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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th August, 2018

+ O.M.P. (COMM.) 178/2018 & I.A. 10579/2018

TEJPAL SINGH

..... Petitioner

Through: Mr. Sachin Datta, Sr. Adv. with Mr.
Amit Mehta & Mr. Jayant Kumar,
Advs.

versus

SURINDER KUMAR DEWAN

..... Respondent

Through: Mr. Anil Kher, Sr. Adv. with Mr.
D.R. Bhati and Ms. Subiya Akbar
Warsi, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner challenging the Arbitral Award dated 29.12.2017 passed by the sole arbitrator adjudicating the disputes between the parties in relation to the Collaboration Agreement dated 03.05.2005.

2. There were three versions of the Collaboration Agreement produced before the Arbitrator.

3. The first one was the original Collaboration Agreement produced by the petitioner marked as RW 6/D. The same contains handwritten corrections such as in Clause 4, where instead of non-refundable security deposit of Rs. 25 lakhs, a cutting had been made to correct it to Rs. 22 lakhs. There is no dispute between the parties

regarding these corrections.

4. The second copy of the Collaboration Agreement was the one filed by the respondent alongwith the Statement of Claim, marked as CW1/1. The same had some handwritten portion in the document. The petitioner in its statement of defence has denied this document and claimed it be tampered and forged.

5. Third version of the Collaboration Agreement was the one filed alongwith the rejoinder filed by the respondent before the arbitrator and the same was marked as CW 1/C. This also had some cuttings and additions made by hand, out of which, the petitioner admitted to a few, while denying the rest, specifically what was marked as 'A' and 'B' in the said document. The said document bears the signatures of the petitioner on other changes which have been made in the document by hand. In this regard the relevant portion of the cross-examination of the petitioner is reproduced hereinbelow:-

“Q18. Please see the collaboration agreement dated 3rd May, 2005 marked as Annexure CW1/C. Is it correct that this document has been signed by you on every page and you have also signed the cuttings on the said document?”

Ans. Yes. The document has been signed by me on every page. Cuttings have also been signed by me except that the cutting at point “A” on internal page no.5 of the document does not appear to be mine. However, signatures appearing at the said cutting at point “B” appears to be mine but I had not signed.”

6. The reference to point 'A' and point 'B' is reproduced hereinbelow:-

6. That the said property shall be divided between the parties as under:

Owner's Allocation : Entire Ground floor and Entire First floor only, with common driveway and stairs.

Second party Allocation: Entire Second floor, ~~with~~ with its roof terrace rights into sky.

11. That at the time of taking of first floor the second party will be bound to pay balance amount of Rs. 8,10,000/- Rupees

Cyber *Prakash* ~~The~~ asks paid to the first party and after the receipt of such amount the first party will be bound to execute the proper sale deed of entire second floor with its roof rights into sky of the above mentioned property in favour of the second party or his nominee and after the completion of the construction the second party shall hold over the actual vacant and peaceful possession of the same and direct him to him.

12. That the second party and first party both undertake not to

7. It is an admitted case between the parties that the property was sealed by the Municipal Corporation of Delhi (MCD) on 30.05.2006 due to unauthorized construction. An FIR was also registered on 28.09.2006 against the said unauthorized construction. The officials of the MCD also demolished the third floor portion of the said property. On 22.01.2007 the property was de-sealed by the MCD for a period of seven days to remove the unauthorized construction, however, instead of regularizing the construction, the petitioner started to complete the unauthorized construction including

reconstruction of the third floor. Thereafter, the respondent vide letter dated 25.04.2007, requested the MCD not to entertain any requests of the petitioner with regard to the sanctioning of the plans in respect of the property and further vide legal notice dated 11.05.2007 terminated the Collaboration Agreement. In the meantime the respondent had to suffer the agony of rejection of an application seeking anticipatory bail, which was eventually granted in his favour on 07.02.2007 on the second application being moved before this Court.

8. The respondent claiming that due to this act of raising unauthorized construction and non-completion of the Agreement by the petitioner, the respondent had suffered losses, filed his claims before the Sole Arbitrator *inter alia* making the following claim :-

“Claim A – A sum of Rs. 5,72,000/- (Rupees Five Lakh Seventy Two Thousand Only) being rent paid by him @ Rs. 13,500/- till 31.10.2008, along with interest @ 18% p.a. and Rs.16,000/- per month which he is paying towards rent along with interest @ 18% p.a till the time he is able to reconstruct and occupy the said property.

