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

\+ **O.M.P. (COMM) 7/2015**

COMMANDER (R) PRAVEEN SHARMA & OTHERS ..... Petitioners
Through: Mr. Ravi P. Mehrotra & Mr. Vibhu Tiwari, Advocates.

versus

K.N. INFRACON PRIVATE LIMITED & OTHERS ..... Respondents
Through: Mr. Ruchin Midha & Mr. Iggu Chittiappa, Advocates.

CORAM: JUSTICE S. MURALIDHAR

<u>O R D E R</u>

% **14.03.2017**

1. This is a petition by Commander Praveen Sharma and 15 other Petitioners under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') challenging an Award dated 25th July, 2015 passed by the sole Arbitrator in the disputes between them and the Respondents, K.N. Infracon Private Limited (Respondent No.1); Spire World (Respondent No.2) and Millennium Spire-India Management Private Limited (Respondent No.3).

2. Most of the Petitioners had earlier served in the Armed Forces and are stated to now be in the civil aviation sector. The Respondents had issued an advertisement regarding launch of residential projects in Sector 106 in Gurgaon, Haryana in January, 2010. They advertised the said project as Flexihomes, which was in the form of 100% customisable apartments. There was freedom to an applicant to have the apartment customised to the

desire and lifestyle of the applicant.

3. The Petitioners had a meeting with the Vice President of the Spire Group on 30th March, 2010. The Executive Director (Marketing) of Spire World project sent an e-mail dated 4th May, 2010 confirming the Developer would be able to provide the units of 3,000 sq.ft. in a single tower. It was further acknowledged that the size of the tower could be modified for the Petitioners' group. It was stated that the Developer would be able to provide up to a maximum of two towers of 15 floors each with two flats on each floor in sets of 30 residential units per tower.

4. Each of the Petitioners paid Rs.2 lakh by issuing a cheque in favour of Respondent No.1 towards booking of the flats. The applications were submitted on 14th June, 2010. By an e-mail dated 15th June, 2010, the draft copy of the Memorandum regarding the points of mutual understanding was sent by the Respondents to Petitioner No.1. The payment confirmation receipt was dated 13th July, 2010.

5. There was an extensive exchange of correspondence thereafter between the parties on the issue of the ambiguity of the planning of the project and the terms and conditions. It is stated that in the meeting held on 21st January, 2011 the Managing Director (MD) of Spire World, the Developer, accepted that it was not certain of the location of the towers/flat area/design. The Petitioners state that although an assurance was given by the Respondents that all the points would be responded to, no further response or action was taken by the Developer.

6. On 25th September, 2011, an e-mail was sent to the MD of the Developer by Petitioner No.1 (who was acting on behalf of other Petitioners as well) where it was pointed out that they were not being provided full information about planning and development of the project. The Petitioners enquired where the project was held up due to lack of clearances by the Government. The Respondents were asked to give a reply by 7th October, 2011 failing which the Petitioners would have to resort to legal recourse for redress.

7. In response to the above e-mail, the Developer sent a communication on 5th October, 2011 to the Petitioners which read as under:

> "Subject: Refund of money
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> Sir,
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> This is in reference to your application for allotment of residential unit in our project named 'Spire Central' located at Sector 106, District Gurgaon. You have paid us a total sum of Rs.200000/- (Rupees Two Lakh(s) Only) in respect of your aforesaid application.
>
> You are aware that there has been no consensus between you and us in relation to some points due to which no formal agreement has been executed between you and us. Hence your aforesaid application stands cancelled.
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> We are herewith refunding your aforesaid amount of Rs.220150/- (Rupees Two Lakh(s) Twenty Thousand One Hundred Fifty Only) along with interest thereon @ 9% per annum with effect from the date on which your money was credited in our account till the date of this letter. Now our all accounts with you stands fully and finally settled.
>
> Henceforth we shall have no liability towards you and the receipts issued by us towards acknowledgement of payments received from you stands cancelled."

8. The Petitioners state that they were shocked to receive the above communication. On 30th October, 2011 the Petitioners sent an e-mail stating *inter alia* that the return of cheques was not acceptable. Petitioner No.1 specifically stated that he was not encashing the cheque "since it is deficiency in service & considered a breach of 'contract'."

9. This was followed by the Petitioner by filing CS(OS) No. 948/2012 in this Court in which an application was filed by the Respondents under Section 8 of the Act seeking reference of the disputes to arbitration. An order was passed in the said application on 10th January, 2013 recording that the Respondents herein would nominate a retired High Court Judge as an Arbitrator.

