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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 142/2017**

M/S REAL GAINS ESTATE PVT. LTD & ANR. Petitioners

Through: Mr Kunal Prakash, Advocate for
petitioner nos.1 & 2.

versus

M/S AMR INFRASTRUCTURES LTD & ANR. Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
28.03.2017

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VIBHU BAKHRU, J

IA Nos.3615-3616/2017

1. For the reasons stated in the applications, the delay of 8 days in filing and the delay of 30 days in re-filing are condoned.
2. The applications are disposed of.

IA No.3614/2017

3. Allowed, subject to all just exceptions.
4. The application is disposed of.

O.M.P. (COMM) 142/2017 & IA No.3613/2017

5. M/s Real Gains Estate Pvt. Ltd (hereafter 'RGEPL') and M/s

Grassland Developers India Ltd. (hereafter 'GDIL') have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 18.10.2016 (hereafter 'the impugned award') made by the sole arbitrator, Justice R. V. Raveendran (Retired).

6. The impugned award was rendered in the context of disputes that had arisen amongst RGEPL and GDIL (hereafter collectively referred to as 'petitioners') and M/s AMR Infrastructures Ltd. (hereafter 'AMR') and M/s R. C. Infosystems (P). Ltd. (hereafter 'RCI'). AMR and RCI are collectively referred to as 'respondents' hereafter.

7. Justice Raveendran, (Retired), a former judge of the Supreme Court of India, was appointed as a sole arbitrator by an order dated 25.05.2012 passed in a petition preferred by RGEPL under Section 11 of the Act (ARB. P. 22/2012) to adjudicate the disputes that had arisen between RGEPL and the respondents. During the pendency of the arbitration proceedings, GDIL and the respondents entered into a Memorandum of Understanding whereby the said parties agreed to refer all disputes to the sole arbitrator. Thereafter, GDIL and respondents requested Justice Raveendran (Retired), the sole arbitrator, to also consider the disputes between them along with the disputes between RGEPL and the respondents.

8. The disputes between the parties essentially relate to the brokerage/ commission agreed to be paid to RGEPL as a selling agent and to GDIL as the coordinator in respect of a project concerning development of an Information Technology Park named "*Kessel i-Valley*" (hereafter 'the

project'). The said development comprised of residential as well as commercial units measuring about 2 million sq. ft. of space. The project was to be developed on a plot of land measuring 25 acres in Tech Zone, Greater Noida, UP, which was acquired by RCI on leasehold basis.

9. RCI had granted the rights to develop the project to AMR. The parties entered into an Agreement dated 30.06.2006 (hereafter 'the Agreement') whereby the respondents appointed RGEPL as a sole and exclusive agent to sell and book units in the project. In terms of the Agreement, the respondents agreed to pay brokerage at the rate of 6.5% on *'each and every sale of a unit'* in the Project and 25% of the differential amount between the base price and the actual selling price. GDIL was to act as a coordinator between RGEPL and the respondents for the smooth functioning of the arrangement between them. In consideration for the said services, respondents agreed to pay GDIL, a commission at the rate of 6% on *'each and every sale of a unit'* in the project.

10. According to RGEPL, it was entitled to a sum of ₹33,87,19,615/- as brokerage and a further sum of ₹7,46,85,897/- as differential profit between the base selling price of the units and the actual selling price. Admittedly, the respondents had paid an aggregate sum of ₹26,18,79,089/- to RGEPL and, therefore, RGEPL claimed the balance sum of ₹15,15,26,423/-. In addition, RGEPL claimed that since certain space in the project had been booked directly by the respondents, RGEPL was also entitled to brokerage in respect of such bookings.