Claim B – A Sum of Rs. 1,26,00,000/- (Rupees One Crore Twenty Six Lakh Only) @ Rs.3,00,000/- per month from the date of deprivation of property till 31.10.2008, along with interest @ 18% p.a. for 42 months and Rs.3,00,000/- per month along with interest @ 18% p.a. till the time he is able to reconstruct and occupy the said property.

Claim C – Rs. 10,00,000/- (Rupees Ten Lakh Only) towards cost of demolition charges.

Claim D – Rs. 1,00,00,000/- (Rupees One Crore Only) along with interest @ 18% p.a. towards damages for mental tension, agony, harassment and humiliation suffered by him.

Claim E- Rs. 70,000/- (Rupees Seventy Thousand Only) towards electricity bill.”

9. The following reliefs were also claimed before the Sole Arbitrator:-

*“a) Granting permission to the claimant to apply to the MCD/concerned authorities for de-sealing the premises bearing no. A-2/5, admeasuring 450 sq. Yards situated at Model Town, Delhi and for the purposes of bringing the structure thereon within the norms of the permissible limits;
b) Allowing the claims of the claimant as detailed in para 27, and accordingly pass an award of the said amounts, along with interest @ 18%;
c) Permanently restraining the respondent, his agents, employees, workmen, attorneys and /or any other person claiming through the respondent from accessing, entering/trespassing into the premises bearing No. A-2/5, Model Town, Delhi;
d) Awarding the pendent lite and future interest in favour of the claimant and against the respondent on the aforesaid amount @ 18% p.a. till the date the whole of the amount is liquidated to the claimant;
e) Awarding the cost of the present reference/ proceedings in favour of the claimant.”*

10. The learned arbitrator in the Impugned Award has awarded claim no. A in favour of the respondent holding as under:-

“14.5 Even otherwise, it is a matter of record that the collaboration agreement was entered into between the parties on 03.05.2005. Pursuant thereto, the existing structure was demolished and till date, claimant is out of possession of this property. Accordingly to claimant he has paid a rent of Rs. 13,500/- per month till August 2008 and is further paying rent of Rs. 16,000/- per month with effect from 01.09.2008. Presently each floor is being let out @ Rs. 1 Lac per month. Respondent himself admitted in cross examination that rental in the area is approximately Rs. 15, 000/- to Rs. 25, 000/- per month of the similar area. RW2 Sh. Raj Kumar also stated that

rent for newly constructed flat was approximately Rs. 35, 000/- per month at that time and now it can fetch Rs. 1 Lac. That being so claim of claimant of Rs. 13, 500/- per month till August 2008 and thereafter at the rate of Rs. 16, 000/- cannot be said to be excessive or exorbitant. However, as per the agreement, Ex.CW1/2 the respondent was to pay Rs. 13, 000/- as rent for delayed period, therefore, claimant is awarded rent w.e.f. May, 2006 till the date of award @ 13, 000/- per month which comes to be Rs. 18, 20,000/- (Rupees Eighteen Lakhs and Twenty Thousand Only)."

11. Learned senior counsel for the petitioner submits that the arbitrator has, in awarding this claim relied upon the second version of the Collaboration Agreement that is CW 1/1 though the same has not been proved on record. He further submits that the respondent had not produced any evidence in support of its claim in form of rental receipt or otherwise. It is further submitted that in any case, once the Collaboration Agreement had been terminated by the respondent vide its notice dated 11.05.2007, the arbitrator could not have granted the said claim beyond that date.

