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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 1st May, 2018

+ O.M.P. (COMM) 182/2018

BHASIN INFOTECH AND INFRASTRUCTURE PRIVATE
LIMITED Petitioner

Through: Mr.Neeraj Malhthora, Sr. Adv. with
Mr.Lokesh Bhola, Mr.Sanchit Gawri, Advs.

versus

AHMAD MIAN & ANR. Respondents
Through: Nemo

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.5799/2018

Exemption allowed, subject to all just exceptions.

O.M.P. (COMM) 182/2018 & I.A. No.5798/2018 (Stay)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioner challenging the Arbitral Award dated 27th January, 2018 passed by the Sole Arbitrator adjudicating the disputes between the parties in relation to the Letter of Allotment dated 22nd December, 2009.

2. By the Letter of Allotment dated 22nd December, 2009, the petitioner had agreed to allot to the respondents commercial shop bearing No.104 on LG floor having an approximate Super Area of

705.09 sq. ft. in the shopping mall know as 'Grand Venezia' at Greater Noida, being constructed by the petitioner on Plot No.SH-3, Site-IV, Industrial Area, Surajpur, Greater Noida (UP). The respondents had paid an amount of Rs.55 lacs to the petitioner towards the sale consideration of Rs.1,05,76,350/- and agreed to pay balance consideration and other additional charges/IFMS @ Rs.500/- per sq. ft. on offer of possession of the unit, calculated on the basis of super area.

3. Simultaneously with the execution of the above Letter of Allotment, the parties executed a Memorandum of Understanding on the same day that is 22nd December, 2009, whereunder the petitioner agreed to pay to the respondents a sum of Rs.55,000/- per month till handing over of the possession of the shop, as monthly return.

4. The petitioner vide its letter dated 15th July, 2015 called upon the respondents to pay a sum of Rs.58,10,151/- towards balance payment for allotment.

5. The respondents on the other hand, *inter alia* vide emails dated 6th August, 2015 and 12th August, 2015 expressed their readiness and willingness to make the payment as demanded by the petitioner after adjusting the amount of Rs.11,55,000/- towards unpaid assured return amount calculated till August, 2015. The petitioner, on the other hand, vide letter dated 3rd August, 2015, called upon the respondents to pay the demanded amount within 15 days of the said letter, failing which the petitioner threatened to cancel the allotment.

6. As disputes arose between the parties in relation to the above demand and insistence of the respondents for adjustment of the

monthly assured return, it led to the filing of a petition under Section 9 of the Act by the respondents being OMP(I) No.477/2015 before this Court. On 2nd September, 2015, this Court, after noting that parties would explore the possibility of an amicable settlement, recorded the undertaking on behalf of the petitioner herein that no precipitative action shall be taken by the petitioner against the shop in question. Finally, as the disputes could not be settled, on an application under Section 11 of the Act being Arbitration Petition No.515/2016, this Court appointed the present Sole Arbitrator to adjudicate the disputes that had arisen between the parties. The arbitration proceedings, as noted above, resulted in the Impugned Award dated 27th January, 2018.

7. Learned senior counsel for the petitioner submits that on the date of pronouncement of the Award, the petitioner had filed an application under Section 12 read with Section 13 of the Act calling upon the Sole Arbitrator to withdraw himself as the Arbitrator. He submits that this application was filed as the petitioner gained knowledge of the fact that the Sole Arbitrator had appeared in some other connected petition being Arbitration Petition No.467/2017 titled ***Golden Chariot Recreations Pvt. Ltd. vs. Bewealthy Properties Pvt. Ltd. & Ors.***, wherein the three Group Companies of the petitioner herein were respondents. He submits that in view thereof, Entry No.21 of the Fifth Schedule to the Act was attracted giving rise to justifiable doubts on the independence and impartiality of the Sole Arbitrator. Learned senior counsel for the petitioner submits that the Arbitrator has not considered this application and, therefore, the

Impugned Award is liable to be set aside.

