

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 21.05.2018

+ **O.M.P. (COMM) 351/2016**

ANSAL PROPERTIES & INFRASTRUCTURE LTD...Petitioner

Versus

NIDHI BUILDERS (I) PVT. LTD.

...Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Arush Khanna and Mr Lakshay Mehta.

For the Respondent :Mr Arvind Sharma.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (Ansal) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 02.05.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a Sole Arbitrator, Mr V.S. Aggarwal (Retired) (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties with respect to the 'Collaboration Agreement' dated 28.01.2008 (hereafter 'the Agreement').

2. By the impugned award, the Arbitral Tribunal has rejected Ansal's claim for refund of ₹10 crores paid to the respondent under

the Agreement. Ansal contends that the impugned award is patently illegal as its claim for refund of ₹10 crores was irrefutable.

3. Briefly stated, the relevant facts necessary to address the controversy are as under:-

3.1 In December, 2006, Delhi Development Authority (DDA) invited offers for purchase of freehold commercial plots at four locations in Delhi including Plot No. 9, Sector 20, Part II, Dwarka, New Delhi (hereafter 'the Property').

3.2 On 16.01.2007, the respondent submitted its bids pursuant to the above invitation for an amount of ₹18,32,00,000/- and deposited initial Earnest Money of an amount of ₹4,60,00,000/- to DDA.

3.3 On 04.05.2007, DDA accepted the respondent's bid and issued a letter to the said effect. The initial Earnest Money of ₹4,60,00,000/- deposited by the respondent was arranged by way of a secured loan from Syndicate Bank (hereafter 'the Bank') by providing an undertaking to mortgage the Property with the Bank.

3.4 On 28.01.2008, the bank disbursed a loan of ₹5,84,82,075/- to the respondent, which it is stated was utilized to make payment of a part of the consideration payable for the Property. The respondent required a further amount of ₹10 crores to be paid to DDA as the balance consideration for the Property. In this backdrop, the parties entered into the Collaboration Agreement ('the Agreement'), whereby Ansal was to make the balance payment of ₹10 crores to DDA, *inter*

alia, in consideration for the right to develop, construct, sell and alienate the Property.

3.5 On 28.01.2008, the Bank consented that it had no objection for the parties to enter into the Agreement.

3.6 Thereafter, the respondent executed Power of Attorney and General Power of Attorney in favour of Ansal empowering Ansal to act on behalf of the respondent and to have the exclusive right to sell, mortgage, alienate the Property.

3.7 On 28.02.2008, the Property was conveyed in favour of the respondent. Thereafter, on 06.03.2008, Ansal took possession of the Property. The respondent was under an obligation to keep the Property free and saleable; however, Ansal could offer the Property for sale and the proceeds were to be utilized to pay the Bank.

3.8 The respondent defaulted in the repayment of the loan amount and as the Bank was contemplating enforcement of its security interest, the respondent suggested that the Property be sold. On 29.05.2008, Ansal issued a letter stating that the rights would be assigned with respect of the Property in favour of the new buyer only on receipt of entire payment that is, an amount of ₹10 crores.

3.9 On 02.03.2009, the Bank issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act), as the account of the respondent was declared as a Non-Performing Asset

(NPA).

3.10 On 15.04.2009, Ansal issued a letter requesting the respondent to clear dues and settle the matter and to not create any third party rights in the Property.

3.11 In August, 2011, the Bank filed an Original Application bearing O.A. No. 7/2010 before the Debts Recovery Tribunal-II (DRT) for recovery for a sum of ₹24,17,11,166.20/-. Thereafter, the respondent filed an application praying that the Property be sold by way of public auction. On 31.05.2011, the DRT observed that the Bank is bound to take steps for sale of the Property.

3.12 The Property was sold and the sale proceeds were appropriated by the Bank towards its dues.

4. Mr Arush Khanna, learned counsel appearing for Ansal contended that the Arbitral Tribunal had erred in rejecting Ansal's claim for refund of ₹10 crores along with interest. He stated that the said amount had been paid to the respondent for making payment for the Property in question. Admittedly, the Property had been taken over by the bank and Ansal was deprived of any benefit from the same. He submitted that in the circumstances, the obligation of the respondent to refund the sum of ₹10 crores could not be disputed.

5. Mr Arvind Sharma, learned counsel appearing for the respondent countered the aforesaid submission. He submitted that Ansal had paid a sum of ₹10 crores to acquire development rights of

the Property. The Property was to be developed and sold and the loan taken from the Bank was to be repaid from the sale proceeds. He submitted that since Ansal had failed to develop and sell the Property, the bank had recovered its loan by sale of the Property and, therefore, the respondent had also not derived any benefit from the Property and had no obligation to repay the sum of ₹10 crores.

Reasons and Conclusions

6. At the outset, it is relevant to mention that Ansal had filed a Statement of Claims raising several claims, *inter alia*, claiming that the respondent be restrained from creating any third party rights in the Property and further praying that it be put in possession of the same. In the alternative, Ansal had prayed for refund of ₹10 crores along with interest at the rate of 24% (i.e. 28.01.2008 till 30.06.2013). Ansal had also sought for future interest. In addition, Ansal had also sought damages, which were quantified at ₹9 crores. However, before the Arbitral Tribunal, Ansal had restricted its claim for seeking only refund of ₹10 crores.

