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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 26th February, 2018

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O.M.P. (COMM) 93/2018 & IA No. 2779/2018 & 2780/2018

VVA DEVELOPERS PVT. LTD & ORS. Petitioners

Through: Mr.Vinod Tyagi, Adv.

versus

IMPROVE VYAPAAR PVT. LTD.

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No. 2780/2018 (Exemption)

Allowed, subject to all just exceptions.

IA No. 2779/2018 (Stay)

As the petition itself has been dismissed, the application is also dismissed as having becoming infructuous.

O.M.P. (COMM) 93/2018

1. This petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), is challenging the Arbitral Award dated 06.11.2017 passed by the Sole Arbitrator in Case Ref. No. DAC/1609-3-17 titled as *M/s. Improve Vyapaar Pvt. Ltd. vs. M/s. VVA Developers (P) Ltd.*

2. The counsel for the petitioner submits that the disputes between the parties were in relation to the Memorandum of Understanding dated 18.03.2013 executed only between the petitioner no.1 and the respondent. He submits that the petitioner no. 2 and 3 were not party to the said MOU as well to the Arbitration Agreement and had been wrongly impleaded in the Arbitration Proceedings, being the Directors of the Petitioner No.1 Company. On being asked if any plea of mis-joinder was taken before the Arbitral Tribunal, the learned counsel for the petitioner concedes that no such plea had been taken before the Arbitrator. In view of Section 4 and 16 of the Act, in my opinion, this plea cannot be now taken to challenge the Impugned Award. The petitioner no. 2 and 3, having not taken such plea before the Arbitrators, are deemed to have waived their objection to such impleadment and are deemed to have submitted themselves to the jurisdiction of the Arbitrator.

3. It is further contended by the counsel for the petitioner that the claim filed before the Arbitral Tribunal was clearly barred by Law of Limitation. He submits that even in the Statement of Claim, in paragraph 21 thereof, the respondent had contended that the cause of action for filing of the claim petition arose on 31.06.2013, and upon failure of the petitioner no. 1 to refund the amount, on 31.08.2013. He submits that as the invocation of Arbitration was only on 03.09.2016, the claim was barred by Law of Limitation. He further contends that the two payments of Rs.45 lakhs and 7.50 lakhs made by the petitioner no. 1 were on account of Sale / Booking of flats that had fallen in the share of the respondent and in terms of Clause 5 of the

Memorandum of Understanding. He, therefore, submits that this payment was not a payment of “Debt” or “Interest” thereon and, therefore, could not be used for extension of period of limitation under Section 19 of the Limitation Act, 1963.

4. I am unable to agree with the submissions made by the counsel for the petitioner. The fact that the payments of Rs. 45 lakhs and 7.50 lakhs being made by the petitioner no. 1 to the respondent on 24.09.2013 and 06.12.2013, that is, within the period of limitation is not denied. It was for the petitioner to show on what ground or reason these payments had been made, if they were not made in part-payment of the debt owed. The contention of the petitioner that these payments were made in accordance with Clause 5 of the Memorandum of Understanding and upon Sales / Booking of the flats falling in the shares of the respondent has been rejected by the Arbitral Tribunal on the ground that the petitioner no. 1 has not rendered any proof in support of such a plea.

5. The Arbitral Tribunal has further relied upon the fact that the petitioner no. 1 had also not raised any demand for the balance payment from the respondent and this itself shows that both the parties acted on the understanding that the agreement stood terminated and the amount had to be refunded back by the petitioner no.1 to the respondent.

6. Barring making a reference to a table given in the present petition showing Unit number(s), certain amounts as principle and tax paid etc., there is absolutely no proof of any such transaction filed by the petitioner.

7. In any case, this being a finding of fact arrived at by the Arbitral Tribunal upon appreciation of the evidence led before him, this Court, in exercise of its power under Section 34 of the Act, cannot re-appreciate the same to arrive at a different conclusion.

8. The Supreme Court in ***Associate Builders v. Delhi Development Authority***, AIR 2015 SC 620, held as under:

“It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

9. The counsel for the petitioner further contends that the Arbitral Tribunal has erred in holding that the project itself was to be completed and delivered by 30.06.2013. He draws my reference to Clause 10 of the Memorandum of Understanding to show that the petitioner no. 1 was only to obtain all the “required sanctions and approvals on or before 30.06.2013” and not to complete the construction thereof. He submits that as the petitioner had obtained the requisite sanctions and approvals, the respondent was not entitled to claim refund of the amount paid by it or interest thereon.

10. In my view, the petitioner is merely trying to take the benefit of

a clerical error in the Award on this aspect. The Arbitrator, in the Impugned Award has clearly held that the petitioner no. 1 was to obtain the requisite sanction and approval by 30.06.2013, which it had failed to obtain. The Arbitral Tribunal holds that the petitioner no. 1 has not filed any evidence or material on record to show that the requisite sanction and approval had in fact been obtained by the petitioner no.1 before the said date. There is no challenge to this finding of the Arbitral Tribunal. In view of the same, in terms of Clause 11 of the Memorandum of Understanding, the respondent had become entitled to the refund of the amount along with interest at the rate of 18% per annum. I, therefore, do not find any error in the Impugned Award on this account.

11. The last contention of the counsel for the petitioner is to the award of interest at the rate of 18% per annum in favour of the respondent. Here again the Arbitrator, relying upon Clause 11 of the Memorandum of Understanding, has granted such interest in favour of the respondent. The Arbitrator has also denied to the respondent the benefit of Clause 12, which provides for compensation in favour of the respondent. As the Arbitrator has acted in terms of the contract between the parties, the Impugned Award cannot be faulted.

12. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no orders as to costs.

NAVIN CHAWLA, J

FEBRUARY 26, 2018/rv