

\$~24

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 15th April, 2019
+ **O.M.P. 1125/2014**

VINOD SETH(DECEASED) THR
KUNAL SETH AND ANR. Petitioners
Through Mr. P.K. Rawal, Mr. Tarun Agarwal
& Mr. Rishabh Sharma, Advocates
(M-9810008623)
versus

SUDERSHAN KUMAR BHAYANA & ANR. Respondents
Through Mr. Sanjeev Kumar Baliyan,
Advocate (M-9818340105)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition arises out of award dated 21st October, 2013 passed by the Ld. Sole Arbitrator. The disputes arose out of agreement dated 9th April, 2010 by which the Petitioner – Sh. Vinod Seth agreed to construct on the property of Mr. Sudarshan Kumar Bayana, i.e, property bearing no. 40, Block F-1U, Pitampura, Delhi. As per the agreement, the builder had to construct “1/3rd parking plus 2/3rd basement with water proofing work, upper ground floor, first floor, second floor and third floor with all the fittings and furniture as per A-class construction.” In lieu thereof, the builder was to retain the second floor of the property. The builder had to pay a total sum of Rs.64 lakhs, in addition, in three separate instalments. The time period given for carrying out the construction was 12 months or earlier along with a grace period of two months. Subsequently, the owner would be entitled to Rs.10,000/- per day as penalty. As per clause 13 of the agreement,

if the owner breaches the agreement, he was to refund double of the earnest money. If the builder breached the agreement, the earnest money and the compensation amount was to be forfeited by the owner.

2. The building plan for the property was sanctioned on 31st December, 2010 and extension of 3 to 4 months was given by the owner. In August, 2011, disputes arose between the parties and on 11th November, 2011, the owner terminated the contract. Vide letter dated 13th January, 2012, the owner forfeited the earnest money and also called upon the builder to pay a sum of Rs.55 lakhs.

3. A petition under Section 9 of the Arbitration and Conciliation Act, 1996 came to be filed before this Court and on 18th May, 2012, the owner was restrained from alienating, disposing of or dealing with or creating any third party interest in respect of the second floor.

4. An application for vacation of stay was moved by the owner which was heard on 21st September, 2012. On the said date, the Ld. Single Judge of this Court referred the disputes to arbitration by the sole Arbitrator and the interim order was modified. The said order is extracted herein below:

“1. This a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (‘Act’) filed by the Petitioner, Mr. Vinod Seth, (‘Builder’) against the Respondents, Mr. Sudershan Kumar Bhayana and Smt. Kiran Bhayana, who in the agreement dated 9th April 2010 are described as the joint owners of a property bearing No. 40, Block F1U, measuring 242 sq. yards, Pitampura, Delhi ? 110034 (‘the property in question’).

2. In terms of the said agreement, after demolishing the existing structure, the Builder was to construct 1/3rd parking plus 2/3 basement with guiniting work

(water proofing), upper ground floor, first floor, second floor and third floor with all fittings, fixture and finishing work as per A class construction. The Builder was to pay the Respondents a sum of Rs. 64 lakhs in the manner as set out in para 4 of the agreement. The Builder was entitled to get the rights of second floor, without roof right and without possession, for which the sale deed was to be registered separately.

3. With disputes arising between the parties, the Builder invoked the arbitration clause by sending a notice on 26th December 2011 to the Respondents.

4. When the present petition was listed on 18th May 2012 this Court restrained the Respondents from changing the existing position of the structure(s) on the property in question and directed them to maintain status quo as regards title and possession. Thereafter, the Respondents filed IA No. 11098 of 2012 for vacating the interim order. The parties' efforts at settlement through mediation were not successful.

5. Learned counsel for the parties state that the parties are agreed that the disputes could be referred to an Arbitrator appointed by this Court.

6. Learned counsel for the Respondents states, on instructions, that without prejudice to their rights and contentions, the Respondents are willing to maintain status quo as regards the second floor of the property in question, as and when it is constructed, till the conclusion of the arbitral proceedings.

7. Consequently, the interim order passed by this Court on 18th May 2012 is modified by directing that the Respondents will not alienate, dispose of, encumber or deal with or create any third party right

in respect of the second floor of the property in question, as and when it is constructed, during the pendency of arbitral proceedings. This is without prejudice to the rights and contentions of either party.

8. The contention of the Builder that he is entitled to half of the basement plus one car parking space, will be examined by the learned Arbitrator.

