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

% *Date of Judgement: 13th February, 2019*

+ **FAO(OS) (COMM) 28/2019**
JITENDER RAJPAL & ANR Appellants
Through Mr. Sudhir Sharma, Advocate

versus

ANSAL PROPERTIES & INFRASTRUCTURE LTD
..... Respondent
Through Mr. Rakesh Kumar, Mr. Chetan Dutt,
Mr. Raj Kumar Yadav and Ms.
Anubha Singh, Advocates

+ **FAO(OS) (COMM) 29/2019**
VARUN TANDON Appellant
Through Mr. Sudhir Sharma, Advocate

versus

ANSAL PROPERTIES & INFRASTRUCTURE LTD
..... Respondent
Through Mr. Rakesh Kumar, Mr. Chetan Dutt,
Mr. Raj Kumar Yadav and Ms.
Anubha Singh, Advocates

+ **FAO(OS) (COMM) 31/2019**
AMRAJIT SINGH KAPOOR & ANR Appellants
Through Mr. Sudhir Sharma, Advocate

versus

ANSAL PROPERTIES & INFRASTRUCTURE LTD
..... Respondent
Through Mr. Rakesh Kumar, Mr. Chetan Dutt,
Mr. Raj Kumar Yadav and Ms.
Anubha Singh, Advocates

CORAM:

**HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH**

G.S. SISTANI, J. (ORAL)

CM.APPL 6658/2019 (Exemption) in FAO(OS) (COMM) 28/2019

CM.APPL 6660/2019 (Exemption) in FAO(OS) (COMM) 29/2019

CM.APPL 6664/2019 (Exemption) in FAO(OS) (COMM) 31/2019

1. Exemptions allowed, subject to all just exceptions.
2. The applications stand disposed of.

FAO(OS) (COMM) 28/2019 & CM. APPL6659/2019

FAO(OS) (COMM) 29/2019 & CM. APPL6661/2019

FAO(OS) (COMM) 31/2019 & CM. APPL6663/2019

3. These appeals have been filed by the appellants under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') against the impugned orders dated 17.12.2018 in (FAO(OS)(COMM) 28/2019 and FAO(OS)(COMM) 29/2019) and 21.12.2018 (FAO(OS)(COMM) 31/2019), whereby the learned Single Judges have dismissed the appellants' petitions under Section 34 of the Act challenging the impugned award dated 27.07.2018.
4. For the sake of convenience, we dispose of all these three appeals by a common order.
5. Since FAO(OS)(COMM) 28/2019 and FAO(OS)(COMM) 29/2019 are filed against the common impugned order of the learned Single Judge, the facts of FAO(OS)(COMM) 28/2019 are being considered for disposal of these appeals. However, the facts of FAO(OS) (COMM) 31/2019 are distinguished and the same is being dealt separately.

FAO(OS) (COMM) 28/2019 & CM. APPL6659/2019

FAO(OS) (COMM) 29/2019 & CM. APPL6661/2019

6. The necessary facts required to be noticed for disposal of the present appeals are as under:
7. The respondent (developer) in the year 2007 advertised for sale of under construction shops in a shopping mall, the 'Boulevard' situated at Ludhiana, Punjab. The appellants applied for allotment of four shops in the said shopping mall for running hosiery business. Pursuant to which, Sh. Deepak Sachdeva (respondent) issued allotment letters dated 22.09.2007 containing the detailed terms and conditions of the said allotment. As per the allotment letters, the ground floor shops were priced @ Rs.15,500/- per sq. ft. and all the first floor shops were priced @ Rs.13,000/- per sq. ft. The appellants booked total super area of 1668 sq. ft. at first floor and 360 sq. ft. at the ground floor respectively. The respondent received payment for the said allotment partly in cash and partly through cheque. The appellants opted for construction laying plan as prescribed in the agreement letter dated 22.09.2017 thereby computing the total consideration for all the four shops @ Rs.2,72,64,000/-. As per the appellants, the respondent has received Rs.1,55,70,000/- as cash payment at the time of booking and the remaining amount of Rs.89,60,956/- by way of various instalments through cheques/cash with respect to all the four shops. As per clause 11 of the agreement, the respondent was under an obligation to deliver the peaceful possession of the shops within the stipulated period of three years from the date of such allotment, which the respondent failed to comply with. In order to affect the conveyance of the shops, the respondent was required to obtain a power of attorney from the owner

