

\$~10

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 149/2019 & CM Appl.No. 29423/2019 (stay)**

DLF HOME DEVELOPERS LIMITED Appellant

Through Mr. B.B.Gupta, Sr.Advocate with
Mr. Pravin Bahadur & Mr. Vishnu
Kant, Advocates

versus

CHANDER MOHAN LALL Respondent

Through Respondent in person with Mr.
Sandeep Sharma, Ms. Nancy Roy,
Mr. Aman Dhyani & Ms. Kanchan
Semwal, Advocates

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
05.07.2019

%

Dr. S. Muralidhar, J.:

1. This appeal by DLF Home Developers Limited is directed against the judgment dated 28th March, 2019 passed by the learned Single Judge disposing of OMP (Comm) No. 271/2018 filed by the Respondent under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') raising a limited challenge to an Award dated 31st March, 2018 of the sole Arbitrator adjudicating the disputes between the parties.

2. The facts in brief are that M/s BHL Forex & Finlease Limited (BHL) booked four commercial office spaces with the Appellant and executed four separate Retail Office Space Buyer's Agreements (SBAs) on 31st May,

2006. BHL thereafter assigned the said four premises to the Respondent by an Assignment Agreement (AA) dated 2nd November, 2006 for a total sale consideration of Rs.9,37,12,500/-. The AA noted that BHL had already paid Rs. 6,33,49,650/- to the Appellant and that the remaining amount payable by the Respondent herein to the Appellant was Rs.3,03,62,850/-. BHL submitted the requisite papers to the Appellant on the basis of which the four properties were transferred in the name of the Respondent in place of BHL.

3. The case of the Respondent was that he made further payments to the Appellant as demanded by it. According to him, in terms of Clause 10.3 of the SBAs, the Appellant was under an obligation to inform him in writing that the certificate of occupancy and use of the properties ('Occupancy Certificate') had been obtained from the Delhi Development Authority ('DDA') thereby requiring the Respondent to take possession of the properties and pay a total balance of Rs.71,22,150/- in respect of all four premises at the time of handing over their possession.

4. The Respondent contended that after he had made payments in November 2008, the Appellant for the first time on 12th January, 2011 sent him an email raising a demand of Rs. 1,94,50,156.63. It was stated therein by the Appellant that the delay in taking possession would entail the Respondent having to pay holding charges calculated at Rs. 25 per square feet per month. The case of the Respondent was that in terms of the SBAs, the properties had to be handed over to him by 31st May, 2009. He questioned the demand raised by the letter dated 12th January, 2011 stating that till that date he had not been informed of the receipt by the Appellant of the

Occupancy Certificate. He accordingly refuted the liability to pay any holding charges. He conveyed to the Appellant by e-mail dated 21st January, 2011 of his intention to claim loss and user opportunity costs from the date the properties were supposed to be handed over to him till the date they actually were.

5. Subsequently, further claims were raised by the Appellant against the Respondent which were refuted by him leading to the invocation of the arbitration clause in the SBAs and reference of the disputes between the parties to arbitration by a sole Arbitrator. The Respondent herein (the Claimant in the arbitration proceedings) sought the following reliefs against the Appellant (the Respondent in the arbitration proceedings):

“i. Award in the sum of Rs. 2,77,38,900/- as claimed under Claim No.1.

ii. A declaratory award by holding that the Respondent has liability for payment of monthly rent at the rates mentioned above.

iii. Direction to the Respondent to file copy of Occupancy Certificate issued by DDA in its favour with a copy thereof to the Claimant.

iv. A direction to the Respondent to receive the balance payment of Rs. 71,22,150/- and simultaneously execute the registration deeds in favour of the Claimant in respect of properties no. 1001, 1002, 1023 and 1024.”

6. The case of the Appellant on the other hand was that they were ready to hand over possession of the properties to the Respondent in June, 2009 itself and that receipt by the Appellant of the Occupancy Certificate on 3rd June,

2009 was in the knowledge of the Respondent. They termed his conduct in not making any queries and remaining silent from November, 2008 till January, 2011 as ‘malafide’ and alleged that he had concocted a story in the claim petition. As a good gesture to all customers including the Respondent, the Appellant offered, and without prejudice to its rights and contentions, to waive the holding charges.