11. Before the Arbitral Tribunal, RGEPL sought the following reliefs:-

- “(a) An award directing respondents 1&2 to pay Rs.15,15,26,423 to claimant.
- (b) An award directing respondents 1&2 to pay interest at the rate of 18% per annum from due date till date of realisation, on the amount prayed in para (a) above.
- (c) An award directing respondents 1&2 to *"render true and correct account of details of balance sale proceeds received in the entire project on the remaining amount by respondents 1&2 with respect to bookings generated in the project by claimant."*
- (d) An award directing respondents 1&2 to render account of *"details of the refund given to the customers/reduction in space area due to the acts and omissions on the part of respondents 1&2."*
- (e) An award directing respondents 1&2 to render account of *"details of preferential location charges and car parking charges, etc. received by respondents 1&2 from customers on the sale bookings generated by claimant in the project."*

12. Similarly, GDIL also claimed a sum of ₹1,97,12,515/- towards balance commission from the respondents in respect of services rendered as a coordinator.

13. The respondents did not dispute the appointment of RGEPL as a sole and exclusive selling agent under the Agreement and the appointment of GDIL as a coordinator between RGEPL and the respondents. However, they contended that RGEPL was entitled to brokerage of only ₹24,51,75,741/- against, which RGEPL had already received a sum of ₹28,14,25,455/-. Accordingly, they claimed refund of the excess amount paid to RGEPL. The respondents also claimed that only a sum of

₹22,63,16,064/- was payable by the respondents to GDIL and consequently, sought refund of a sum of ₹2,88,55,607/- paid in excess to GDIL by the respondents.

14. The respondents also raised counter claims; some of which were given up/reduced during the course of the arbitral proceedings. Apart from claiming that the respondents had paid excess brokerage, the respondents also alleged that the petitioners had breached the Agreement inasmuch as they had not generated bookings for the entire project within a period of eight months as agreed. They alleged that brokerage/commission for bookings done beyond the period of eight months was not payable as the same were done beyond the terms as agreed under the Agreement. The respondents also claimed expenses incurred for procuring bookings, which was quantified at a sum of ₹11,74,36,430/-. Further, the respondents alleged that the petitioners had embezzled funds collected from the customers. They also made a claim in respect of sums collected by the petitioners to the account of '*M/s i-Home Interiors*' from some of the customers on account of interior works. It was claimed that the price for '*i-Homes*' included the price for interior works and therefore no sum for such works could be charged.

15. The Arbitral Tribunal considered the aforesaid disputes. One of the main controversies raised was whether the brokerage/commission was payable on the booking of the units or on the sale of such units. The petitioners claimed that in terms of the Agreement, brokerage/commission was payable on the booking of the units. They also claimed that the price of the units in cases where the customers had opted for a down payment plan, was to be ascertained by considering the down payment as being the net

present value (NPV) of the sale price.

16. The respondents, on the other hand, contended that the brokerage/commission was only payable on the sale of the units and therefore the petitioners were not entitled to any brokerage/commission in cases where the customers had defaulted in paying the consideration and/or in cases where the customers had cancelled their bookings.

17. The Arbitral Tribunal examined the clauses of the Agreement and held that in terms of clause 3.1 of the Agreement, brokerage/commission was payable only on sale of the units and not merely on bookings.

18. The Arbitral Tribunal accepted the claim of the petitioners that RGEPL was appointed as the sole and exclusive selling agent and therefore would also be entitled to brokerage/commission in respect of the units that were sold by the respondents either directly or through other agents/brokers. However, the Arbitral Tribunal also held that the respondents would also be entitled to credit for the expenses for making such sales, which was determined as 5% of the selling price.

19. Insofar as the claim of RGEPL for the differential profit between the base price and the actual selling price (quantified at ₹7,46,85,897/-) was concerned; the Arbitral Tribunal had noted that the respondents had merely denied the said claim without providing any particulars and therefore sustained the said claim.

20. Insofar as the counter claims were concerned, the Arbitral Tribunal did not accept the claim as far as embezzlement of cash is concerned

because of lack of evidence. The Arbitral Tribunal accepted that the petitioners had unauthorizedly collected ₹400 per sq. ft. for interior works from some of the customers who booked units in ‘*i-Homes*’; but, did not award the amount claimed in favour of the respondents since (i) the amount of ₹12 crores as claimed by the respondents was not established by sufficient material; and (ii) the amount was refundable by ‘*M/s i-Home Interiors*’ to the customers who had booked the units and not the respondents.