of the land on which the proposed mall was advertised to be constructed. It is the grievance of the appellants that even after paying the amount as per the agreement, the appellants received four letters from the respondent by which the respondent demanded the appellants to pay an additional sum of Rs.1.20 crore (approx.) within a fortnight. Pursuant to the said claim, the appellants raised their grievance with the respondent. The respondent thereupon promised to revise the letter of demand and thereby delivering physical possession of the land. Meanwhile, the actual owner of the land Sh. Naveen Talwar filed a petition under Section 11 of the Act for appointment of an arbitrator. On 12.10.2012, the Punjab & Haryana High Court appointed Mr. N.K. Sodhi, Chief Justice (Retd.) as the sole Arbitrator to adjudicate the dispute between the parties, since the respondent did not disclose its pending litigation with the owner of the land and kept the appellants engaged in unnecessary negotiation resulting in breach of the agreements.

8. The appellants sent a legal notice dated 05.10.2016 to the respondent to appoint an arbitrator to adjudicate the disputes. Since the respondent failed to appoint the arbitrator within 30 days from such receipt, the appellants filed a petition under section 11 of the Act before this Court for the appointment of a neutral arbitrator to resolve the disputes.
9. The learned sole arbitrator vide award dated 27.07.2018 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 payable) has only directed refund of an amount of Rs. 87,60,896/- as refund of the principal amount.

10. Being aggrieved with the award, the appellants filed an OMP under section 34 of the Act before the learned single judge partially challenging the award. The learned Single judge rejected the objection and dismissed the petition holding that the objections raised by the appellants are matters of appreciation of evidence and the court in its exercise of powers under section 34 cannot set aside the award by re-appreciating the evidence. Hence the present appeals.
11. The counsel for the appellants submits that the learned Single Judge while passing the impugned order ignored the fact that the documents amongst several other things clearly mentioned that a particular shop was sold at a specific rate and the outstanding price was to be paid within the period of three years. The counsel further submits that in order to determine the character of a document the same has to be looked in its entirety and not in part/s. It is the contention of the counsel for the appellants that the arbitral tribunal passed the award without recording parties' mutual rights and obligations and also without recording satisfaction regarding any financial claims.
12. The counsel for the respondent submits 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 appellants because the appellant has failed to provide necessary documents to support its contention.

FAO(OS) (COMM) 31/2019 & CM. APPL6663/2019

13. The relevant facts with respect to the present appeal are as under:
14. In 2007, the respondent advertised for sale of under construction shops

in the Boulevard. On 21.08.2007, Mr. Umesh Narayan Vajpeyi (original allottee) applied for allotment of a shop in the mall of the respondent. Pursuant to Mr. Vajpeyi's application, Sh. Deepak Sachdev issued an allotment letter dated 15.10.2007 allotting the shop bearing no.FF-12 at First Floor @ Rs.13,012/- per sq. ft. having super area of 561 sq. ft.