7. In the arbitration the learned Sole Arbitrator framed the following issues for consideration:

- “1. Whether the Claimant has complied with the payment schedule contained in the Retail Office Space Buyer’s Agreements and the schedule of payment attached thereto? OPC.
2. Whether the Respondent informed the Claimant about receipt of the Occupancy Certificate in accordance with clause 10.3 & Annexure 3 of the Retail Office Space Buyer’s Agreements, if so by what means? OPR.
3. Whether the Respondent is liable to pay to the Claimant lost rental with respect to properties in question and if so at what rate and for what period. OPC.
4. Whether the Respondent is liable to execute sale deeds and hand over vacant possession of the properties in question to the Claimant and if so on what terms? OPC.”

8. Before the learned Arbitrator the Respondent filed an application under Section 17 of the Act for interim reliefs. The said application was disposed of by the learned Arbitrator by an order dated 20th February, 2013 requiring the Respondent, as an interim measure and without prejudice to the rights and contentions of the parties, to deposit with the Appellant the last

instalment payable in terms of the SBAs along with the holding and maintenance charges from 12th January, 2011 till the actual handing over of possession of the properties by the Appellant to the Respondent. The Respondent was also asked to provide to the Tribunal a Fixed Deposit Receipt (FDR) of a Nationalised Bank in the name of the Appellant for an amount equivalent to holding and maintenance charges from 1st May, 2009. Subject to compliance with the above directions, the Appellant was to hand over possession of the premises to the Respondent. The Appellant's entitlement to the amount lying in the FDR was to depend on the final outcome of the arbitral proceedings.

9. The Respondent challenged the above order dated 20th February, 2013 in this Court in Arbitration Appeal No. 8/2013. The said appeal was disposed of by this Court by an order dated 1st July, 2013 requiring the Respondent to deposit maintenance charges from 12th January, 2011 till actual handing over of the possession of the suit property with the Registrar General of the Court by way of an FDR. The Respondent was also directed to deposit the last instalment with the Appellant within one week and the Appellant was to hand over possession after the said deposit by 10th July, 2013. This Court granted liberty to the Appellant to file its counter-claim in the arbitration proceedings and correspondingly permitted the Respondent to raise all issues with regard to the maintainability and limitation of such counter-claim.

10. Thereafter the Appellant filed before the sole Arbitrator a counter-claim for interest, maintenance charges, house tax, ground rent etc. in respect of

the four properties as well as *pendente lite* interest. In view of the counter claim two further issues were framed by the learned sole Arbitrator as under:

“Issue No.5.

“Whether the counter claim is not maintainable as the same has been filed at a belated stage” OPC.”

Issue No.6.

Whether the counter claimant/Respondent is entitled to the amount as prayed for in Para ‘a’ of the prayer clause of the counter claim. If so, to what amount? OPR/OPCC”

The issue with regard to relief (already issue No.5) was re-numbered as issue No.7.

11. On issues 1 and 2 the learned Sole Arbitrator in the impugned Award dated 31st March, 2018 held that while the Appellant was not obliged to send the copy of the Occupancy Certificate to the Respondent it was “certainly obliged to inform him about the receipt of Occupancy Certificate alongside calling upon him to pay the last instalment which could only be raised after receipt of such certificate.” It was further held that intimation of the last instalment by the letter dated 10th June 2009, as claimed by the Appellant, was not actually sent to the Respondent. The findings on Issues 1 and 2 were confined to the period till 10th June, 2009 when the Appellant allegedly sent an intimation to the Respondent.

12. On issue No. 4 the learned Arbitrator noted that pursuant to orders of this Court sale deeds had been executed and possession of the properties was also handed over to the Respondent. Therefore, the said relief already stood granted. Issue No.5 was decided by the Arbitrator against the Respondent,

since the Appellant's counter-claim was filed pursuant to the leave granted by this Court. It was held that the counter-claim could not be said to be time barred.

13. The learned Arbitrator took up issues 3 and 6 together for discussion as they were inter-connected. The learned Arbitrator discussed Clause 11.4 of the SBA for deciding the issue of the compensation payable. It was held that although the Occupancy Certificate had been received by the Appellant in June, 2009, but it was unable to deliver possession of the properties to the Respondent because of non-communication in that respect. The Respondent was held entitled to compensation in terms of the aforementioned clause at Rs. 25 per square feet per month from 10th June, 2009 till 12th January, 2011.