12. I have considered the submissions made by the learned senior counsel for the petitioner. I note that the arbitrator has placed reliance on CW 1/1 only to restrict the liability of the petitioner to an amount of Rs. 13,000/- per month with effect from May, 2006 till the date of the Award, inspite of the petitioner's own witness stating that the rent for newly constructed flat of the same size in the locality would have been Rs. 35,000/- per month during the relevant period. I, therefore, find the argument of the learned senior counsel for the petitioner to be self destructive as far as the submission based on failure of the

respondent to prove the version of the Collaboration Agreement marked as CW 1/1 is concerned. At the same time, learned senior counsel for the respondent does not deny that the petitioner was not confronted with CW1/1 when the petitioner took the stand as a witness. In fact, during the cross-examination of the petitioner he was confronted only with CW1/C. The original of CW1/1 was also not produced before the Arbitrator on the ground that the same could not be traced. In view of the above, the Arbitrator has clearly erred in relying upon the version of the Collaboration Agreement marked as CW1/1. The obligation to pay the rent was mentioned only in CW1/1 which remained unproved. Therefore, the Impugned Award insofar as it grants Claim (A) in favour of the respondent, cannot be sustained.

13. The petitioner further challenges the Award on Claim no.(B) made in favour of the respondent. It is submitted that the third floor was constructed by the petitioner with the knowledge and consent of the respondent and in terms of the Collaboration Agreement.

14. The Arbitrator has found no merit in the said plea observing as under:-

“15.4 Admittedly, the municipal plan for the construction of the property was sanctioned upto second floor and construction on third floor was impermissible. It is, therefore, to be seen as to whether there was any agreement between the parties for construction of third floor and its allocation to respondent. Various clauses of the agreement in this regard are very relevant. As per the collaboration agreement Ex.RW6/D itself, it was agreed:

Clause 1

*That the subject of this Collaboration Agreement between the First Party and the Second Party is the Property No. A-2/5, measuring 450 sq. yards., situated at Model Town, Delhi whereof **Ground Floor, First Floor, Second Floor with its roof rights upto sky** are to be constructed after demolishing the present structure.*

Clause 4

*That in addition to meeting out entire cost of construction, the Second Party has agreed to pay a sum of Rs. 30,00,000/- (Rupees Thirty Lakhs Only), as non-refundable security, out of which a sum of Rs. 22,00,000/- (Rupees Twenty Two Lakhs Only), has been paid by the Second Party to the First Party and the first party hereby admits and acknowledge the receipt of the same, and it has been agreed that a sum of Rs. 8,00,000/- (Rupees Eight Lakhs Only) shall be paid by the Second Party to the First Party on or upto Two Months at the time of lantor of First Floor simultaneously the First Party will be bound to execute the proper sale deed of **Entire Second Floor, with its roof rights upto sky** of the above mentioned property in favour of the Second Party or his nominee(s).*

Clause 6

That the said property shall be divided between the parties as under:

*Owner's Allocation: **Entire Ground Floor and Entire First Floor only, with common driveway and stairs.***

*Second Party Allocation: **Entire Second Floor, Entire Third Floor, with its roof/terrace rights upto sky.***

However the owner shall be entitled to go on the top terrace for the maintenance of his water tank and of TV Antenna, in day hours.

Clause 11

That at the time of lantor of First Floor the Second Party shall be bound to pay balance amount of Rs. 8,00,000/- (Rupees Eight Lakhs Only) to the First Party and after receipt of such amount the First Party will be bound to execute the proper sale

deed of entire Second Floor, with its roof rights upto sky of the above mentioned property in favour of the Second Party or his nominee(s) and after the completion of the construction the second party shall handover the actual vacant and peaceful possession of the owner's allocation to him.

15.5 A bare reading of clause 1, 4 and 11 of the agreement goes to show that there was neither any agreement to construct third floor or its sale to respondent. It is only in clause 6 that there was a stipulation for allocation of second floor, third floor with its roof/terrace rights upto sky to respondent. However, admittedly certain cutting were made in this agreement. As per agreement Ex.CW1/C admittedly signed by respondent on all pages, in para 6 allocating the share to respondent, there is cutting at point A, B and C whereby "entire third floor" was deleted. Although respondent has tried to challenge his signatures at point A and B in para 11 of the agreement, interestingly he did not dispute the cuttings at point A, B and C in para 6 of the agreement. Therefore, a combined reading of clause 1, 4 and 11 of the agreement coupled with the cutting made in para 6 of the agreement at point A, B, C goes to show that there was no agreement for construction of third floor which even otherwise could not have been constructed as per municipal by laws prevalent at that time and for which no plan was sanctioned or its sale to the respondent."