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

9. The Arbitrator had been appointed by this Court on 4th November, 2016. The parties had made their final arguments before the Sole Arbitrator on 13th December, 2017. On a request being made on behalf of the petitioner for deferment of pronouncement of the Award on the ground of the petitioner wanting to explore the possibility of an amicable settlement, the Arbitrator fixed the date of pronouncement of the Award as 27th January, 2018. It is only on 27th January, 2018 that the application under Sections 12 and 13 of the Act seems to have been filed before the Arbitrator. Apart from the fact that the apprehension/doubt on the impartiality or independence of the Sole Arbitrator being expressed by the petitioner is too remote in the present case, I find that the above sequence of events would show that this application was filed merely to somehow delay the culmination of the arbitral proceedings into an Award and was *mala fide* in nature. It is not the case of the petitioner that the Arbitrator was aware of the relationship between the petitioner herein and the respondents in Arbitration Petition No.467/2017. Even otherwise, from the Impugned Arbitral Award or other proceedings in the arbitration, it could not be shown by the petitioner if such bias/ impartiality or lack of independence was evident in any manner.

10. In ***HRD Corporation (Marcus Oil and Chemical Division vs. GAIL (India) Ltd. (Formerly Gas Authority of India Ltd.)*** 2017 SCC OnLine SC 1024, the Supreme Court has considered the distinction

between the Fifth and Seventh Schedule of the Act and has held that while the Seventh Schedule covers situations which are more serious being non-waivable, the Fifth Schedule lists situations that may give rise to doubts as to the Arbitrator's impartiality or independence. The two Schedules to the Act are to be construed in the light of the general principles contained therein that every Arbitrator shall be independent and impartial towards the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the Arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedule.

11. In the present case, the only allegation made against the Sole Arbitrator being based on Entry no.21 of the Fifth Schedule, the same therefore, is not an absolute bar or disqualification for the Arbitrator.

12. Having considered the allegations made, even on facts, the same cannot give rise to even an iota of doubt against the impartiality or independence of the Arbitrator in question.

13. Learned senior counsel for the petitioner has contended that the Arbitrator has refused to consider the objection of the petitioner under Sections 12 and 13 of the Act on the ground that after signing of the Impugned Award, he had become *functus officio*. In this regard, learned counsel for the petitioner has drawn my reference to the letter dated 29th January, 2018 addressed by the Sole Arbitrator to the

learned counsel for the petitioner. The learned senior counsel for the petitioner placing reliance on the judgment of the Supreme Court in *Union of India vs. Tecco Trichy Engineers and Contractors* AIR 2005 SC 1832 has submitted that the arbitral proceedings terminate within the meaning of Section 32 of the Act only after all the conditions, including that of delivery of an Arbitral Award under Section 31(5) of the Act are complied with. He submits that in the present case, the copy of the Arbitral Award was received by the petitioner only on 30th January, 2018 and, therefore, till that date, the arbitration proceedings had not terminated and the Arbitrator had not become *funtus officio*. The Arbitrator should have, therefore, considered the application under Sections 12 and 13 of the Act filed by the petitioner.

14. As noted in the letter dated 29th January, 2018, the Arbitrator had pronounced the Award in the presence of both the parties on 27th January, 2018. It was only after signing of the Award that the petitioner sought to move the application under Section 12 read with Section 13 of the Act challenging the mandate of the Sole Arbitrator. Section 31 of the Act provides for ‘Form and contents of Arbitral Award’. Section 31(5) of the Act states as under:-

“(5) After the arbitral award is made, a signed copy shall be delivered to each party.”

15. Therefore, after an Arbitral Award is made, Section 31 (5) of the Act mandates delivery of a signed copy thereof to each party. The parties were admittedly present at the time of pronouncement and the

petitioner could have very well taken a copy of the Award from the Arbitrator at that stage. In any case, the said issue is not of much importance in the present case, in view of my observation above that no case for impugning the impartiality or independence of the Arbitrator was made out by the petitioner.

