave notice dated 15th November 2006 to which the Petitioner replied on 2nd January 2017. The Petitioner also claimed rendition of accounts and its share of profit, assets and properties of the partnership.

9. The Respondents on the other hand denied that there was any contribution by the Petitioner in cash in the sum of Rs. 120 lakhs. However, the Respondents admitted having received Rs. 85 lakhs through cheques but claimed that the said amount was a loan and not the Petitioner's capital contribution to the partnership. The MoU was a preliminary document for the purpose of working out the modalities which ultimately did not succeed. The MoU was not acted upon and was terminated in view of Petitioner's failure to contribute the amount of Rs. 15 lakhs as envisaged thereunder.

10. By the impugned Award dated 1st April 2013 the learned Arbitrator rejected the claims of the Petitioner as not substantiated. The reason that weighed with the learned sole Arbitrator in coming to the above conclusion was as under:

(i) that the MoU was only a preliminary document and not the deed of partnership. It did not mention any oral partnership or the investments already made by the Petitioner prior thereto. If there was in fact any capital contribution made by the Petitioner it would find specific mention in the MoU.

(ii)Irrespective of what happened prior to 2nd August 2006 the Petitioner was under obligation to contribute Rs. 15 lakhs. There was no evidence to show that a sum of Rs. 1.20 crores was invested by the Petitioner towards capital contribution of the firm.

(iii) There was also no evidence to show that the balance outstanding credited in the bank account in PNB at Sukhrali had to be transferred to Escrow account of Respondent No. 1 and not the partnership. The expression 'advance received from business associates' for the entry in the balance sheet of Respondent No. 1 for year ending on March 2006 cannot be construed as contribution of capital by the Petitioner to the partnership.

(iv) Likewise, a purchase of land measuring about 3 acres in the name of the Petitioner and the inclusion of this land in the representations made by Respondent No. 1 to the government for release of the said land from acquisition did not prove partnership.

(v) Also, the mere participation of directors of Petitioner in the religious ceremonies like Havan did not prove the partnership. In fact the Petitioner took no step either for release of land from the acquisition and did not take part in the transactions of the affairs of the partnership firm.

(vi) The mere absence of a separate loan agreement would not make a difference to the treatment of the amount. The Petitioner cannot rely upon failure of Respondent No. 1 to deduct TDS on the interest paid on the loan. The Petitioner was a creditor and not a partner.

(vii) Mr. Parveen Mangla (CW-1) was able to show that in the books of accounts of Petitioner, the payments of Rs. 85 lakhs was shown as loan to Respondent No. 1. Had the Petitioner been a partner it ought not have accepted Rs. 25 lakhs on 6th May 2006 and another Rs. 25 lakhs on 2nd September 2006.

(viii) The Petitioner had also failed to produce independent witnesses like brokers who facilitated the land transactions which may have thrown light on the existence of an oral partnership.

11. This Court has heard at length the submissions of Mr. Tarun Singla, learned counsel for the Petitioner and Mr. J.P. Sengh, learned Senior Counsel appearing for the Respondents.

12. At the outset it requires to be noted that the scope of interference by the Court with an arbitral award is circumscribed by Section 34 of the Act. Since this Court is not sitting in appeal over the award, it is not expected to re-appreciate the evidence and interfere only because a different view is possible to be taken on the evidence. After the amendments to Section 34 of the Act brought about by the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23rd October 2015, a merit review is not possible. Even *de hors* the aforementioned amendment, only an award that is so perverse so as to shock the judicial conscience is liable to be interfered with.

13. Learned counsel for the Petitioner submitted that even oral partnership can be said to be exist. He relied upon the decision in ***M/s.K.D. Kamath and Company v. Commissioner of Income Tax, Bangalore 1971 (2) SCC 873.*** He further relied on the decision in ***M/s. Shivraj Reddy & Brothers v. S. Raghu Raj Reddy 2002 (3) CCC 400 (AP)***.

14. Learned counsel for the Petitioner, however, did not dispute the fact that the Petitioner had failed to prove that Rs. 1.20 crores was given in cash. He however maintained that Rs. 85 lakhs was given by cheque. According to him, this would still not make a difference ads afar as proving the existence of an oral partnership was concerned.

15. On the other hand it was contended by the Respondents that the Petitioner fabricated and forged the statement of account (CW-1/5A) dated 15th July 2006 by tracing the signature of Respondent No.2 from the MoU originally entered into with the Petitioner. There was categorical finding of the learned Arbitrator in this regard. The expert evidence produced by the Respondent No. 1 clearly established forgery on the part of the Petitioner. Relying on the decision in ***S.P. Changalvaraya Naidu v. Jagannath (1994) 1 SCC 1*** it is pointed out that the party whose case is based in falsehood can be non-suited at any stage of the litigation.

16. The Court finds that the Petitioner has not been able to dislodge the factual finding that the existence of an oral partnership was not proved by the Petitioner by placing on record any credible evidence. The Petitioner was obviously unable to satisfy the learned Arbitrator that on the basis of the

said evidence, taken collectively that there was existence of an oral partnership. While it is true that the partnership need not necessarily be in writing as explained by the Supreme Court in ***K.D. Kamath and Company v. Commissioner of Income Tax, Bangalore*** (*supra*) there should be an agreement to share the profits as well as the losses of the business and the business must be carried out on by all or any of them acting for all.

17. In this context, the Court is of the view that the MoU is not possible to be read as partnership deed as suggested by the learned counsel for the Petitioner. For proving the existence of a partnership the Petitioner has to show that: (i) there is an agreement to share the profits as well as the losses of the business; and (ii) the business must be carried on by all or any of them acting for all. This has been unable to be established by the Petitioner. The finding to the same effect by the learned Arbitrator has not been shown to be perverse much less of a nature that shocks the judicial conscience.

18. For all the aforementioned reasons, the Court is not persuaded to hold any of the grounds under Section 34 of the Act is made out in the present case. The petition and IA No. 17162/2015 are dismissed but, in the facts and circumstances, no orders as to costs. Accordingly, the interim order dated 20^{th} April 2015 stands vacated and the pending applications bearing IA Nos. 17445-17446/2015 by the interveners are also dismissed.

S.MURALIDHAR, J

DECEMBER 07, 2016
Rm