21. The learned counsel appearing on behalf of the petitioners sought to assail the impugned award essentially on two fronts. First, he submitted that the Arbitral Tribunal had grossly erred in reducing a sum of ₹2 crores each from the brokerage and commission payable to RGEPL and GDIL respectively. He submitted that having accepted that the petitioners were entitled to brokerage/commission, the Arbitral Tribunal could not have reduced the same. Second, he submitted that the computation of the brokerage was erroneous and the amount as claimed ought to have been allowed.

22. The aforesaid contentions are unmerited and cannot be sustained. The Arbitral Tribunal had accepted the petitioners’ contention that they were entitled to brokerage and commission on the sale made by the respondents directly or through other agents. This was accepted in view of the plain language of the Agreement wherein it was expressly recorded that the petitioners were entitled to brokerage/commission on “*each and every sale of a unit in the said PROJECT*” and further, the recitals of the Agreement clearly indicated that the respondents had offered “*exclusive selling and*

marketing rights to RGEPL with respect to entire PROJECT". However, if the respondents were to yield the commission and the brokerage, which would have been payable for selling and marketing the units, they would also be entitled to claim the expenses incurred for the same. The brokerage/commission effectively represented the gross revenue for sale and marketing of the project. Indisputably, the petitioners would also have incurred expenses for earning such revenue. It is thus obvious that the petitioners could not claim the gross revenue for sale and marketing of the project, while avoiding the liability to pay the expenses. Thus, the Arbitral Tribunal proceeded to estimate the expenses attributable to sale and marketing of the units sold by the respondents directly or through other agents. This Court does not find any infirmity in the aforesaid approach.

23. The Arbitral Tribunal had estimated the expenses to be 5% of the sale price on the basis of the balance sheet submitted by RGEPL. It noted that in the year ended 31.03.2007, RGEPL had reflected a revenue of ₹12.57 crores while incurring an expenses of ₹10.38 crores. Further, in the year ended 31.03.2008, RGEPL had earned gross revenue of ₹5.45 crores and had incurred expenses of ₹3.98 crores. On the aforesaid basis, the Arbitral Tribunal determined that approximately 5% of the sale price would be a reasonable estimate of the expenses attributable to marketing/selling the units.

24. It is well settled that the scope of proceedings under section 34 of the Act is limited and does not entitle this Court to re-appreciate the evidence and supplant its view over that of the Arbitral Tribunal. No interference with the impugned award would be warranted unless, it is found to be perverse or

patently illegal. The assessment of expenses made by the Arbitral Tribunal is based on material on record; it is neither perverse nor patently illegal and therefore this Court finds no ground to interfere with the same.

25. The contention that the Arbitral Tribunal had erred in computing the brokerage/commission payable to the petitioners is also not persuasive. It is apparent that the Arbitral Tribunal was faced with the challenge of reconciliation of the accounts produced by the rival parties. After an extensive exercise, most of the issues as to the accounts were reconciled. Insofar as the figures pertaining to the sale price and the space sold is concerned, the Arbitral Tribunal found that the necessary details were available only with the respondents and the accounts produced by the petitioners were not complete. Thus, the Arbitral Tribunal accepted the figures as produced by the respondents.

26. According to the petitioners, the total sale price was ₹3,59,67,13,381/- , while according to the respondents, it was ₹3,42,21,81,552/-. After examining the material produced on record, the Arbitral Tribunal accepted the total sale price of the units sold in the project as ₹3,42,21,81,552/-. Accordingly, the brokerage payable to RGEPL was assessed at ₹20,24,41,800/- and the commission payable to GDIL was determined as ₹18,53,30,893/-. The said figures were arrived at by computing the brokerage and commission payable at the rate of 6.5% and 6% on the sale price, respectively and further deducting a sum of ₹2 crores each on account of brokerage/expenses estimated to have been incurred in respect of direct sales. This Court is unable to find any patent illegality in the aforesaid approach which would warrant any interference in these proceedings.

27. The petition and pending application are, accordingly, dismissed. No orders as to costs.

VIBHU BAKHRU, J

MARCH 28, 2017

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