

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

+ **OMP(COMM) Nos. 511/2018 &512/2018**

% ***17th December, 2018***

+ **O.M.P. (COMM) 511/2018**

JITENDER RAJPAL & ANR. Petitioners

Through: Mr. K. R. Chawla and Mr.
Sudhir Sharma, Advocates.
(7678323196)

versus

ANSAL PROPERTIES & INFRASTRUCTURE LTD.

..... Respondent

Through: Mr. Rakesh Kumar, Mr. Rupesh
Kumar Singha and Ms. Anubha
Singh, Advocates.
(9953940683)

+ **O.M.P. (COMM) 512/2018**

VARUN TANDON & ANR. Petitioner

Through: Mr. K. R. Chawla and Mr.
Sudhir Sharma, Advocates.
(7678323196)

versus

ANSAL PROPERTIES & INFRASTRUCTURE LTD.

..... Respondent

Through: Mr. Rohit Gupta, Advocate
(9953589611)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

O.M.P. (COMM) 511/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 is filed by the claimants in the arbitration proceedings impugning the Award of the Arbitrator dated 27.07.2018 by which the Arbitrator has instead of awarding the claim as made of Rs. 6,77,02,538/- (principal amount of Rs. 1,55,70,000/- and the balance being towards interest due/payable as claimed) has only directed refund of an amount of Rs. 87,60,896/- as refund of the principal amount. The difference of amount which has not been awarded by the Arbitrator in the Award is on account of the fact that though the petitioners had claimed that this difference of amount between Rs. 1,55,70,000/- and Rs. 87,60,896/- was paid in cash, but no credible evidence in the form of documentary evidence was led to show that the respondent ever received this difference amount in cash. Since the discussion on issue no.2 which deals with the issue of refund

of the principal amount with interest, is subject matter of para 8 of the Award, this para 8 read as under:

- “8. Issue No.2: As regards the question whether the Claimants are entitled to claim no.1 for the refund of principal amount with interest, as claimed, be it noted that the Allotment Letter(s) issued by the respondent containing the Terms & Conditions constitute the contract between the parties with regard to the subject matter of these proceedings. Further, in terms of the provisions of the Evidence Act, 1872 as to the 'Exclusion of oral by documentary evidence' when the terms of a contract have been reduced to the form of a document, I am not inclined to accept the plea/deposition of the witness of the claimants that the consideration for the shop(s), at the time of its provisional allotment, was more than what was written in the allotment letter(s). In the given evidential matrix, I am inclined to hold that the consideration for each of the 4 shops was what is stated in the allotment letter of the respective shop. As regards the payment towards the consideration, be it noted that the respondent, with its letter dated 26-05-2011 in respect of GF-09 and 3 letters dated 15-06-2011 in respect of FF-09, FF-10 FF-11, besides informing the claimants of the increase of the size of each of the 4 shops and calling upon the claimants to pay for the increased size of the respective shop at the rates indicated in the said letters, also annexed a Statement of Account in respect of each of the 4 shops viz. indicating that, thus far, the claimants have paid Rs.20,16,000/- towards GF-09, Rs.17,57,800/- towards FF-09, Rs.15,73,381/- towards FF-10 and Rs.34,13,715/- towards FF-11. It would be pertinent to note that in respect of 3 of the 4 shops, namely, GF-09, FF-09 and FF-10, the amount stated to have been paid by cheques i.e. Rs.20,16,000/- towards GF-09, Rs.17,57,800/- towards FF-09 & Rs.15,73,381/- towards FF-10 tallies with the figures indicated in the aforesaid statement of account. It is only in respect of one shop No. FF-11, while the claimant claims to have paid Rs.36,13,715/- by cheques, the statement of account indicated Rs.34,13,715/-. Strangely, the claimant has given cheque nos. in respect of the payments made for 3 of the 4 Shops, namely, GF-09, FF-09 and FF-10 the claimant has failed to indicate the cheque no. of the amount of Rs.2 lakh in respect of shop no. FF-11. In the given circumstances, I am inclined to accept the figure as given in the statement of account in respect of shop no. FF-11, in so far as the payment by cheques are concerned. As regards the alleged payment of a huge amount of