15. Later, Mr. Vajpeyi entered into a tripartite agreement with the appellant and stepped into the shoes of the original allottee. The respondent confirmed and endorsed the transfer of the interest of the allotment after receiving the administrative charges of Rs.56,154/- from the original allottee. Upon such transfer, the respondent issued a letter dated 21.06.2008 to the present appellants.
16. The appellants paid a sum of Rs.73,25,200/- through cheques in periodic instalments. As per the terms of the allotment, upon paying the total consideration of Rs.73,00,000/-, the claimants were not required to pay anything (in case the construction and transfer of shop remained within bounds) but only to get possession, with refund of Rs.25,200/-, which has never been given for transfer of the concerned shop. The payment plan as contained in the allotment letter is as follows:

PAYMENT PLAN – FF-12		
CONSTRUCTION LINKED INTEREST FREE INSTALMENT PLAN		
1.	On booking	Rs.15,00,000/-
2.	On completion of Ground Floor roof slab	Rs.3,50,000/-
3.	On completion of Second Floor roof slab	Rs.3,50,000/-
4.	On completion of all roof slab	Rs.3,50,000/-
5.	On completion of brick work	Rs.3,50,000/-
6.	On completion of common Area flooring	Rs.3,50,000/-

7.	On completion of electrical services	Rs.3,50,000/-
8.	On installation of HV Air Conditioner chillers Power Backup & other services	Rs.2,00,000/-
9.	At the time of possession	Rs.2,00,000/-

17. The respondent had received the payments partly in cash (Rs.33,00,000/-) and partly through cheques (Rs.15,00,000/-) from the original allottee at the time of booking on 21.08.2007. The original allottee had opted for the construction linked plan and the remaining instalments were agreed to be paid by the appellants in the manner prescribed in the allotment letter dated 15.10.2007.
18. As per clause 11 of the allotment agreement, the respondent was under an obligation to deliver possession of the shop within three years from the date of booking and convey the same by execution of sale deed of the shop adhering to the timeframe fixed for its delivery as time was the essence of the agreement. However, the respondent breached the agreement and failed to deliver possession and transfer the booking of the shop within the stipulated time period. Additionally, the respondent also failed to obtain the power of attorney from Sh. Naveen Talwar (owner of the land), on whose property, the advertised mall was to be constructed. On 26.05.2011, the appellants received a demand letter bearing no. APIL/L3/Ldh/FF09 for a demand of Rs.12,20,572/- to be paid till 10.06.2011. Pursuant to which, the appellants visited the office of the respondent at Chandigarh to seek redressal. The respondent thereupon promised to revise the letter of demand and thereafter delivered the physical possession.

19. However, the respondent has failed to obtain approvals from the competent authorities for the promotion and development of the proposed shopping mall.
20. That the disputes have arisen between the parties pertaining to the damages, increased area of the shop and the increased amount for the same. The appellants pursuant to the dispute sent a legal notices dated 07.11.2016 and 29.03.2017 to the respondent demanding appointment of an arbitrator. The respondent neither replied to the same nor appointed any arbitrator as per the agreement (clause 34). In addition to the non-appointment of the arbitrator, the respondent also did not disclose its exiting litigation with the owner of the land.
21. The appellants filed an arbitration petition no.391/2017 under Section 11 (6) of the Arbitration Act before this Court. The learned Single Judge on 22.09.2018 appointed Sh. S.M. Chopra, retired ADJ a Sole Arbitrator to adjudicate the dispute in the presence of the respondent. The sole arbitrator served various notices on the respondent due to its non-appearance. The arbitrator then proceeded ex-parte with the matter. That vide impugned award, the Arbitral Tribunal has awarded that the respondent shall pay Rs.38,41,000/- to the claimants towards refund of the principal amount along with 18% interest from the date of the receipt of the respective amount(s) till its realization. The Arbitral Tribunal further directed the respondent to pay Rs.5 lakhs to the claimants towards other losses along with the interest. Additionally, the Arbitral Tribunal also directed the respondent to pay Rs.5,60,000/- as cost.
22. Counsel for the appellants submits that there was no dispute raised by

the respondent in terms of the consideration of Rs.73,25,200/- paid by the appellants towards the allotment of the shop in question. He further submits that in spite of there being any dispute, the learned Single Judge has erred in upholding the award which held that the appellants had paid only a sum of Rs.38,41,000/- to the respondent. The counsel further submits that there being no dispute raised by the respondent on the amount received by it and his predecessor-in-interest, a presumption has to be drawn against the respondent under Section 114 (g) and (h) of the Indian Evidence Act.

