

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. 379/2012**

Reserved on: 14.11.2018
Date of decision : 28.11.2018

FRANCIS PARKASH MATHUR AND ANR

..... Petitioners

Through: Mr.Vivek Kohli, Ms.Pruna Kohli
 & Ms.Neetika Bajaj, Advs.

versus

SURIDHI INFRACON PRIVATE LIMITED

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners challenging the Arbitral Award dated 16.01.2012 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Collaboration Agreement dated 02.09.2004 executed between the parties.

2. The petitioners, as owners of property bearing no. F8/2 Vasant Vihar, New Delhi, had entered into the Collaboration Agreement with the respondent, who was the builder, for the purpose of re-development of their property. As certain disputes arose between the parties in relation to the said Collaboration Agreement, the same were referred to the Sole Arbitrator resulting in the Impugned Award.

3. The learned counsel for the petitioners submits that the Arbitrator has erred in rejecting the claim of the petitioners for Damages for delay in handing over of the possession of the property upon its re-development by the respondent to the petitioners. He submits that in terms of the Collaboration Agreement, the construction of the property was to be completed within twelve months of handing over of the possession of the same by the petitioners to the respondent. Such possession was handed over by the petitioners to the respondent on 14.09.2004, however, admittedly, the possession of the property was given by the respondent to the petitioners upon its re-development only on 14.12.2005, that is, beyond the period prescribed in the Collaboration Agreement. He submits that in terms of the Collaboration Agreement, incase of such delay in handing over of the possession, the respondent was to pay penalty of Rs. 5,000/- per day to the petitioners for the period of such delay. He submits that the Arbitrator has, therefore, erred in not granting the claim of the petitioners for such damages on account of delay.

4. I have considered the submissions made by the learned counsel for the petitioners. At the outset I would quote clauses of the Collaboration Agreement relied upon by the learned counsel for the petitioners:-

“That the Builder undertake to complete the proposed building within a period of 12 months from the date of handing over of vacant possession from the Owners to the Builder, subject to FORCE MAJEURE and further if delay is occasioned for any reason of any act or legislation or restriction, prohibition or restrained imposed by any Statutory Body and or Governmental Authority, no liability shall attach to the Builder.

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That in case the Builder fails to complete the construction of the proposed building within the above stipulated period, then the Builder shall be liable to pay a penalty to the tune of Rs. 5,000/- (Rupees five thousand only) per day to the Owners.”
(Emphasis supplied)

5. The Arbitrator, in the Impugned Award has found that the construction of the property was completed and the completion certificate was obtained by the respondent on 04.08.2005, that is, within the period of twelve months from the date of handing over of the possession by the petitioners to the respondent. The Arbitrator further found that the above mentioned Clauses of the Collaboration Agreement applied only to the construction of the building and therefore, would not be applicable where, though the construction has been completed on time, the possession was not delivered by the respondent to the petitioners due to certain other disputes.

6. I am in agreement with the finding of the learned Arbitrator and therefore, do not find any force in the contention raised by the learned counsel for the petitioners. The above referred Clauses clearly apply only to the completion of construction of the re-developed building. Admittedly, such construction had been completed within the prescribed period of twelve months from the handing over of the possession by the petitioners to the respondent and therefore, the above referred Clauses of the Collaboration Agreement would have no application. If the handing over of the possession of the re-developed building after its construction was delayed by the respondent, the same had to be separately proved by the respondent. Any consequential damages caused to the petitioners thereby had also to be separately proved by the petitioners by leading

evidence in that regard. The petitioners did not lead any evidence on their claim for damages and merely relied upon the above Clauses of the Collaboration Agreement. Therefore, the Arbitrator has rightly rejected the said claim of the petitioners.

7. The learned counsel for the petitioners further submitted that the Collaboration Agreement provided for only one lift for the second floor of the property, which fell in the share of the petitioners. However, the respondent constructed the second lift for the first floor, which fell in the share of the respondent. The petitioner had therefore, claimed cost of the additional area occupied by this second lift, however, the Arbitrator has wrongly rejected the same by relying upon the legal notice dated 22.08.2005 addressed on behalf of the petitioners to the respondent.

8. I have considered the submissions made by the learned counsel for the petitioners, however, again find no merit in the same. The Arbitrator in his Impugned Award has found that the second lift was installed by the respondent without the consent of the petitioners, however, the petitioners later consented to the same and demanded certain works to be carried out by the respondent in the property. As there was no complaint about the said works having not been carried out by the respondent, the petitioners cannot now turn around and make a grievance regarding this lift.

