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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **O.M.P.(I) (COMM.) 207/2017**

SUDHIR KUMAR ..... Petitioner

Through Ms Poonam, Advocate.

versus

ABW INFRASTRUCTURE LTD. FORMERLY KNOWN AS (ADITYA BUILD WELL PVT. LTD.) ..... Respondent

Through Mr Sermon Rawat, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **27.02.2018**

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the respondent be directed to secure the deposit of a sum of ₹2,01,59,401.39/-.

2. The petitioner had entered into three similar Memorandums of Understanding (MoUs) all dated 30.08.2008 for purchase of commercial office spaces measuring 800 Sq. Ft. (74.35 Sq. Metres) each at the consideration of ₹8181/ per Sq. Ft in Platinum Tower, Sohan Road, Malibu Town, Gurgaon. The petitioner has paid a sum of ₹ 65,44,800/- in respect of each of the said MoUs; thus, in aggregate, the petitioner has paid a sum of ₹1,96,34,400/- to the respondent for purchasing commercial space. All these three MoUs are identically worded. The relevant clauses of the said MoUs

read as under:-

"1. That the Developer hereby agrees to Allot to the Buyer and the Buyer hereby agrees to purchase, proposed Commercial Office Space/Unit admeasuring the aggregate tentative Super Area of 800 Sq.ft or say 74.35 Sq. Mtrs. (hereinafter referred to as "the Office Space") subject to final confirmation of area on completion of the proposed building/ complex proposed to be known as "Platinum Tower" proposed to be developed in the vicinity of Gurgaon (Haryana) @ Rs.81811- per sq.ft. of the super area amounting to a total consideration of Rs.65,44,800/- (Rupees Sixty Five Lacs Forty Four Thousand Eight Hundred only). The consideration amount shall be increased or decreased on the basis of actual area to be determined upon completion of the proposed building/complex at the time of final possession.

2. After receipt of the consideration@ Rs.8181/- per sq.ft. of the entire super area i.e. Rs.65,44,800/- (Rupees Sixty Five Lacs Forty Four Thousand Eight Hundred only), the Developer shall give an investment return @ Rs. 75/- (Rupees Seventy Five only) per Sq. Ft. per month of the Super Area i.e. Rs.60,000/- (Rupees Sixty Thousand only) with effect from 01/09/2008 on or before 7th day of every month after the expiry of the month till such time the Developer is not able to lease the Proposed Space.

5. That the Developer upon completion of the construction of the proposed building/complex containing the said proposed Office Space and after all amounts due have been paid by the Buyer with respect thereof in full, the Developer shall cause the proposed Office Space to be leased out as per the then generally prevailing market rates. The Buyer hereby duly authorizes the Developer unconditionally to lease out the proposed office space and shall inform the Buyer about the terms & conditions of the lease as settled with the lessee. The Buyer under no circumstances shall be entitled to lease the said proposed Office Space and/or to

otherwise deal with the same directly without the consent in writing of the Developer. The terms and conditions of lease negotiated by the Developer, as aforesaid, shall be final and binding upon the Buyer. In the event, the Buyer obstructs or neglects or defaults to sign the necessary documents of lease after it has been finalized by the Developer, the Developer shall have the right to terminate the Allotment of the proposed office space in favour of the Buyer and shall further have right to deal with the proposed office space as it may deem fit and proper including right to execute the lease in Developer's own name. In that eventuality this MOU shall stand terminated and the Developer shall return the consideration amount as paid by the Buyer back to the Buyer, only after deducting all the sums paid by the Developer on account of Assured Investment Return to the Buyer.

6. That since the Developer has, as in (clause 2) guaranteed the Buyer an Assured Investment Return of Rs. 75/- (Rupees Seventy five only) per Sq. Ft. per month of the Super Area, the Developer in fulfilment of its above referred guarantee, hereby covenants with the Buyer that in the event the proposed office Space is leased at a gross monthly rental of less than the Assured Investment Return of Rs. 75/- (Rupees Seventy five only) per sq. ft. per month of the Super Area, then the Developer agrees that the sale consideration for the proposed premises shall stand reduced by the amount calculated by the formula given below:

[Assured monthly return of Rs. 75/- per sq. ft. - (less) actual monthly rental (if less than Rs. 75/- per sq. ft. per month) = Rs. "A" multiplied by Rs.109.09 per sq. ft.], towards and by way of compensation to the Buyer for the lower rental than guaranteed where 'A' stands for amount of decrease in rent per sq. ft. per month.