9. This Court appoints Mr. V.K. Gupta, (Retd.) District and Sessions Judge, r/o E-63, Sector-39, Noida 201302 (Mobile No. 9871124531) as sole Arbitrator to adjudicate the disputes including the claims and counter-claims of the parties. The parties are agreed that the arbitration can take place under the aegis of the Delhi High Court Arbitration Centre (DHCAC). It is ordered accordingly. The fees of the learned Arbitrator will be in terms of the DHCAC (Arbitrators Fees) Rules.

10. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Co-ordinator, DHCAC forthwith."

5. The matter was then referred to arbitration under the aegis of the Delhi High Court Arbitration Centre. The parties filed their pleadings and evidence was also led. The impugned award thereafter came to be passed by the Ld. Arbitrator on 21st October, 2013.

6. Vide the impugned award, the Ld. Arbitrator has arrived at the following findings:

- i) That time was of the essence of the contract;
- ii) That an oral amendment to the contract was not permissible in view of Section 92 of the Indian Evidence Act, 1872;

- iii) That the construction was started by the contractor but was stopped in August, 2011 in view of the various sanitary and health issues which arose in the site;
- iv) Various documents including notices issued by the MCD, Police and the Magistrate showed that the contractor was careless and did not maintain healthy environmental conditions at the site;
- v) The builder was in breach of the agreement dated 9th April, 2010;
- vi) Damages were awarded as per the agreement at Rs.10,000/- per day as laid down in clause 7 of the agreement;
- vii) The period for which the same has been calculated is 9th April, 2011 to 8th April, 2013;
- viii) Insofar as the contractor was concerned, refund of the entire Rs.45 lakhs which was the earnest money paid by the contractor was awarded along with the cost of construction of Rs.36,92,400/- for the construction of the basement, stilt parking as also the ground floor area.

7. Finally, the Ld. Arbitrator passed an award in the following terms:

“I hereby direct that (i) the claim is allowed to the effect that he is entitled to claim Rs.72 lacs from the Counter-claimant, (ii) The Counter-claim is partly allowed to the extent that the respondent/Counter claim is entitled to recover Rs.81,92,400/- from the claimant, (iii) Both the parties shall bear their own arbitration costs.”

8. On behalf of the builder – Mr. P.K. Rawal, Ld. Counsel has submitted that time was not the essence of the contract as the extension was admittedly given by the owner. This fact was admitted by the owner in his evidence. He further submits, even if there is a breach, damages cannot be

awarded as mentioned in the agreement, unless the factum of loss is actually established in terms of the judgments in *Fateh Chand v Balkishan Das (1964) 1 SCR 515* and *Kailash Nath Associates v Delhi Development Authority (2015) 4 SCC 136* etc. In his submission, forfeiture of the entire earnest money is completely unjustified in these facts. The award of Rs.10,000/- per day as penalty, for a period of almost two years is totally unjustified as even as per the agreement, the time for construction was 14 months. Further there is no basis for awarding the amount for a period of 9th April, 2011 to 8th April, 2013. He further submits that the builder had admittedly started construction of ground floor as of July, 2011 even as per the owner's testimony.

9. On the other hand, Ld. Counsel for the owner submits that the factum of breach has been held against the contractor. In fact, the contractor, after termination of the contract and despite the construction not being complete, executed a Power of Attorney in favour of some third party which shows his *mala fides*. Moreover, the owner was compelled to terminate the agreement as repeated notices were being issued by the governmental authorities in view of water logging and bad construction etc. He further submits at the time of signing of the agreement, the contractor was well aware that he would be liable to pay a sum of Rs.10,000/- per day as penalty. It is accordingly submitted by Ld. Counsel for the Respondent that the award passed by the Ld. Arbitrator is wholly justified.

10. This Court has gone through the award as also the testimony of the two witnesses who had appeared for the respective parties. The builder- Mr. Vinod Seth has submitted that for establishing the cost of construction, he obtained receipts from the labour/contractor. However, the said receipts

were misplaced. Thus, for the construction which was carried out and the expenses of Rs.36,92,400/-, there was no evidence whatsoever on record for awarding the same to the builder.

11. He also admits, that MCD sent various challans to him for creating an unhealthy environment at the site of construction. He further admitted that water proofing in the basement was not done as the graniting was still pending. He was not able to establish on record that the shuttering material had been called for at the site.

