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

Date of decision: 21st February, 2018

+ **O.M.P. (COMM) 84/ 2018**

S.S. GROUP PVT.LTD. Petitioner
Through: Mr.Aashish Chopra, Mr.Ajiteshwar
Singh and Ms.Shreya Gupta, Adv.
versus

LT. COL. H.S. BEDI (RETD.) & ANR. Respondents
Through: Mr.Ashim Vachher and Mr.Vaibhav
Dabas, Adv.

+ **O.M.P. (COMM) 386/2017**

LT. COL.(RETD.) H.S BEDI & ANR. Petitioners
Through: Mr.Ashim Vachher and Mr.Vaibhav
Dabas, Adv.
versus

M/S NORTH STAR APARTMENT PVT. LTD. & ANR. Respondents
Through: Mr.Aashish Chopra, Mr.Ajiteshwar
Singh and Ms.Shreya Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. Nos.2476-77/2018 in OMP (Comm) 84/2018

Exemption allowed subject to all just exceptions.

I.A. No.2475/2018 in OMP (Comm) 84/2018

1. This is an application seeking condonation of delay in re-filing of the petition.
2. As the respondents has also challenged the Award by way of OMP(COMM) 386/2017 and I propose to dispose of both the objections by this common order, as also taking into account the grounds mentioned in the application seeking condonation of delay, the delay is condoned and the application stands allowed.

O.M.P. (COMM) 84/2018 & OMP (Comm) 386/2017

1. These are petitions under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the ‘Act’) challenging the Arbitral Award dated 18.07.2017 (as amended on 28.08.2017) passed by the Sole Arbitrator. Both of these petitions are being disposed of by this common order. S.S. Group Pvt. Ltd. is hereinafter referred to as the ‘petitioner’ and Lt.Col.(Retd.) H.S. Bedi and Mrs.Maninder Bedi are hereinafter referred to as the ‘respondents’.
2. The disputes between the parties relate to the “Flat Buyer’s Agreement” dated 17.05.2007 by which Pent-House B, having an *approximate* Super Area of 7875 sq. ft. in Building 8, located at Sector 50 Gurugram, Haryana, having a net rate of Rs.5,900/- and preferential location charges of Rs.200 per sq. feet (hereinafter referred to as the “Subject Property”) was allotted by the M/s North Star Apartment Pvt. Ltd. in favour of the respondents Lt. Col. H.S. Bedi (Retd.) and Mrs. Maninder Bedi. The total sale consideration of the Subject Property was agreed at Rs.4,80,37,500/-. Some of the relevant conditions of the Agreement are reproduced herein below:

“WHEREAS:

xxxxxxx

D. The Developer has represented and the FLAT BUYER(S) has specifically noted that the building plans have not yet been approved in respect of the GROUP HOUSING COMPLEX by the DTCP. The DEVELOPER has represented and the FLAT BUYER(S) has specifically noted that the performance by the DEVELOPER of their obligation under this Agreement is contingent upon the approval of building plans by Director, Town & Country Planning, Haryana and being subsequently maintained as valid and any subsequent amendments, additions, alterations and modifications in the building plans as may be made by the DEVELOPER and approved by the Director, Town & Country Planning, Haryana from time to time.

E. The DEVELOPER has represented and clarified to the Flat Buyer(s) that the building plans and the floor plans have been prepared on the basis of guidelines issued by the DTCP/Haryana Urban Development Authority (HUDA) and all the essential requirements had been complied with while preparing the building plans and the floor plans, however, in case the state government authorities direct to make any additions or alterations, the same shall be carried out in accordance with law by the DEVELOPER.

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G. The FLAT BUYER(S) has applied to the DEVELOPER vide application dated 25/09/06 agreeing to the terms and conditions as set out in the application for the allotment of residential Flat No. PHB located in Building No. 8 (hereinafter referred to as the BLOCK) on TOP Floor in the GROUP HOUSING COMPLEX, having an approximate Super Area of 7875 square feet (731.43 sq. mts) (hereinafter referred to as the FLAT areas whereof are tentative and subject to change till the grant of Occupation Certificate by

the competent authority) and for allotment of one open/covered parking space.

H. The FLAT BUYER(S) has understood and has agreed to abide by the terms and conditions as set out in the application form, for the allotment of the FLAT in the GROUP HOUSING COMPLEX, having an approximate Super Area of 7875 square feet (731.43 sq. mtrs.) and for allotment of an open/covered parking space.