16. Learned senior counsel for the petitioner contended that in the present case, there were two independent Agreements executed between the parties; one in form of Letter of Allotment dated 22nd December, 2009, which contained an Arbitration Agreement between the parties and the second in form of the Memorandum of Understanding dated 22nd December, 2009, which does not contain any Arbitration Agreement between the parties. He submits that in terms of clause 44(b) of the Letter of Allotment, it was only the disputes arising out of or touching upon or in relation to the terms of the allotment letter that were referable to the arbitration. The dispute with respect to petitioner defaulting in making payment of the monthly return under the Memorandum of Understanding dated 22nd December, 2009 was, therefore, not arbitrable in the present case. Learned senior counsel for the petitioner further relies upon the judgments of the Supreme Court in ***M.R.Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.*** (2009) 7 SCC 696 and ***Inox Wind Ltd. vs. Thermocables Ltd.*** AIR 2018 SC 349 to contend that in the present case, the MOU did not contain any reference to the Letter of Allotment and, therefore, even by incorporation, the Arbitration Agreement contained in the Letter of Allotment cannot come to the aid of the respondents to contend that the dispute in relation to non-

payment of monthly return was also arbitrable.

17. I have considered the submissions made by the learned senior counsel for the petitioner, however, I find no merit in the same. The MOU dated 22nd December, 2009 clearly makes a reference to the allotment of shop No.104 as allotted in the Letter of Allotment dated 22nd December, 2009. It further refers to the sale consideration, the advance received by the petitioner towards such allotment and the balance sale consideration payable by the respondents. The two documents, therefore, form part of one single transaction between the parties. The Arbitration Agreement between the parties, as noted above, is contained in clause 44(b) of the Letter of Allotment and is reproduced hereinbelow:

“44(b) All or any disputes arising out of or touching upon or in relation to the terms of this provisional Allotment Letter including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitrator shall be appointed by the Company. The arbitration proceedings shall be held at an appropriate location in Delhi/New Delhi. The Courts at Delhi alone shall have jurisdiction in all matters arising out of/touching and/or in connection to this letter.”

18. A reading of the above would show that all disputes ‘in relation to’ the terms of the Allotment Letter and the ‘respective rights and obligations of the parties’ were agreed to be settled through

arbitration. In *Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors.* (2013) 1 SCC 641, the Supreme Court had held that the parties may execute different agreements but all with one primary object in mind. In such circumstances, the performance of any one of such agreements may be irrelevant without the performance and fulfilment of the principal or the mother agreement. In cases involving execution of such agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. In such cases, the Court would normally hold the parties to the bargain of Arbitration and not encourage its avoidance.

19. In the present case, the Sole Arbitrator has also considered this issue in detail and has held as under:-

“.....However, it is important to refer to and go through the various terms and conditions of the MoU as well as the letter of allotment to determine the intention of the parties as far as the aforesaid two documents are concerned. The MoU has been executed on 22.12.2009, which is the same date as that of the letter of allotment. In the opening parts of the MoU a reference is made to the application for allotment for the shop in question made by the Claimants to the Respondent and the Respondent's consent to the application-cum-terms and conditions. The facts about the size of the shop, location, total consideration as well as the advance money and receipts thereof are mentioned in the MoU. The liability to pay the balance amount has been stated to be based on the conditions as prescribed under application-cum-terms and conditions. The MoU further states that this

balance amount shall be payable at the time of handing over the physical possession of the shop. It emerges clearly from a perusal of the MoU that at various points it refers to the terms and conditions of the allotment of the shop in question. These terms and conditions which are referred in the MoU are the terms and conditions which are enumerated in the allotment letter dated 22.12.2009. In this letter of allotment it has been clearly stated that the allotment is subject to the 'terms and conditions' contained in it. Interestingly, these terms and conditions of allotment also contain clause 44(b) i.e. the arbitration clause agreed between the parties. In addition to this, it is also noteworthy that there is no specific date of handing over the physical possession of the shop in question mentioned in either the letter of allotment or the MoU. Instead the Respondent has taken upon itself the obligation to pay Rs. 55,000/- per month to the Claimants as an assured monthly return till the possession of the shop is handed over to the Claimants.