12. On the other hand, the owner also appeared and submitted that the architect prepared the map of the building with the consent of both the parties. The MCD thereafter sanctioned the plans. He admits that *“It is true that the respondent had constructed the independent basement floor and parking according to the map, annexure CC-2”*

13. He admits that it took four to five months for the parties to arrive at an oral agreement in respect of the plans. He stated that he was not aware as to when the construction was started by the builder. In response to the question as to whether the construction of the basement and the parking was completed by July, 2011, the owner stated that he did not remember the same. However, he admitted that after July, 2011, the construction of the ground floor was put in place. The owner further admitted that he did not invoke arbitration but he started construction on his own from February, 2012. He stated that he did not obtain any permission from the Court for commencing the construction. Curiously, the owner also does not mention as to how much expenditure he incurred for floor wise construction of the building.

14. In the present case, the evidence on the record is sketchy on both

sides. Apart from the admitted agreement and notices and letter of termination, there is no evidence on damages by either side. The facts that can be gathered from the agreement and evidence are that till August, 2011, the builder was undertaking construction in the property however, from August, 2011, onwards stopped the construction. Thus, the construction was stopped midway and reasons for the same are not far to seek as it appears that the MCD and police issued various notices in respect of the construction of the building. This would have obviously put the owner to enormous harassment and frustration. The owner had no option but to terminate the contract, which was done on 11th November, 2011. The finding by the learned Arbitrator that the contractor was in breach is borne out from the record and does not deserve to be interfered with. The question of monetary compensation arises from both sides as there are claims and counter claims by the parties. The admitted position is that the builder has paid Rs.45 lakhs as earnest money, and the same has been directed to be refunded by Id. Arbitrator. In addition, the Id. Arbitrator has awarded a sum of Rs.36,92,400/- as claimed, by the builder, in his favour. Thus, a total sum of Rs. 81,92,400/- has been awarded to the builder. Admittedly no evidence was led in respect of the construction which was undertaken by the builder. Both the parties have not led evidence in respect of the charges which were incurred for construction. The total area constructed by the builder is not in doubt. The cross examination shows that no receipts were placed on record by the builder to support the cost of construction, though of course the factum of construction cannot be disputed. The total area constructed by the builder is: basement - 1728 sq. feet, stilt parking -1728 sq. feet, ground floor – 1728 sq. feet, plus *chajja* - 116 sq. feet. The claims have been made

by the contractor on the basis of Rs.900/- per sq. foot for the basement and Rs.600/- per sq. foot for remaining floors. There being no evidence on record in respect of this amount, Id. Arbitrator simply accepted the entire claim of the contractor. Since the owner has not challenged the awarded amount by means of a petition under Section 34 of the Act, this court has no choice but to uphold the award for the construction. In so far as the refund of earnest money deposit of Rs.45 lakhs is concerned, the various documents including the notices from the MCD and the Police do show the breach by the Contractor. Thus, Rs.45 lakhs earnest money which has been mentioned in the agreement can be forfeited since the contractor is held to be in breach

15. Clause 13 of the Agreement between the parties reads as under:

“That if the first party breaches the agreement in any way without any proper reason he will be liable to pay double of the earnest money only and if second party breaches the agreement the earnest money and the compensation amount will be forfeited by the first party.”

16. As per the above clause, the owner is entitled to earnest money, as also the compensation amount. As per the settled law, whenever there is a clause of this nature, the pre-determined sum is the maximum that can be awarded in such a case. The factum of loss is to be proved in order to be able to justify forfeiture. The factum of loss having been established by the owner i.e. in view of various notices issued by the Governmental authorities, the question arises as to whether the entire amount should be permitted and what should be the compensation amount to be paid to the owner.

17. The Arbitrator has awarded compensation of a sum of Rs.72 lakhs by calculating the period of delay w.e.f. 9th April, 2011 to 8th April, 2013.

Admittedly, the construction was continuing till August, 2011. Thus, the start date of compensation as 9th April 2011 is without any basis, hence, the start date should be 09th August, 2011. The further error in the Arbitrator's award is taking the full period of two years for compensation which is liable to be granted. As per the agreement itself, the total period contemplated for completing the construction was 12 months, plus two months grace period. Thus as per the parties themselves, the construction could be completed in a total period of 14 months. It is the admitted position that some part of the building has in fact been constructed by the Contractor. Accordingly, the period for which compensation is payable is restricted from 9th August, 2011 till October, 2012 @ Rs.10,000/- per day as specified in the contract.

18. With these modifications, the award is upheld and the OMP is disposed of. All the pending applications are also disposed of as infructuous.

PRATHIBA M. SINGH
JUDGE

APRIL 15, 2019

Rahul/b

(corrected and released on 2nd May, 2019)