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1. SALE OF FLAT AND RIGHTS THERETO

1.1 Consideration for sale of Flat and Rights Thereto

In consideration of the FLAT BUYER(S) complying with the terms and conditions of this Agreement and making timely payments of the SALE PRICE AS PER THE SCHEDULE OF PAYMENTS IN Annexure I the DEVELOPOER hereby agrees to sell and the FLAT BUYER(S) hereby agrees to purchase the said FLAT having a super area of 7875 sq. ft. (731.43 sq. mts.) approx.

1.2 SALE PRICE

a

(d). Super Area

It is made clear that the super area of the FLAT as defined in Annexure II is tentative and subject to change till the construction of the Group Housing Complex is complete. The Sale Price payable shall be recalculated upon confirmation by the Developer of the final super area of the said flat and any increase or reduction in the super area of the said flat shall be payable or refundable without any interest at the same rate per square feet as agreed herein above. If there shall be an increase in super area, the FLAT BUYER(S) agrees and undertakes to pay for the increase in super area immediately on demand by the DEVELOPER and if there shall be a reduction in the super area, then the refundable amount due to the FLAT BUYER(S) shall be adjusted by the

DEVELOPER from the final installment as set forth in the schedule of payments appended in Annexure I.

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(f) Earnest Money

The FLAT BUYER(S) has entered into this Agreement on the condition that out of the amount(s) paid/payable by him/her towards the SALE PRICE, the DEVELOPER shall treat 10% of the SALE PRICE as EARNEST MONEY (hereinafter referred to as the EARNEST MONEY) to ensure fulfilment by the FLAT BUYER(S) of the terms and conditions as contained in the application and this Agreement.

The FLAT BUYER(S) hereby authorizes the DEVELOPER to forfeit out of the amounts paid/payable by him/her them, the EARNEST MONEY as aforementioned together with the processing fee, any interest paid, due or payable, any other amount of a non-refundable nature in the event of the failure of the FLAT BUYER(S) to perform his/her/their obligations or fulfill any/all of the terms and conditions set out in this Agreement executed by the FLAT BUYER(S) or in the event of failure of the FLAT BUYER(S) to sign and return this Agreement in its original form to the DEVELOPER within (30) days from the date of its dispatch by the DEVELOPER.

The FLAT BUYER(S) agrees that the conditions (or forfeiture of earnest money shall remain valid and effective till the execution and registration of the conveyance deed (or the said FLAT and the FLAT BUYER(S) hereby authorizes the DEVELOPER to effect such forfeiture without any notice to the FLAT BUYER(S) and the FLAT BUYER(S) has agreed to this condition to indicate his/her/their commitment to faithfully fulfill all the terms and conditions contained in his/her/their application and this Agreement.

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7.2 Major Alteration/Modification

In case of any major alteration/modification resulting in excess of 10% change in the super area of the FLAT in the sole opinion of the DEVELOPER any time prior to and upon the grant of occupation certificate, the DEVELOPER shall intimate the FLAT BUYER(S) in writing thereof and the resultant change, if any in the SALE PRICE of the FLAT to be paid by him/her and the FLAT BUYER(S) agrees to deliver to the DEVELOPER in writing his/her/their consent or objection to the changes within thirty (30) days from the date of dispatch by the DEVELOPER of such notice failing which the FLAT BUYER(S) shall be deemed to have given his/her/their full consent to all such alterations/modifications and for payments, if any, to be paid in consequence thereof. If the written notice of the FLAT BUYER(S) is received by the DEVELOPER within thirty (30) days of intimation in writing by the DEVELOPER (sic: FLAT BUYER(S)) indicating his/her/heir non-consent/objections to such alterations/modifications as intimated by the DEVELOPER to the FLAT BUYER(S), then in such case alone, this Agreement shall be cancelled without further notice and the DEVELOPER shall refund the money received from the FLAT BUYER(S) within sixty (60) days from the date of intimation received by the DEVELOPER from the FLAT BUYER(S). On payment of the money after making deductions as stated above, the DEVELOPER shall be released and discharged from all its obligations and liabilities under this Agreement. In such a situation, the Developer shall have an absolute and unfettered right to allot, transfer, sell, assign, the FLAT and all attendant rights and liabilities to a third party. It being specifically agreed that irrespective of any outstanding amount payable by the DEVELOPER to the FLAT BUYER(S), the FLAT BUYER(S) shall have no right, lien or charge on the FLAT in respect of which refund as contemplated by this clause is payable.