15. The Arbitrator has therefore, based her finding on the terms of the Collaboration Agreement and no manner of oral evidence led by the petitioner could have been entertained to disapprove the same. In fact even the Collaboration Agreement CW1/C admitted by the petitioner, restricted the construction only to the second floor. In any case, it was admitted by the petitioner that unauthorized construction beyond the sanctioned pan was carried out by him on each floor.

16. The learned senior counsel for the petitioner submits that third floor was mentioned in the area to be allocated to the petitioner under

the Collaboration Agreement, however, it had been scratched out in the Exhibit CW1/C. It was also scratched out in CW1/1. He further submits that while all other alterations in CW1/C bear the signature of the petitioner, there is no signature appended under the scratching out of the third floor from the share of the petitioner. In Exhibit RW 6/D in fact, the third floor is clearly mentioned to be falling in the share of the petitioner.

17. The learned senior counsel for the petitioner based on the above, submits that the third floor was not only permitted by the respondent to be constructed but it had also been agreed upon that it would belong to the petitioner.

18. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same.

19. Clause 1 of Exhibit CW1/C as also EX. RW6/D mentions as under:-

“1. That the Subject matter of this Collaboration Agreement between the first party and the Second party is the Property No. A-2/5, measuring 450 sq.yds., situated at Model Town, Delhi whereof Ground Floor, First Floor, Second Floor with its roof rights upto sky are to be constructed after demolishing the present structure.

20. Therefore, the parties had clearly stipulated that the construction is to be confined only to the second floor and not any further. In any case, there is no proof of any Agreement between the parties that the construction shall be carried out on each floor beyond the sanctioned limit. Clearly therefore, the petitioner was in default of

the terms of the Collaboration Agreement. In fact, the learned Arbitrator has given the following findings, which are not disputed:-

“Besides the testimony of claimant, there is admission on the part of respondent that building plan was sanctioned for construction of property upto second floor and approx 2000 square feet on each floor was to be constructed. However, in utter violation of sanctioned plan third floor was also constructed and construction of approx 2750 square feet on each floor was raised with the result a show cause notice was issued by the MCD raising objection to the unauthorized construction. Since the respondent failed to remedy the breaches, officials of MCD demolished the third floor of the property during the period 23rd to 28th April, 2006. However, respondent again started construction of third floor, therefore, MCD sealed the entire property on 30.05.2006. Thereafter one FIR was registered against the claimant being no. 609/20006 u/s 188,466(1) of the Delhi Municipal Corporation Act and S.188 and 457 of IPC. The claimant applied for anticipatory bail, however, in view of the information placed on record by the officials of MCD that unauthorized construction was still being raised, the application was rejected. Another application was moved before High Court on 3rd November 2006 and ultimately on 07.11.2006 High Court granted bail. For the purpose of getting property de-sealed, representation was made before MCD and property was de-sealed vide letter dated 22.01.2007 for a period of 7 days in order to remove unauthorized construction and submit relevant documents for regularization of property. However, instead of removing unauthorized construction, respondent again started raising construction on third floor. Therefore, property was again resealed by MCD. Respondent did not stop his nefarious designs and according to claimant, respondent trespassed into the property and took

construction work at the said property. Therefore claimant was constrained to write to MCD not to entertain any request from the respondent with regard to sanctioning of plan etc. and claimant also terminated collaboration agreement vide legal notice dated 11.05.2007. There is no substance in the submission of the learned counsel for the respondent that claimant could not have unilaterally cancel the collaboration agreement and it was undeterminable in nature. Since the respondent was not remedying the breach by removing the unauthorized construction but was also bent upon raising construction upto third floor, there was no option left with the claimant but to cancel the collaboration agreement. Even otherwise, even if according to the respondent the collaboration agreement could not be terminated, a wrongful termination of contract could have been challenged by an independent claim which steps have not been taken by the respondent.”

In view of the above finding, it cannot be said that the Arbitrator has wrongly held the petitioner to be in breach of the Collaboration Agreement.

