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

Date of order: 18.12.2018

+ **FAO(OS) (COMM) 305/2018**

R K MILLEN & COMPANY
(INDIA) PVT LTD & ANR

..... Appellants

Through: Mr. Dhruv Surana, Mr. Ashish
Choudhary, Advocate

versus

NATIONAL BUILDING CONSTRUCTION
CORPORATION LTD

..... Respondent

Through: Mr. Debarshi Bhadra, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (Oral)

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CAV No.1191/2018

Since the respondent has been represented through counsel -
Mr. Debarshi Bhadra, therefore the caveat stands discharged.

C.M. Appl. No. 53325/2018 (Condonation of delay of 24 days)

By this application, the appellant seeks condonation of delay of 24
days in preferring the appeal.

For the reasons stated in the application, the same is allowed and the
delay of 24 days in filing the appeal is condoned.

The application stands disposed of.

FAO(OS) (COMM) 305/2018, C.M. Appl. No. 53326-53327/2018

1. The appellant is aggrieved by an order dated 17.09.2018, passed by the learned Single Judge, dismissing the appellants' petition under Section 34 of the Arbitration & Conciliation Act, 1994 [hereafter referred to as the "Act"] and upholding an award dated 28.02.2014.
2. The parties entered into a Memorandum of Understanding dated 05.10.2007 [hereafter referred to as the "MOU"] under which it was agreed that a piece of agricultural land of about 34.83 acres owned by the appellants [hereafter referred to as the "subject property"] would be developed by them in partnership on the terms and conditions stated thereunder. The respondent herein was required to make a payment of ₹10 crores to the appellants in lieu of transfer of the subject property to the proposed partnership firm. The appellants were required to attempt to acquire contiguous parcels of land out of the sale proceeds. One of the obligations of the appellants under the MOU was to apply for and obtain change of the land use ("CLU") from agricultural to residential-cum-commercial, in order to enable development of the proposed project. Pursuant to the MOU, the parties entered into a partnership deed dated 09.10.2007, in which they had a 50% share each. The partnership deed also reflected the appellant's obligation to apply for the change of land use. A supplementary MOU dated 20.11.2007 and supplementary deed of partnership dated 28.11.2007 were entered into between the parties. The sum of ₹10 crores was paid by the respondent to the appellant on 28.11.2007, and the subject property was transferred to the partnership firm.
3. Soon after these agreements were entered into, and before the transaction between the parties could be completed, land acquisition

proceedings in respect of the subject property were commenced by a notification under Section 4 of the Land Acquisition Act, 1984, dated 07.07.2008, followed by a declaration dated 23.05.2008 under Section 6 of the said Act. The appellants claim to have acquired knowledge of the land acquisition proceedings only in June, 2008, upon being served with two notices under Section 9 of the said Act dated 09.05.2008. Although the land acquisition proceedings were challenged before the Calcutta High Court, by the respondent as well as the partnership concern, it appears that the said challenge was ultimately not pressed. The petitioner itself also filed various proceedings in the Calcutta High Court against the acquisition proceedings, with which we are not concerned for the purposes of the present appeal.

4. The disputes which was referred to arbitration arose out of a letter dated 05.12.2008 from the respondent to the appellant claiming refund of the sum of ₹10 crores paid by it and expenses incurred by it pursuant to the transaction, along with interest @ 20% per annum on the ground that the appellants had not obtained permission for change of land use within the period of 12 months stipulated in the MoU. The respondent relied upon clause 8.8 of the MOU, which provides as follows:

“8.8 CLU application will be made by RKM within 90 days of receipt of payment. In case the CLU is not obtained by RKM within 12 months from the date of payment of Rs.10 crores by NBCC to RKM, NBCC shall have the option to treat the agreement as terminated, in which event NBCC will be entitled to recover from RKM the sum of Rs.10 crores paid to RKM Plus any other expenditure incurred by NBCC in the project on behalf of PARTNERSHIP FIRM along with interest @ 20% p.a. On payment of the amount as aforesaid the total land will be transferred from Partnership Firm to RKM. If RKM fails to refund the sum of Rs.10 crores Plus any other expenditure incurred by NBCC in the project on behalf of PARTNERSHIP

FIRM along with interest @ 20% p.a within 30 days of the receipt of a notice of demand from NBCC in writing, NBCC shall have the unfettered right to sell the land standing in the name of the Partnership Firm in the open market at the then prevailing market price through press advertisement to the extent or any part thereof, to recover their dues as mentioned above from the sale proceeds and the balance amount if any will be refunded to RKM.

RKM unconditionally undertakes to refund the sum of Rs.10 crores Plus any other expenditure incurred by NBCC in the project on behalf of PARTNERSHIP FIRM along with interest @ 20% p.a. w.e.f. the date of payment of Rs.10 crores by NBCC to RKM to the date of realization within 30 days of the receipt of a notice of demand from NBCC, as aforesaid, RKM shall also furnish at the time of transfer of land to partnership firm, a Power of Attorney (PoA) duly registered in favour of NBCC to dispose of the land standing in the name of the Partnership Firm so that NBCC can recover their amount as mentioned above Apropos grant of CLU the PoA shall be discharged. (PoA proforma enclosed). ”

By an order dated 29.11.2011, in an application under Section 11 of the Act, this Court appointed Dr.Justice M.K.Sharma, a former Judge of the Supreme Court as the sole arbitrator to adjudicate the disputes between the parties.

5. On an interpretation of the said clause and appreciation of the evidence adduced before him, both documentary and oral, the learned Arbitrator found that the appellants herein had been negligent in discharging their responsibility to obtain the change in land use certificate within the period of twelve months stipulated in the MOU. They had also not replied to the demand letter of the respondents dated 05.12.2008. In the circumstances, the learned Arbitrator awarded refund of the sum of ₹10 crores, and charges incurred towards stamp duty and registration of the sale

deeds, alongwith interest @ 20% per annum. Upon payment of the said amounts, it was held that the appellants would be entitled to return of the subject property. Against this award, the learned Single Judge has declined to interfere by the impugned judgment dated 17.09.2018.

6. We are of the view that the appellants have failed to make out any ground for setting aside of the award under Section 34 of the Act. It is undisputed that the appellants were responsible for obtaining the change in land use which was required for the project to commence. The parties had clearly provided for the consequence of a failure to obtain the said certificate within twelve months in Clause 8.8 of the MOU. This is not a case of a concluded sale between two parties, after which acquisition proceedings have commenced, but a case where parties were under continuing obligations to each other, which were directly related to the transaction in the subject property. The intervention of the land acquisition proceedings very soon after the MOU and partnership deed were entered into may well have rendered impossible the completion of the project as expected by the parties, but this by itself does not take the matter out of the purview of clause 8.8 of the MOU. We, therefore, reject the contention of the appellants that the acquisition proceedings operated as any kind of *force majeure*, or that the only recourse available to the respondent was to claim 50% of the compensation ultimately granted in lieu of the acquisition, being its share of the partnership property. In any event, the findings returned by the learned Arbitrator are based on an interpretation of the contractual provisions and appreciation of the evidence before him. This is, therefore, not a case which falls within the limited grounds of interference under Section 34 of the Act, as laid down by the Supreme Court *inter alia* in *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49.

7. In the facts and circumstances aforesaid, the impugned order of the learned Single Judge does not call for any interference. The appeal is accordingly dismissed.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

DECEMBER 18, 2018

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