10. Before the learned sole Arbitrator, a former Chief Justice of the High Court of Himachal Pradesh, the Petitioners filed their claims where *inter alia* the following reliefs were prayed for:

> "i. declare that the unilateral cancellation of the claimants applications for flats in the development project was unwarranted, unjustified and bad in law, without any valid reason, and further that refund of the claimants applications monies by the respondents was inappropriate and wholly unjustified in the circumstances;
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> ii. direct restoration of the claimants applications, along with the application monies, for flats in the Spire Central 106 Property Development Project floated and administered by the respondents;
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> iii. direct the respondents to forthwith furnish the exact status of the land and project, when the claimants had applied for the same in the year 2010, as also at the present time, including, but not limited to various clearances, licences and government approvals;

iv. restrain the respondents from allotting to any person, the flats/interest of the claimants in the Spire Central 106 Property Development Project, as existing prior to the wrongful cancellation of the claimants applications by the respondents;

v. direct the respondents to give to the claimants a flat each of the agreed size/specifications and at the agreed cost of 2010, being the basic rate of Rs. 2218 per square foot, including compensation in lieu of rent, and penalty for the delay in handing over the promised flat beyond 2013, either in the project in question or in the event of inability or any difficulty, in the respondents other on-going projects in nearby areas, on the same agreed conditions of cost/size/specifications and terms;

vi. award the costs and legal expenses of the present arbitration proceedings in favour of the claimants and against the respondents, as also the charges and costs incurred by the claimants in the High Court of Delhi for having to file the civil suit against the respondents following the unjustified cancellation of their applications;

vii. award compensation to the claimants for the mental agony and harassment caused to them owing to the unjustified and arbitrary cancellation of their applications in the project by the respondents;

viii. award punitive and exemplary damages to the claimants on account of the unreasonable and unjustified conduct of the respondents; and

ix. pass such other order and/or further orders as this Hon'ble Arbitral Tribunal may deem fit and proper in the facts and circumstances of the present case."

11. Subsequently Claim (v) was amended to provide for an alternative prayer for a direction that each of the claimants should be compensated to the extent of Rs. 1,67,37,250 by the Respondents in the event the claimants "cannot be given a flat in question terms of the agreement in the year

2010......" Prayer (v-a) was inserted for a direction to the Respondents to pay to the claimants rent @ Rs. 25,000 per month for a similar three bedroom flat with effect from 1st January, 2014 till the amount of compensation is paid by the Respondents, based on the premise that the three year timeline by the Respondents for handing over a flat in their project expired by the end of the year 2013. The further amendments were as regards the quantification of costs and legal expenses at Rs.2 lakh and compensation towards mental agony at Rs. 5 lakh per claimant.

12. It must be noticed at this stage that there were different sets of claims filed by other groups, who were similarly placed as the Petitioners. Mr. Gautam Sarawgi and 19 others had filed a similar suit for recovery of Rs. 2,21,67,08,598 against the Respondents. The Developers of that project were Gold Developers Private Limited. That project was abandoned. The claimants there were informed that the Director General, Town and Country Planning ('DGTCP'), Haryana, Chandigarh had ordered cancellation of license No. 102/2010 as a result of which the Respondents had to abandon the project. In the said suit the parties agreed to go before the same learned Arbitrator.

13. While in the case of Mr. Gautam Sarawgi and 19 others an Award was made by the same Sole Arbitrator on 17th July, 2015, in the present case the Award was passed one week later on 25th July, 2015.

14. In both Awards the learned Arbitrator rejected the claims for compensation and held that each of the claimants would be entitled to the booking amount together with interest at 9% per annum and nothing else. It

was held that the relief for specific performance was barred under Section 14 of the Specific Relief Act, 1963 ('SRA').

15. It must be noticed at this stage that the challenge by Mr. Gautam Sarawgi and 19 others to the Award dated 17th July, 2015 by way of OMP No. 520/2015 was rejected by this Court when it dismissed the said petition by the order dated 6th December, 2016.

16. The present petition by Commander Praveen Sharma and 15 others challenges the impugned common Award dated 25th July, 2015 passed by the same learned sole Arbitrator, who gave the aforementioned Award dated 17th July, 2015 in the claims of Mr. Gautam Sarawgi and 19 others.

17. At the hearing of the present petition on 20th January, 2017, it was submitted by learned counsel for the Respondents that this Court by its order dated 6th December, 2016 in OMP No. 520/2011 (*Gautam Sarawgi v. K.N. Infracon Pvt. Ltd.*) already dismissed a challenge to a similar Award. ON that date Mr. Ravi Mehrotra, learned counsel for the Petitioners, sought time to examine the said judgment and make submissions.

18. Today when the matter was taken up for hearing Mr. Mehrotra first pointed out the distinguishing features as far as the present case is concerned. He pointed out that in the case of Mr. Gautam Sarawgi and 19 others, the reason for termination of the individual contracts was due to abandonment of the project by the Developer as a result of reason of cancellation of the license by the DGTCP, Haryana. However, in the present case, the reason for cancellation as indicated by the Developer in the letter

dated 5th October, 2011 was not abandonment of the project but the lack of consensus between the parties. He further pointed out that unlike the case of Mr. Sarawgi, the learned Arbitrator in the impugned Award in the present case has sought to uphold the termination of the individual contracts for failure of the Petitioners to make payment of instalments within time.