14. As far as for the period from 12th January, 2011 till the date of handing over possession was concerned, the learned Arbitrator held that both parties were responsible for delay and therefore the Respondent would not be entitled to any compensation. Likewise it was held that the Appellant would not be entitled to levy holding/maintenance or related charges on the basis that the delay was due to the conduct of the Respondent. Having arrived at the above findings, the learned Arbitrator held that the Respondent would also be entitled to interest on the amount of compensation at 15% p.a. for the aforementioned period which was to be payable within 30 days of the Award and thereafter, at 18% per annum till realization.

15. As regards the counter-claim of the Appellant, the learned Arbitrator held that ground rent was payable by the Respondent at agreed rates from

12th February 2011. It was further held that the Appellant would not be entitled to get maintenance charges till the delivery of the possession of properties to the Respondent. The Appellant was held entitled to maintenance charges from the date of possession, the advance consumption deposit and registration charges.

16. The reliefs ultimately granted by the learned Arbitrator were as under (the Respondent herein being referred to as the Claimant in the impugned Award and the Appellant herein as the Respondent):

“(i) Award in favour of the Claimant and against the Respondent of compensation @ Rs.25 per square feet per month on super area of the premises in question for the period starting from 10th June, 2009 till January, 2011 (12th November, 2011) along with interest @ 15% per annum, payable within 30 days of the date of award and thereafter @ 18% per annum till realization.

(ii) Award in favour of the Respondent and against the Claimant of interest on ground rent as per clause (35) of the Agreement from 12th February, 2011 up till the date of payment made by the Claimant.

(iii) Award in favour of the Respondent and against the Claimant of ACD amount (Advance Consumption Deposit) payable after delivery to the Claimant of the detailed statement of account in this regard.

(iv) Award in favour of the Respondent and against the Claimant of the amount of registration fees spent by the Respondent, along with interest as per Clause (35) of the Agreement, from the date the Respondent incurred these expenses.”

17. The Arbitrator clarified that the Appellant would be entitled to seek

adjustment of the interest, ground rent and registration charges with the interest from the sum of Rs.39,39,398/- deposited in this Court by the Respondent. Any balance amount still payable would be entitled to be recovered from the Respondent by the Appellant. On the other hand if there was any balance left in the said amount after adjustment of the amounts payable by the Respondent to the Appellant, the Registrar General of this Court was to release to the Respondent balance amount which would be adjusted by him towards the claim awarded in his favour.

18. The Respondent challenged the above Award before the learned Single Judge by filing OMP (COMM) 271 of 2018 under Section 34 of the Act. The primary challenge of the Respondent was to the finding of the Arbitrator that he was not entitled to claim damages beyond 12th January 2011. A further challenge was to the finding of the Arbitrator that damages would be confined to Rs.25 per sq.foot per month as provided in Clause 11.4 of the SBA.

19. The learned Single Judge has in the impugned order dated 28th March 2019 discussed Clause 11.4 of the SBA. The learned Single Judge concurred with the interpretation placed thereon by the learned Arbitrator, in para 113 of the Award, as under:

"113.As regards the quantum of compensation to the Claimant, the same would be what the parties contemplated at the time of the Agreement, and which is what is provided in clause (11.4). As per this clause (11.4) if the seller abandons the scheme or becomes unable to give possession within 36 months or within extended period, it shall be entitled to terminate the AGREEMENT, but at its sole option and discretion. If it does

not decide to terminate the AGREEMENT in that event it shall pay to the allottee compensation @ Rs.25/- psf of super area per month for the period of delay. The contention of the Claimant that this clause does not get triggered and this limit of compensation cannot be applied in his case, is not tenable. Though Occupancy Certificate had been received by the Respondent in June 2009, it became unable to deliver possession to him because of non-communication in that respect and in a way it was inability on the part of the Respondent to deliver possession within prescribed time. The said clause, in my view, shall become applicable, being within the contemplation of the parties, and would entitle the Claimant the compensation at the rate mentioned therein i.e. Rs.25 psf per month from 10th June 2009 till 12/01/2011."