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ANNEXURE II
DEFINITION OF SUPER AREA

Super area of said Premises shall be the sum of Specific area of the said premises and its nonexclusive pro-rata share of common areas in the said Complex and its periphery. The Specific area of the said Premises shall mean the entire area enclosed by its periphery walls including area under walls, columns and half the area of walls, common with other premises etc., which form integral part of said Premises, including internal balcony(ies), if any. The Common Area shall mean all such parts/areas in the said complex, which the allottee(s) of the said Premises shall use by sharing with other occupants of the said complex including corridors land passage, atrium common toilets, lifts and lift lobby, escalators, area of cooling towers, AHU rooms, security/fire control rooms, staircases, munties, lift machine rooms and water tanks. In addition entire service area in the basement including but not limited to electric substation, transformers, D.G. set rooms, underground water and other storage tanks, AC Plant room, pump rooms, Maintenance and Service rooms, fan rooms and circulation areas etc. shall be counted towards common areas.

The super area of the said premises if provided with usable open terrace/s shall also include full area of such Terrance(s) however the Allottee(s) shall not cover such terraces and shall use the same as open terrace only and in no other manner whatsoever.”

3. In view of the allotment, the respondents have paid a sum of Rs.4,33,28,777/- to the petitioner.
4. The disputes arose when the North Star Apartments Pvt. Ltd. vide its communication dated 28.01.2014 called upon the respondents to pay a further sum of Rs.3,77,64,767/- as the balance sale consideration before taking possession of the Subject Property. This increase in the sale consideration was due to increase in Super Area to the extent of 13000 sq. ft.

5. The respondents challenged the increase in the Super Area and filed a petition under Section 9 of the Act being OMP(I)(COMM) 13/2016 and by an ad-interim order dated 13.01.2016 the petitioner was restrained from transferring/alienating the Subject Property.

6. The Sole Arbitrator was appointed by this Court vide its order dated 25.02.2016 in a petition under Section 11 of the Act filed by the respondents.

7. The Sole Arbitrator, after considering the documents filed before him and taking into account the various conditions of the Agreement, has held that the Super Area mentioned in the Agreement was stated to be tentative and was subject to a change. He has further held that due to change in constructed portion, numbers of the flats being reduced and instead of ground floor the building having to be constructed on stilt, there was a *bona fide* increase in the Super Area. The Agreement itself provides that upon change in the Super Area, the petitioner would be entitled to raise demand based on the Super Area of the flat being finally handed over to the respondents. The Arbitrator further holds that the respondents, though challenged the increase in the Super Area, did not lead any evidence to show that the Super Area as claimed by the petitioner was incorrect. The Arbitrator, therefore, holds that the respondents were liable to pay as per the demand raised by the petitioner. However, relying upon Clause 7.2 of the Agreement, which is quoted herein above, the Arbitrator holds that where there is an increase in the Super Area by more than 10%, an option is to be given to the respondents to either accept such increase in the Super Area or to object to the same. In case of a written notice of the objection, the Agreement was to stand cancelled and the petitioner was to refund the

amount paid by the respondents within a period of 60 days from the date of intimation of the objection.

8. The Arbitrator, after considering the evidence led before him, has concluded that though the respondents were not agreeing to any increase in the Super Area of the flat, at the same time, they were also insisting for the allotment of the flat as per the same terms and did not ask for refund of the amount paid by them to the petitioner. The relevant findings of the Arbitrator are quoted herein below:

“23. It is quite clear that the claimants were not agreeing to any increase in the super area of the flat which would have resulted in increase in consideration of the flat. The respondents are not right in arguing that the claimants had not objected to the demand raised by the respondents asserting increase in super area of the flat within 30 days of receipt of the letter issued by the respondents on 28-01-2014 (R-5). In e-mail dated 2-2-2014 the claimants have raised objection to any increase in super area and made queries as to the super area had increased. It is correct that the claimants were not right in claiming that there could not occur any increase in super area without any increase in carpet area of the flat. Despite getting all relevant documents from where any Architect could have easily determined the total area of common facilities and services and total area of the flats and calculated the pro rata rate.

24. It is self evident that at the time the allotment letter was issued and later agreement was executed the sanctioned plan had larger number of flats to which the area of common facilities and common services were to be allocated pro rata area of the same but in reduction in number of built in flats obviously resulted in increase in super area of such flats including the flat in question. The respondents in the statement of defence given some example

of such other flats where buyers have accepted increase in super area.

25. Be as it may the Clause 7.2 of the agreement envisaged cancellation of the agreement on the claimants objecting any increase in super area but the respondents had chosen not to do so. The claimants had also not in correspondence asked for refund of the amount already paid and had insisted on getting the flat at the original price. I have seen the judgments cited by the learned counsel for the claimants and the response of the learned counsel for the respondents in written arguments showing non applicability of the same to the facts of this cases and I find none of those cases are of any help in deciding this matter.