cash, amounting to Rs.1,55,70,000/-for the 4 shops, at the time of booking, in the given evidential matrix, I am not inclined to believe the claimant in this regard. If the claimants had paid any amount over and above what was indicated in the said statement of account, it was expected of the claimants to have 'forthwith' refuted the statement of account annexed with the aforesaid letters. The evidence suggests that it was only in the Legal Notice dated 05-10-2016 (with its addendum dated 29-03-2017) that the claimants, for the first time, put forth its version of the total consideration of each of the 4 shops, the amount alleged to have been paid in cash/cheques. In the given evidential matrix, including the copy of the payment receipts filed by the claimants, I am inclined to hold that the claimants have paid and the respondent has received only the amount(s) as was reflected in the aforesaid statement of account(s). Consequently, the claimants are held to be entitled to the Refund of the sum total of the amounts received by the respondents, and as reflected in their aforesaid statement of account in respect of all the 4 shops being subject matter of these proceedings, namely Rs.20,16,000/- towards GF-09, Rs.17,57,800/- towards FF-09, Rs.15,73,381/- towards FF-10 and Rs.34,13,715/- totaling Rs.87,60,896/- (Rupees eighty seven lakh sixty thousand eight hundred ninety six only) as the Principal amount. As regards Interest, on the principles of parity, the claimants are held to be entitled to interest @ 18% p.a on the various amount(s) comprised in the aforesaid Rs.87,60,896/- (Rupees eighty seven lakh sixty thousand eight hundred ninety six only) from the date of payment/receipt of the respective amount(s) till payment/realization. Claim No.1 is partly allowed in aforesaid terms. This issue is answered accordingly."

(Underlining Added)

2. It is therefore seen that the Arbitrator has awarded the amount of Rs. 87,60,896/-, and this amount is supported by means of necessary documents evidencing this payment, and the Arbitrator has rejected the claim for cash payments alleged to have been paid by the petitioners to the respondent by rejecting the case of the petitioners that simply because it was mentioned by the petitioners in the Legal

Notice dated 05.10.2016 that the cash payment was made, this would not amount to discharge of onus of proof of amounts having been paid in cash to the respondent by the petitioner.

3(i). An Award can only be set aside if the award is against the contractual provisions or the law of land or if the Award is so manifestly perverse that it deserves to be set aside. The relevant principles in this regard are contained in the judgment of the Supreme Court in the case of *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

3(ii). In the present case there is no issue of any violation of the contractual terms or violation of any provision of law, but the issue is as to whether Arbitrator has given a perverse finding in only awarding a sum of Rs. 87,60,896/- instead of 1,55,70,000/- on account of the fact that no credible evidence which can legally prove cash payments existed in the arbitration record as led by the petitioners that the difference of Rs. 1,55,70,000/- and Rs. 87,60,896/- was paid in cash by the petitioners to the respondent. In my opinion, this finding of the Arbitrator in the facts of the case cannot be said to be in any manner perverse because a simple mention by the petitioners in a legal notice

that they have paid a huge amount running into lakhs of rupees would not mean that it is proved that respondent has received the huge amount running into lakhs and lakhs of rupees in cash. Merely because an Arbitrator is appointed in a petition under Section 11 by referring to the Legal Notice dated 05.10.2016, in which, cash payment made are mentioned, it would not mean that the respondent has admitted receipt of lakhs and lakhs of rupees in cash.

5. The Ld. Counsel for the petitioners has sought to place reliance upon the contract document annexure C-35/Ex.C-6, and which contains detailed calculation as to how the price will be charged for the subject shops, however, what is the original agreement price and what is the price actually paid are two totally separate matters, and what is actually paid has to be proved to the judicial conscience of the Arbitrator, and in this regard, the petitioners rightly and miserably failed, as without any documentary proof of making payments of huge amount of lakhs of rupees in cash and an Award could not have been passed in favour of the petitioners and against the respondent for the huge amount which is alleged to have been paid in cash by the petitioner to the respondent.

6. No other ground is urged on behalf of the petitioner, before this Court except as discussed above.

7. There is no merit in the petition. Dismissed.

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In view of the aforesaid discussion, and which applies *mutatis mutandis* so far as this petition is concerned, this petition is also dismissed.

DECEMBER 17, 2018/ib

VALMIKI J. MEHTA,