20. However, the learned Single Judge, after discussing the correspondence exchanged between the parties, did not find any justification for the Arbitrator to direct the Respondent to pay interest on the amount of ground rent from 12th February 2011 till the date of payment. The learned Single Judge held that the Arbitrator's conclusion that the Respondent had refused to make the demanded payment from 12th January 2011 onwards was not factually correct. The direction of the Arbitrator restricting the damages awarded in favour of the Petitioner till 12th January 2011 and requiring him to pay interest on the ground rent with effect from 12th February 2011 were accordingly set aside. The Appellant was directed to pay damages to the Respondent at Rs.25 per sq. feet per month till the date the actual possession of the properties were handed over to the Respondent.

21. This Court has heard the submissions of Mr. B.B. Gupta, learned Senior Counsel for the Appellant and the Respondent who appeared in person.

22. Mr. Gupta's principal submission was that the learned Single Judge ought not to have re-appreciated the evidence and substituted the view of the learned Arbitrator as regards the liability of the Appellant to pay damages to the Respondent for the period beyond 12th January 2011. It was submitted that the learned Single Judge had wrongly interpreted the letter dated 18th May 2011 written by the Respondent to the Appellant. Mr. Gupta submitted that the learned Single Judge was in error in concluding that the demand for damages by the Respondent was not made a pre-condition to the Appellant handing over possession of the property to the Respondent.

23. Mr. Gupta further submitted that the findings of the learned Single Judge that, on the basis of the order passed by this Court on 20th February 2013 in the appeal filed against the order passed by the learned Arbitrator in the application under Section 17 of the Act, that the Respondent had offered to pay the last instalment and to secure the Appellant's interest was unsustainable since the Respondent never stood by the offer and in fact challenged the interim order passed by the learned Arbitrator. In the circumstances, according to Mr. Gupta, the view taken by the learned Arbitrator was a plausible one and did not call for interference.

24. This Court has considered the above submissions. While it is the settled legal position that an Award will not be interfered with by the Court under Section 34 of the Act only because another view is possible, it is equally well-settled that an Arbitral Tribunal must decide in accordance with the terms of the contract and the evidence that has been placed on record. If any

of the findings of the Arbitral Tribunal is unsupported by the evidence on record or is based either on an erroneous reading of the evidence, it may warrant interference by the Court. This is the settled legal position as explained by the Supreme Court in *Associate Builders v. DDA (2015) 3 SCC 49* and *National Highways Authority of India v. ITD Cementation India Ltd. (2015) 14 SCC 21*.

25. In the impugned order, the learned Single Judge was conscious of the settled legal position as regards the scope of the powers of judicial review of the Court under Section 34 of the Act. The learned Single Judge accordingly declined to interfere with the interpretation placed by the learned Arbitrator of Clause 11.4 of the contract. The finding of the learned Arbitrator was that the Appellant had not been able to give possession to the Respondent till 12th January 2011. This was not interfered with. The learned Single Judge interfered with the impugned Award only with regard to the liability of the Appellant to pay damages to the Respondent for the period beyond 12th January 2011. The correspondence analysed by the learned Single Judge showed that the conclusion of the Arbitrator that the Respondent had refused to make the demanded payment to the Appellant from 12th January 2011 onwards was not factually correct.

26. Having again examined the correspondence exchanged between the parties, the Court is of the view that the finding of the learned Single Judge does not call for interference. Indeed, it appears that the Arbitrator's conclusion in this regard was not based on a correct appreciation of the evidence and therefore required interference by the learned Single Judge

under Section 34 of the Act. The view taken by the learned Single Judge cannot be set to be perverse or unreasonable. It is in fact consistent with the evidence on record and, therefore, does not call for any interference. The setting aside of the Award to the extent of requiring the Respondent to pay the Appellant the ground rent from 12th February 2011 and the further direction to the Appellant to pay damages to the Respondent at Rs.25 per sq. feet per month till the date the actual possession of the properties were handed over were as a corollary to the above conclusions. They also do not call for interference.

27. The appeal is accordingly dismissed but in the circumstances with no order as to costs.

CM Appl.No. 29422/2019 (Exemption)

28. Exemption allowed, subject to all just exceptions.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 05, 2019

mw