Further, the arbitration clause is widely worded and encompasses all or any disputes arising out of or touching upon or in relation to the terms of the provisional allotment letter including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties. Even if the MoU is treated to be an independent and separate document, it is quite apparent by reading the same that the said MoU is 'in relation to' the terms of the provisional allotment letter. The intention of the parties to inextricably connect the two documents is apparent by the use of the term 'in relation to' inasmuch as admittedly and undeniably the MoU is in relation to the terms of the provisional allotment letter, containing the arbitration agreement between the parties. The importance of the phrase 'in relation to' and application thereof has been discussed in detail by the Hon'ble Supreme Court of India in Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. [(1999) 9 SCC 334]. The Apex court in the said judgment, while analyzing the provisions of Section 85(2)(a) of the Arbitration and Conciliation Act, 1996 held as under:

“23. Section 85(2)(a) of the new Act is in two limbs: (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression - 'in relation to' is of the widest import as held by various decisions of this Court in Daypack Systems (P) Ltd., Mansukhalal Dhanraj Jain, Dhanrajamal Gobindram and Navin Chemicals Mfg. This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word “to” could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act.”

In addition to the foregoing, it is also relevant to note that in its letter dated 15.07.2015, where the Respondent offered the possession to the Claimants while raising demand for balance payable amounts, the Respondent very clearly mentioned that the payment as demanded can be made after deducting the unpaid amount of 'assured return'. The payment being demanded was under the terms of the allotment application and

the liability of the Respondent to pay the assured return was under the MoU. Further, in its letter dated 03.08.2015, the Respondent has very clearly stated "However, in order, to afford you last opportunity, you are hereby advised to make the following payment which are due towards the above unit after adjusting the payment due to us / you in terms of our MoU/ contract/ allotment letter with you:-".

From the above, I have no hesitation in coming to the conclusion that the arbitration agreement between the parties itself takes into its scope any dispute that may arise in relation to the transaction between the parties and it makes no difference even if the MoU was signed separately/ independently by the parties. That was the intention of the parties right from the beginning and the Respondent's contention that any claim arising from the MoU is distinct and independent of the agreed terms and conditions of the allotment and therefore outside the scope of the present arbitration proceedings is incorrect being against the agreement of the parties as well as the clear meaning and interpretation of the arbitration clause/ agreement between the parties. The preliminary objection raised by the Respondent against reliefs Nos. 1, 2 and 3 is therefore rejected."

20. The Arbitrator has therefore, considered the evidence led before him and also interpreted the Agreement to come to the conclusion that the two Agreements form part of one single transaction and the disputes between the parties are therefore, arbitrable. I have no reason to disagree with such finding of the Arbitrator.

21. Learned senior counsel for the petitioner lastly contended that the respondents were in default of the payment terms and, therefore, were not entitled to the specific performance of the Agreement. He submits that Clause 4 of the Letter of Allotment stipulates that the respondents shall pay the balance consideration on offer of possession

of the shop. In the present case, the respondents, however, instead of making payment of the demanded amount, called upon the petitioner to simultaneously hand over the possession of the flat as a condition for making payment of the balance sale consideration. The learned senior counsel for the petitioner submits that this was a breach of the payment terms entitling the petitioner to terminate the allotment. The petitioner in exercise of its power, terminated the allotment in terms of its letter dated 3rd August, 2015 and, therefore, the Arbitrator has erred in directing specific performance of such allotment in favour of the respondents.

22. I do not find any merit in the above submission of the learned senior counsel for the petitioner.

23. Admittedly, the petitioner was in default of payment of the monthly returns in terms of the Memorandum of Understanding to the respondents. The respondents vide letters dated 4th August, 2015, 6th August, 2015 and 12th August, 2015 expressed their readiness and willingness to pay the amount demanded by the petitioner after adjusting the monthly return payable to the respondents. In such circumstances, the respondents could not have been said to be in breach of the payment terms. As far as the effect of letter dated 3rd August, 2015 of the petitioner is concerned, it merely recorded that upon failure of the respondents to pay the demanded amount within 15 days, the petitioner may terminate the allotment. No such letter of termination has been shown to have been issued thereafter. Further, in the Interim Order dated 2nd September, 2015, statement of the counsel for the petitioner (herein) appearing therein had been

recorded to the effect that no precipitative action shall be taken. It cannot, therefore, be accepted that the termination of the allotment was valid or in any case had become effective merely by issuance of notice dated 3rd August, 2015 by the petitioner.