26. The claimants had not even agreed to pay the price of super area of 9043sq.ft. offered by the respondents during these proceedings and they have cared to disclose as to whether they had got the super area calculated in terms of contractual provisions from any Architect which easily could have been done on the basis of all relevant documents placed on the record at the instance of the claimants. In view of the said reasons I hold that the claimants are not entitled to have the flat in question at the original price and the claim in that respect is rejected.

27. Keeping in view the purport of the Clause 7.2 of the contract I hold that the respondents are liable to refund the amount already paid. And I allow this amount to the claimants. The other claims raised by the claimants have no merit as the claimants continued to make payments despite the original period of completion had expired without reserving any right to claim any compensation for delay in completion of the project and more over having agreed to change the payment schedule of the original agreement to construction level schedule. Thus other claims of the claimants are rejected.”

9. Learned counsel for the petitioner submits that as the respondents have failed to object to the increase in the Super Area within 30 days as provided in the Clause 7.2 of the Agreement, the respondents were not entitled to the refund of the amount paid by them. He further submits that the email dated 02.02.2014 cannot be read as an objection to the increase in the Super Area as contemplated in Clause 7.2 of the Agreement.

10. I am unable to agree with the submission made by the learned counsel for the petitioner. The Arbitrator has relied upon the conduct of the parties as also the correspondence exchanged between them to conclude that the respondents had objected to the increase in the Super Area and this was known to the petitioner during the relevant time. Whether the said objection was justified in terms of the Agreement or not is a separate question. This being a finding on fact, this Court in exercise of its power under Section 34 of the Act cannot sit in appeal over the same. In view of the fact that the Super Area of the subject property stood increased from 7875 sq.ft. to 13000 sq.ft, i.e. an increase of almost 65%, the petitioner cannot force the respondents to accept the Subject Property or to loose their investment. I, therefore, find no merit in the objections of the petitioner to the Impugned Award.

11. The respondents have also challenged the Impugned Award by way of their own petition under Section 34 of the Act, being OMP(COMM) 386/2017. The contention of the learned counsel for the respondents is that in terms of Clause 7.2 of the Agreement, once an objection is raised by the respondents to the increase in the Super Area, the Agreement automatically stands terminated and the petitioner is liable to refund the payment so received by it within a period of 60 days. He submits that there is no

requirement in Clause 7.2 for the respondents to separately seek refund of the said amount. He submits that as it is the obligation of the petitioner to make the refund within 60 days of such objection, the respondents shall be entitled to interest over the said amount with effect from that date. Counsel for the respondents also relies upon the judgment of the Supreme Court in ***Dushyant N. Dalal and Anr. V. Securities and Exchange Board of India*** (2017) 9 SCC 660, to contend that even in equity the respondents would be entitled to interest from the date on which the cause of action arose in their favour i.e. upon their objection to the increase in the Super Area.

12. I am unable to agree with the submissions made by the counsel for the respondents. It is to be noted that the effect of objection is the cancellation of the Agreement itself. The respondents never agreed to the cancellation of the agreement, but kept insisting on the allotment of the Subject Property at the same rate as was mentioned in the Agreement.

13. In fact, in a petition under section 9 of the Act filed by the respondents, this Court had restrained the petitioner from alienating or creating a third party interest in the Subject Property and this order of restraint had continued right through the Arbitration Proceedings. Therefore, the petitioner could also not use the Subject Property freely.

14. Counsel for the petitioner also points out that the respondents had taken a loan from HDFC Bank against the Subject Property and the HDFC Bank, through its letter dated 07.06.2016, had communicated to the petitioner that on account of an indemnity bond executed by the respondents, the bank stands subrogated in place of the respondents in the said Agreement. Counsel for the petitioner, in my opinion rightly so, contends that the respondents having not claimed refund of the amount from

the petitioner at the relevant time and in fact obtaining a restraint order on the petitioner from dealing in the subject property, are not entitled to any interest being awarded in their favour.

15. In view of the above, I find no merit in the objection petition(s) filed by the petitioner and the respondents and both the petition(s) are dismissed with no orders as to costs.

I.A. No.2478/2018 in OMP (Comm) 84/2018

In view of the dismissal of the petition, the present application is rendered infructuous and is accordingly dismissed.

NAVIN CHAWLA, J

FEBRUARY 21, 2018/Arya