23. Further, counsel for the appellants submits that the arbitrator has erred in not granting the loss of profit in favour of the appellants. Counsel for the appellants submits that the arbitrator has awarded the cost, which was paid by the appellants themselves to the Delhi International Arbitration Centre and the other legal expenses incurred by the appellants have not been awarded as costs.
24. We have heard the counsels for the parties and perused the relevant documents placed on record.
25. In FAO(OS)(C)28/19 & FAO (OS)(C)29/19, the learned Single Judge in his impugned order dated 17.12.2018 recorded that the arbitrator has rejected the claim for cash payment on the ground that the appellants only mentioned about the payments in its legal notice dated 05.10.2016 that the amount was paid in cash but there has not been any supporting document produced by the appellants to back its contention and this would not amount to discharging the onus of proof on the appellants for proving such amount having been paid in cash to the respondent. The learned Single Judge has rightly recorded the fact that the original

agreement price and the actual payable price are two separate claims, and in order to satisfy the judicial conscience of the arbitrator, the actual amount payable by the appellants need to be proved and without the relevant documentary proof of such payments, the award could not have been passed in favour of the appellants.

26. In FAO(OS)(C)31/19, the learned Single Judge rightly upheld the arbitrator in holding that only a sum of Rs.38,41,000/- had been paid by the appellants to the respondents, has relied upon the statement of account sent by the respondents to the appellants. The receipts of the statement of account shows that only an amount of Rs.38,00,000/- had been paid by the appellants and the appellants in its letter dated 01.06.2011, 24.06.2011, 24.08.2011, 16.09.2011 and the subsequent letters did not question the veracity of the statement of account.
27. Furthermore, the learned Single Judge has rightly dismissed the petition on the ground that the arbitrator has given detailed reasons for rejecting the claim of loss of profit as there was inaction on part of the appellants to take timely recourse to justice since 2011. Irrespective of the fact, the arbitral tribunal has indemnified the appellants by awarding the interest at the rate of 18% per annum along with an additional amount of Rs.5 lakhs with interest for other losses suffered. Therefore, it is safe to hold that the arbitrator has balanced the equities and awarded amounts in favour of the appellants. Further, the learned Single Judge has rightly pointed out that award of cost is the sole discretion of the arbitrator and it is not appropriate to interfere with the award on this ground.
28. However, the learned Single Judges in all these three appeals has rightly pointed out the scope of Section 34 of the Act, which is very limited.

Hence, the award could not be set aside under Section 34 of the Act. Furthermore, it is a settled position of law that the scope under section 37 is even narrower.

29. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. This Hon'ble court in its judgement in **P.C.L Suncon (JV) v N.H.A.I.**, 2015 SCC Online Del 13192 , in para 24 stated that :

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on

the merits, the speed and, above all, the efficacy of the arbitral process is lost."

30. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, while deciding a petition under Section 34 of the Act. The Hon'ble Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors, (2006)11SCC181** held as under:

*"52.The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. **The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.** So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

31. In **Associate Builders vs. Delhi Development Authority**, reported at (2015) 3 SCC 49, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under: -

"It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score1 .

Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. MANU/SC/1248/2011 : (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

32. In ***Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited*** ***FAO(OS) 227/2017*** reported at 2017(166)DRJ1, the Court held as under:-

"It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the Id. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the

contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitshu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."

33. Having regard to the law laid down by the courts, we do not find any merit in the appeals. Hence, no grounds are made out to interfere in the impugned orders passed by learned Single Judge under Section 34(2) of the Arbitration and Conciliation Act, 1996.
34. Accordingly, in view of the abovementioned discussions, we find no merit in the present appeals. Thus, the present appeals along with the applications are dismissed.

G.S.SISTANI, J.

JYOTI SINGH, J.

FEBRUARY 13, 2019//