In the event the proposed premises are leased out by the Developer so as to given a monthly rental in excess of the Assured Investment Return of Rs. 75/- per sq. ft per month of the agreed sale consideration of the proposed premises shall stand increased by the amount calculated by the formula given below:

[Actual monthly rental - (less assured monthly return of Rs. 75/-per sq. ft = Rs. ‘B’ multiplied by Rs.54.54 per sq. ft] where ‘B’ stands for the amount of increase of rent per sq. ft. per month.

The increased sale consideration would be payable forthwith by the Buyer to the Developer within 30 days of such written intimation by the Developer to the Buyer. In the event of failure of the Buyer to pay the aforesaid increased consideration in the stipulated time hereinabove, the Buyer shall not be entitled to any Assured Investment Return from the Developer or lease rent from the lessees of the proposed Office Space and the Developer shall appropriate the lease rent till such time the Buyer makes payment of the increased sale consideration. The right, title and interest of the Buyer in the proposed premises shall remain suspended till the time of payment of increased sale consideration. It is further agreed between the parties that the rent received by the Developer shall not be adjusted toward increased sale consideration and the receipt of rent by the Developer shall be the income of the Developer and the Developer shall be fully entitled to reduce the area of the proposed Office Unit proportionately to the amount already received by the Developer from the Buyer after calculating the total sale price based on the increased sale consideration.

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12. In event of any breach of any terms and conditions of this memorandum of understanding by either party i.e. the aggrieved party shall be entitled to enforce the specific performance of this memorandum of understanding and also

> shall be entitled to recover all costs, expenses, losses, incurred by the aggrieved party as result of breach, being committed by the other party.
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> 13. That all disputes or differences arising between the Parties under or in relation to this Memorandum of Understanding, shall be resolved by reference to Arbitration in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be New Delhi only.
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> 14. That Delhi Courts alone shall have the jurisdiction for adjudication of disputes if any between the parties."

3. The petitioner claims that subsequently the respondent persuaded the petitioner to accept 980 sq. ft. of retail space in lieu of the two commercial spaces of 800 sq. ft. each. The petitioner claims that in terms of the said understanding, the petitioner is now entitled to 800 sq. ft. of commercial space and 984 sq. ft. of retail space.

4. The present petition was moved on 25.05.2017 and this Court had passed the following *ad interim* order:

> "In the meantime, the respondent shall ensure that a minimum area of 800 sq. ft. of commercial space and 984 sq. ft. of retails space is secured and remains unencumbered in the property in question, namely, Platinum Tower, Sohan Road, Malibu Town, Gurgaon, which has been developed by the respondent."

5. Although, no reply has been filed on behalf of the respondent, the learned counsel appearing for the respondent had made a statement on 27.07.2017 that "insofar as retail space on the ground floor is concerned, no such space was available as of 25.05.2017 as the entire area already stands alienated". He had further stated that "the commercial space above the ground floor is available and in case, the petitioner was to identify the

commercial space, which is available, the entire disputes can be resolved". Almost, six months have now elapsed and the parties have been unable to resolve their disputes.

6. There appears to be no dispute that the respondent had accepted a sum of ₹1,96,34,400/- and there is no dispute that the petitioner had paid the aforesaid sum as early as in 2006 and 2008.

7. In view of the above, this Court considers it necessary that an appropriate order be passed to secure the petitioner. In the circumstances, it is directed that the respondent shall not transfer, encumber or create any third party interest, or alienate in any manner whatsoever any space in the immovable property Platinum Tower, Sohan Road, Malibu Town, Gurgaon for a further period of 90 days from today.

8. It is further directed that the respondent shall furnish list of all unencumbered assets as well the details of all the bank accounts to the petitioner within a period of 30 days from today.

9. The petitioner is at liberty to invoke the arbitration clause. The petitioner is also at liberty to seek extension of this order and/or further interim orders/measures from the Arbitral Tribunal as and when constituted. The respondent is also not precluded from seeking vacation/variation of the interim order passed today. The Arbitral Tribunal shall consider the applications uninfluenced by any order passed in these proceedings.

10. The petition is disposed of with the aforesaid directions.

VIBHU BAKHRU, J

FEBRUARY 27, 2018/pkv