7. Ansal had founded its claim on the allegation that the respondent had defrauded Ansal by availing of loans against mortgage of the Property, contrary to the Agreement entered into between them. It was also suggested that in fact, the Agreement entered into between the parties was in the nature of an agreement to sell.

8. The Arbitral Tribunal had considered the same and rejected both the aforesaid contentions. A plain reading of the Agreement

indicates that it was a collaboration agreement.

9. The respondent had acquired the Property from the DDA in an auction at a sale consideration of ₹18,32,00,000/- exclusive of the stamp duties and other charges.

10. In terms of the Agreement, Ansal agreed to pay a sum of ₹10 crores to enable the respondent to pay the same to DDA as the balance consideration. Ansal was to develop the Property at its own costs and was entitled to sell the Property. Out of the sale proceeds received by Ansal from the sale of built up space to prospective buyers, the respondent would be entitled for an amount equal to the sum paid to DDA towards the sale consideration, stamp duty, interest on delayed payment, loan taken from the Bank along with interest thereon upto the date of payment. The balance proceeds would fall to the share of Ansal.

11. It is thus seen that the parties had agreed that the loan of the Bank would be discharged from the proceeds of the Property in question and it is only thereafter that Ansal would be entitled to any share from the sale proceeds of the Property. In the present case, loan taken from the Bank had not been repaid along with interest and consequently, the Bank had sold the Property in discharge of its debt; thus, the question of either party receiving any sum from the sale of the Property did not arise. In the aforesaid context, the Arbitral Tribunal rejected Ansal's claim for refund of ₹10 crores paid to the respondent. Clearly, there was no obligation on the part of the

respondent to repay the said sum, as it was paid as consideration of the right to develop and sell the Property.

12. Before the Arbitral Tribunal, it was urged that the respondent had played a fraud upon Ansal inasmuch as it had not disclosed the loans availed from the Bank against mortgage of the Property. This was not accepted by the Arbitral Tribunal, as the Agreement between the parties specifically recorded that the Property had been mortgaged to the Bank against the loans. It was also clearly stated that the respondent had also availed a loan of ₹4.6 crores on 16.01.2007 for paying the earnest money for purchase of the Property. Recitals of the Agreement also indicated that the balance amount of ₹15,83,41,115/- was due and payable to DDA on account of the balance sale consideration, stamp duty, interest and delayed payments and the said amount was payable on or before 28.01.2008. The relevant recitals of the Agreement are set out below:-

“(b) the First Party has made payment of the initial earnest money amounting to Rs.4,60,00,000 (Rupees Four crore Sixty lacs only) on 16.1.2007 towards the earnest Money as per the terms and conditions of auction.

(c) In accordance with the terms and conditions stipulated in the aforesaid letter dated 04-05-07, the First party is required to make payment of the entire balance sale consideration, Stamp Duty and the interest on delayed payments amounting to Rs.15,83,41,115/- (Rupees fifteen crores eighty three lacs forty one thousand one hundred fifteen only) on or before 28.01-2008.”

13. Ansal had agreed to pay a sum of ₹10 crores. It is apparent that the balance amount of ₹15,83,41,115/- was to be arranged by borrowing from the Bank. Ansal in its statement of claims has also admitted that the sum of ₹5,84,82,075/- was borrowed from the Bank against mortgage of the Property in question. It is thus not in dispute that two loans had been availed from the Bank: ₹4,60,00,000/- paid as earnest money to DDA and a further sum of ₹5,84,82,075/- required to fund the purchase of the Property.

14. Mr Naresh Chander, the Managing Director of the respondent had also testified that the said two loans of ₹4.60 + 5.84 Crores had swelled to over ₹22 crores on account of interest.

15. During the course of arguments, this Court had pointedly asked the learned counsel whether the sale proceeds recovered by the Bank exceeded the loan amount of ₹10.44 crores (₹4.6 crores + ₹5.84 crores) and the accumulated interest thereon and the learned counsel had responded in the negative.

16. The Arbitral Tribunal had correctly noted that the fact that the Property was mortgaged to the Bank was within the knowledge of Ansal. The said finding cannot be faulted, as the Agreement expressly records the fact that the Property was mortgaged to the Bank. As noted above, the plain reading of the Agreement indicates that the sale proceeds of the Property were to be utilized towards discharge of the obligations to the Bank and it is only the remaining amount that could be appropriated between the parties. Since the sale proceeds of the

Property were insufficient to discharge the dues of the Bank, the question of any of the parties recovering any further sums does not arise. In view of the above, Ansal's claim for refund of ₹10 crores is clearly unsustainable and this Court finds no reason to interfere with the impugned award rejecting such claim.

17. The petition is, accordingly, dismissed.

MAY 21, 2018
pkv

VIBHU BAKHRU, J