9. I am in agreement with the view taken by the learned Arbitrator. The petitioner no.1 vide his letter dated 27.07.2005 had protested against the proposed construction of the lift for the first floor and called upon the respondent to cease and desist from installing the same. However, from

the subsequent letter dated 10.08.2005 and the legal notice dated 22.08.2005 it becomes apparent that the petitioners requested the respondent to carry out certain specified works in the property as a condition for allowing the respondent to install the said lift. As noted by the Arbitrator and not denied even before me, there is no grievance made by the petitioners that such additional work was not carried out by the respondent. The petitioners having taken advantage of such additional works from the respondent, cannot now be allowed to sustain a claim against the construction of the said lift.

10. The final challenge of the petitioners to the Impugned Award is to the refusal of the Arbitrator to grant damages for the sub-standard construction of the basement by the respondent. The learned counsel for the petitioners submits that the Arbitrator has found in his Award that the work done with respect to the basement by the respondent was totally defective, however, has still not granted damages in favour of the petitioners.

11. I have considered the submission made by the learned counsel for the petitioners, however, find no merit in the same. The Arbitrator while rejecting the claim of damages has observed as under:-

“The controversy however is as to what damages should be awarded to the claimants. Pertaining to the bills submitted there has been no evidence laid. No attempt was made to amend the claim and seek damages specifically. The substantive law in terms of the Arbitration and Conciliation Act cannot be ignored. Damages necessarily had to be proved. The claimant got the work done himself without the permission of this

tribunal and, therefore, made the claim infructuous. Thus little can be awarded.”

12. Though the learned counsel for the petitioners contends that alongwith the application under Section 17 of the Act the petitioners have filed evidence in form of the bills regarding the expenses incurred by them for repairing and rectifying the defects in the basement and the same need not be further proved as the respondent filed no reply to the said application, the fact remains that the petitioners, apart from filing the said bills, did not lead any evidence in proof of those bills or the work done by the petitioners in repairing/rectifying defects in the basement.

13. Even otherwise, a perusal of the contents of the application filed by the petitioners under Section 17 of the Act before the Arbitrator would suggest that the petitioners had only filed the estimate of the expenses that may have to be incurred on rectifying the defects in the basement. The actual work carried out by the petitioners and the expenses incurred on the same has not been filed by the petitioners before the Arbitrator. The relevant pleadings of the petitioners in their application under Section 17 of the Act are reproduced hereinbelow:

“9. Similarly, the seepage / leakage problem in basement of property got severe, and needed urgent attention, as it caused hindrance in the use of entire property and there was severe danger to strength of the building. In fact the said fact was brought to the notice of Respondent on 13.08.2010 during cross-examination. However, as no effort was made by Respondent to carry out the urgent necessary repair, Claimants themselves engaged the service of specialized personnel to remedy the defect. The Claimants/Applicants hired the services of expert (M/s Mercury Waterproofing) to test the defects and

discrepancies, who after verification, reported inter-alia, that the entire basement is in dilapidated condition and whole basement will have to be reopened, i.e. to reach RCC walls and PCC levels so that a fresh fool proof treatment could be provided. The estimated cost quoted by M/s Mercury Waterproofing to carry out entire task is Rs.44,52,500/- (Rupees Forty Four Lakhs Fifty Two Thousand Five Hundred only). The copies of report, dated 09.07.2010 and letter dated 06.10.2010 of M/s Mercury Waterproofing, informing the Claimant No.1 certain shocking facts about the poor construction and condition of the basement, alongwith photographs are annexed herewith and marked as ANNEXURE A/2 (COLLY).

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14. In view of the circumstances mentioned above, the Claimants/Applicants submit that it is just, fair, equitable, in the interest of justice besides being absolutely necessary for the protection of the rights and interests of the Claimants/Applicants that the Respondent may be directed by an order of this Hon'ble Tribunal to secure the property by either properly repairing and permanently fixing the leakage of water as per the satisfaction of the Claimants/Applicants at the earliest or in turn reimburse/compensate (as approved by the experts) the Claimants/Applicants suitably so that the necessary work could be carried out by the Claimants/Applicants themselves.

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- a) direct the Respondent to repair and permanently fix the leakage/seepage of water as per the advise of expert at the earliest; or alternatively*
- b. direct the Respondent to reimburse and properly compensate the Claimants/Applicants suitably by depositing the amount as per the estimate given by the expert required*

for the necessary work, as the same has to be carried out by the Claimants themselves.”

14. A reading of the above would show that the petitioners, by the time of filing of the said application, had not rectified the defects in the basement. Once the rectification work had been done by the petitioners, if at all, it was for the petitioners to have produced the evidence for the amount spent by them on the said work. Even otherwise, the report had to be proved by leading evidence. Mere filing of this estimate alongwith an application under Section 17 of the Act, cannot lead to the inference of the same having been proved. Therefore, no fault can be found with the Award passed by the Sole Arbitrator. In any case, this being the matter of appreciation of evidence, this Court cannot sit as a Court of Appeal to re-appreciate the same.

15. In view of the above, I find no merit in the present petition. The same is accordingly dismissed, with no order as to cost.

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NAVIN CHAWLA, J

NOVEMBER 28, 2018/rv