24. The Arbitrator has also considered this issue in detail and has given the following findings in this regard:-

“From the perusal of the record, it appears that the Respondent has not strictly adhered to the above prescribed sequence of actions. The Respondent has not given any notice, much less of 30 days, informing the Claimants that it had obtained the certificate for occupation and use from the competent authority. The only notice/information given by the Respondent is the letter dated 15.07.2015 where for the first time the Respondent intimated the Claimants that it was ready to hand over the shop in question to the Claimants. It is relevant to note here that although 15 days time was given to the Claimants to make the payment as demanded, instead of 30 days as mentioned above in the allotment letter, no firm date of handing over of possession was given. It was only stated that possession shall be given in due course. Even though the Respondent did not offer the possession of the shop in question to the Claimants strictly in accordance with the terms and conditions of the allotment letter and MoU dated 22.12.2009 yet this was condoned by the Claimants themselves by their email dated 12.08.2015 whereby the Claimants expressed their willingness to pay the amount of Rs.46,55,150/- simultaneously with receiving the physical possession of the shop. This clearly establishes that the Respondent was in a position to hand over the physical possession of the shop in the month of August 2015, in case the Claimants had paid the balance amount and completed other formalities as contemplated by the agreed terms and conditions of contract between the parties.

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Both the above objections raised by the Respondent must fail.

Firstly the Claimants vide their email dated 04.08.2015 challenged the calculations of payable amount made by the Respondent and pointed out the failure of the Respondent to adjust the outstanding monthly return amount along with interest accrued thereon. The Claimants sought six months' time to make the outstanding payment citing reasons of their financial plan being upset due to non-payment of assured return and delay in completion of the project. Thereafter by their email dated 12.08.2015, which was written after cancellation of meeting by the Respondent fixed for 23.07.2015, the Claimants obviously feeling threatened by the possibility of cancellation of their allotment, agreed to pay the demanded sums after adjusting a sum of Rs.11,55,000/- towards unpaid assured returns for 21 months till the month of August 2015. The Claimants agreed to pay a sum of Rs. 46,55,150/-, which was said to be available with the Claimants, simultaneously with the handing over the possession of the shop in question. The Claimants asked the Respondent to specify the time, venue and name of the concerned person for this purpose. It is a matter of fact that the Respondent did not reply to this email dated 12.08.2015. It is established above that at this stage the Respondent was in breach of the promise to pay to the Claimants the monthly assured returns amounting to Rs. 11,55,000/-, which obviously was a good reason for apprehension in the Claimants' minds about the bona fides of the Respondent - Claimants' insistence to pay simultaneously with getting the possession of the shop therefore is appreciable. In my view the condition raised by the Claimants was justified and cannot be held as evidence to show that the Claimants were not ready and willing to perform their obligations under the contract."

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Secondly, in none of the communications written by the Respondent after their demand notice dated 15.07.2015, there is any reference of any demand towards maintenance charges or holding charges payable by the Claimants. This becomes pertinent in view of the fact that the Respondent in its letter

dated 03.08.2015 threatened the Claimants of cancellation in case the demanded payments were not received within 15 days from 03.08.2015. Although, the Respondent contends that the allotment of the shop stood cancelled upon non-payment of the demanded sums by the Claimants within 15 days of the letter dated 03.08.2015 yet this does not appear to be the correct position inasmuch as in the Respondent's reply dated 21.03.2016 to the Claimants' legal notice dated 30.12.2015, the Respondent expressed its willingness to hand over the physical possession of the shop in question on receiving the payable amounts from them. This also shows that the Respondent's argument of lack of ready and willingness of Claimants in August 2015 is inconsequential."

25. I have no reason to disagree with the findings of the Arbitrator on the above issues.

26. Accordingly, I find no merit in the present petition and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

MAY 01, 2018

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