21. The next question is of the amount of damages to which the respondent would be entitled to upon such breach. The learned Arbitrator in the Impugned Award has held as under:-

“According to the claimant, if he had been given possession of the property, he would have lived on one floor and would have let out one floor. In his cross examination dated 14.03.2012 he stated that presently rent on each floor is Rs. 1 Lac per month. In his statement dated 17.12.2012 respondent stated that rental in the area is approximately Rs. 15,000/- to Rs. 25,000/- per month. RW2 Raj Kumar in his statement

dated 10.07.2013 stated that rent for a similarly newly constructed flat was approximately Rs. 35,000/- per month at that time and now it can fetch Rs. 1 Lac per month. As per agreement Ex. CW1/C the construction was to be completed within 12 month i.e. by May 2006. Calculating from this date, return which the claimant could have got from the period of May 2006 till 31.12.2011 @ Rs.35,000/- comes out to Rs. 23,80,000/- (Rupees Twenty Three Lakhs and Eighty Thousand) and w.e.f January 2012 till December 2017 @ Rs. 1 Lac comes out to be Rs. 72,00,000/- (Rupees Seventy Two Lakhs). As such the claimant is awarded Rs. 95,80,000/- (Rupees Ninety Five Lakhs and Eighty Thousand) for deprivation of use of his property alongwith simple interest @ 12%p.a. till the date of award.

Needless to day, due to wrongful and illegal acts of the respondent, claimant has suffered mental tension, agony and harassment, besides loss of reputation in the society due to criminal prosecution initiated against him. Under the circumstances, claimant is awarded a sum of Rs. 25 Lacs towards damages. However, no interest is awarded on this amount.”

22. Learned senior counsel for the petitioner submits that the Arbitrator has awarded this claim till December 2017 which is beyond the period of termination. He submits that there was no proof led by the respondent in support of such damages and in any case, the same could not have been awarded beyond the date of termination of the Collaboration Agreement.

23. I have considered the submissions made by the learned senior counsel for the petitioner. As far as the amount of Rs. 35,000/- per month awarded by the Arbitrator from May 2006 is concerned, the same cannot be faulted as it was based on the testimony of RW2 Mr.

Raj Kumar, who was produced as witness by the petitioner himself. The said witness claims himself to be a property broker and also a builder in the area where the building was constructed. He therefore, would have been aware of the rent that could reasonably be expected by the respondent on completion of the building in terms of the Collaboration Agreement. At the same time, once the Collaboration Agreement was terminated by the respondent vide its notice dated 11.05.2007, it was for the respondent to have proved before the Arbitrator that the petitioner still restricted respondent's access to the building area in its endeavour to complete the building and occupy the same. In the absence of such evidence, the claim beyond the date of termination of the Collaboration Agreement could not have been granted in favour of the respondent. I therefore, restrict the claim awarded, to Rs. 35,000/- per month for the period from May 2006 to 11th May, 2007.

24. The learned senior counsel for the petitioner has further challenged the award of a sum of Rs. 25 lakhs towards damages on account of mental tension, agony, harassment suffered by the respondent. He relies upon the judgment of the Supreme Court in ***Ghaziabad Development Authority vs. Union of India and Another*** (2000) 6 SCC 113, to contend that compensation for mental agony cannot be granted in such commercial contracts.

25. I am unable to agree with the contention raised by the learned senior counsel for the petitioner. In the present case, the respondent, being the owner of the land, had entrusted the work of construction of a building on his land to the petitioner. The petitioner not only raised

unauthorized construction but also made the respondent suffer the agony of facing criminal prosecution on FIR lodged against him. In spite of the property being de-sealed for the purpose of demolishing the unauthorized construction, the petitioner, instead of rectifying the same, carried out fresh unauthorized construction thereby leading to the re-sealing of the property. Clearly the respondent has been able to make out a case for damages on account of mental agony and harassment suffered at the hands of the petitioner. In this view, the award of Rs.25 lakhs as damages, being a reasonable amount, cannot be faulted.

26. There is no other challenge made to the Impugned Award.

27. In view of the above, the Award is partially modified to the limited extent that amount awarded in favour of the respondent under claim A is set aside and in claim B the respondent shall be entitled to damages calculated at Rs. 35,000/- per month for the period from May 2006 to 11th May, 2007 alongwith interest as awarded by the arbitrator. The remaining directions in the Impugned Award are upheld.

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

NAVIN CHAWLA, J.

AUGUST 09, 2018

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