19. The Court is of the view that there are certain elements of similarities and differences between the case on hand and that of Mr. Sarawgi and 19 others. The points of similarities are that in both cases the grant of the relief of specific performance qua the flats has been held to be barred under Section 14 of the SRA. In the considered view of the Court, this is the correct legal position. Therefore, that part of the impugned Award in the present case does not call for interference.

20. The point of difference, however, is that the reason for termination of the contract in the case of Mr. Sarawgi and others as put forth by the Respondents, was the cancellation of the development license by the DGTCP, Haryana, which in turn led to the cancellation of the bookings by the Respondents. In the present case the reason put forth by the Respondents is different. As is clear from the letter dated 5th October, 2011 written by the Respondents to the Petitioners, which has been extracted hereinbefore, the reason was the lack of consensus between the parties. As rightly pointed out by Mr. Mehrotra, under the terms agreed to between the parties, this was not one of the reasons for which the contract could have been cancelled by either party.

21. The learned Arbitrator appears to have proceeded on an entirely different footing in seeking to find the justification for the cancellation of the contract by the Respondents. The learned Arbitrator in paras 38 and 39 of the impugned Award held as under:

> "38. It is further evident from various communications on record filed by the Claimants s that the Claimants had in fact refused to make payment of the further instalments after making the initial payment for allotment of the flat. In the course of oral arguments it was urged by the Counsel for the Respondent that the Claimants in fact, as is evident from the various emails exchanged between the Claimants and the Respondent, clearly refused to make further payment in respect of the flat allotted to them until there was an agreement between the Claimants and the Respondent on the specifications in respect of the flat. It was urged that having refused to make payments of the Instalments as per the Terms and Conditions the Claimants have clearly repudiated the Contract which repudiation was accepted by the Respondents who put an end to the Contract by issuing the above said termination letter.
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> 39. It is an admitted case that there was no agreement between the Claimants and the Respondent in respect of the specifications of the flat allotted to them. Having failed to make payments of the overdue instalments and in fact refusing to pay the overdue instalments on the ground that the specifications of the flat have not been agreed/or on the ground that the final agreement was not executed, is in my view not only the breach of clause 8 of the Terms and Conditions which clearly envisages that timely payment was the essence of the contract but also amounts to repudiation of the Contract. Thus the Claimants are themselves in breach. It is trite that a party in breach has no right to seek relief of either damages or specific performance of the very contract it has itself committed breach of. The Claimants, though have prayed for damages as an alternate relief, they have been unable to establish any breach of the Terms and Conditions of Allotment which can be attributable to the Respondent."

22. It was sought to be urged by Mr. Ruchin Midha, learned counsel for the

Respondents that the admitted case was that there was no agreement between the Claimants and the Respondents in respect of the specifications of the flat allotted to them. He submitted that this was the reason for termination of the contract.

23. The Court is unable to agree with the above submission. The reason for termination of the contract as spelt out by the Respondent Developer itself in its e-mail dated 5th October, 2011. It was only on account of absence of "consensus" in relation to some points without specifying what those points of disagreements were. The correspondence referred to by Mr. Midha reveals that these points of difference were not confined to the specifications of the flat. Secondly, the main reason that has weighed with the learned Arbitrator as is evident from paras 38 and 39 of the impugned Award is the alleged failure by the Petitioners to make payments of the overdue instalments and "refusing to pay the overdue instalments." It was not even the Respondents' case that the Petitioners had failed to make payment of overdue instalments. Therefore, the conclusions in paras 38 and 39 of the impugned Award appear to be based on no evidence at all. They possibly pertain relates to the facts of some other claims before the same learned Arbitrator.

24. Be that as it may it is plain that the learned Arbitrator has proceeded on facts which were not relevant to the claims on hand. The learned Arbitrator has proceeded on the basis of an alleged justification for termination of the contract which was not even put forth by the Respondents. The findings in paras 38 and 39 cannot but be held to be perverse and unsustainable in law.

The impugned Award to the above extent is hereby set aside as being opposed to the fundamental policy of India within the meaning of Section 34(2)(b)(ii) of the Act.

25. The Court clarifies that it is not interfering with the impugned Award insofar as (i) the grant of the relief of specific performance *qua* the flats in question has been held to be barred under Section 14 SRA and (ii) each of the Petitioners has been held entitled to the refund of the booking amount together with interest @ 9% per annum as indicated in the impugned Award. Learned counsel for the Respondents, in fact, has stated that the said amounts would be paid to the Petitioners not later than two months from today.

26. Consequently, it would be open to the Petitioners to seek a fresh arbitration, in accordance with law, only with respect to the following issues:

i. Whether the termination by the Respondents of the contracts, i.e., the cancellation of the flat bookings made by the Petitioners, was justified in law?

ii. If the answer to (i) is in the affirmative, what compensation is each claimant entitled to apart from refund of the booking amount together with interest?

27. It is clarified that if the Petitioners decide to go for a fresh arbitration on the issues as indicated in para 21 above, they would be entitled to the benefit

of Section 43(4) of the Act.

28. The petition is disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J.

MARCH 14, 2017
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