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

+ O.M.P. 9/2018 & IAs 5203/2018, 16522/2018

Date of Decision : 8th February, 2019

SH.SUBHASH VERMA & ORS. Petitioners
Through: Mr.Vikram Pradeep, Ms.Neha
Rajpal, Mr.Ajit Singh, Mr.Dilip Pandita,
Advs.

versus

DARSHAN SINGH & ORS. Respondents
Through: Mr.Harish Malhotra, Sr. Adv. with
Mr.Abhimanyu Singh Khatri, Adv.

+ O.M.P. (COMM) 218/2018 & IA 7084/2018

SARAITA YADAV & ANR. Petitioners
Through: Mr.Harish Malhotra, Sr. Adv. with
Mr.Abhimanyu Singh Khatri, Adv.

versus

SUBHASH VERMA & ORS. Respondents
Through: Mr.Vikram Pradeep, Ms.Neha
Rajpal, Mr.Ajit Singh, Mr.Dilip Pandita,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. These petitions have been filed by the parties to the arbitration proceedings which culminated into the Impugned Award dated 23.12.2017 passed by the Sole Arbitrator adjudicating the

disputes that have arisen between the parties in relation to two Agreements to Sell both dated 08.10.2010.

2. Shri. Subhash Verma, Shri Suresh Kumar Khera and Smt. Seema Khera shall be hereinafter referred to as the 'Petitioners', while Shri. Darshan Singh, Smt. Sarita Devi and Mr. Rajender Yadav shall be jointly referred to as the 'Respondents'.
3. The respondents had filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') being ARB.P. 79/2016 titled *Darshan Singh & Ors. v. Subhash Verma & Ors.* During the pendency of the above petition, in a suit filed by the respondents being CS (OS) 3454/2015 titled *Darshan Singh & Anr. v. Delhi Development Authority & Ors.*, this Court appointed a Sole Arbitrator to adjudicate the claims and Counter Claims of the parties arising out of the two Agreements to Sell both dated 08.10.2010 (in the order one of the Agreements is wrongly referred to as dated 20.01.2010).
4. By the Impugned Award, the Sole Arbitrator has awarded the following relief in favour of the respondent:-

"43. Reliefs.

In view of my above findings an Award is passed in favour of the Claimants and against the Respondents for a sum of Rs.6.50 crores with interest @ 18% p.a. as indicated above."

5. The learned counsel for the petitioners submits that in granting such a relief in favour of the respondents, the Arbitrator has travelled beyond the terms of the reference. He submits that the Arbitrator in awarding the above amount has taken into consideration the amount paid by one M/s Royal Orchids in favour of M/s Gooddeal Marketing Private Limited under the Collaboration Agreement dated 27.03.2012 that has been executed between Darshan Singh through Rajender Yadav, the Power of Attorney Holder, on one part and M/s Royal Orchid on the other. He submits that the Arbitrator having travelled beyond the terms of reference, the Award is liable to be set aside. He places reliance on the judgment of the Supreme Court in *MSK Projects (I) (JV) Ltd. vs. State of Rajasthan and Ors.*, (2011) 10 SCC 573.
6. I have considered the submissions made by the learned counsel for the petitioners, however, find no merit in the same. In the Statement of Defence filed by the petitioners before the Sole Arbitrator, the petitioners have clearly admitted the receipt of payment from M/s Royal Orchid as a part of sale consideration under the Agreement to Sell in question. There was no dispute between the parties with respect to the Collaboration Agreement and for enforcement of the rights under the said Collaboration Agreement, M/s Royal Orchid had filed a civil suit against the respondents and the petitioners. The Sole Arbitrator in his Impugned Award has further held as under:-

“35. The plea of the Respondents as regards receipt of payment from M/s Royal Orchid is not free from infirmities. No evidence has been produced by the Respondents in relation to the nature and purpose of transactions with Royal Orchid as claimed by them. The Claimants state that Respondents received Rs. 3.75 Crores (Rs. 3 Crores 24 Lakhs via RTGS, Rs. 26 Lakhs via cheque and Rs. 25 Lakhs in cash) from M/s Royal Orchid. The receipt of money amounting to Rs. 3.50 Crores from Royal Orchid by the Respondents is not disputed. The certification given by Dena Bank in its letter head is taken into consideration and the same is reproduced below:-

“DB/RP/Feb.2015

dt:11/2/15

This is to certify that M/s Royal Orchids current A/c no. 084411004569 cheque No. 383988 dt. 6.3.2012 for Rs. 26,00,000/- (Twenty six Lacs) present in Inward cig. Dr. 07/03/2012 debited in A/c dated 07.03.2012 favouring Sh. Suresh Kr. Khera Cheque No. 188231 dated 13.04.2012 for Rs. 3,24,00,000/- (Three Crore Twenty Four Lacs) Debited this A/c & sent to RTGS dt. 13.04.12 favouring Suresh Kumar Khera SDC No. 4698050 UTR No. BKDNH12104006215 Beneficiary A/c No. 0426634228 Citi Bank Citi10000002 Suresh Khera A/c

Sd/-

Dena Bank Stamp”

7. The learned counsel for the petitioners has urged that the Certificate dated 11.02.2015 issued by Dena Bank is a forged document inasmuch as the account mentioned therein does not belong to Mr.Suresh Kumar Khera but belongs to M/s Gooddeal

Marketing Private Limited. In my opinion, the same would have no bearing to the facts of the present case. Apart from the fact that this has not been taken up as a ground for challenging the Arbitral Award, the fact remains that the petitioners have accepted the receipt of payment from M/s Royal Orchid as a part of the sale consideration from the respondent against the Agreement to Sell in question. This being so, the certificate falls into insignificance as the Arbitrator has also based his findings on the admission of the petitioners.

8. The learned counsel for the petitioners has further challenged the award of interest in favour of the respondents. He submits that the Arbitrator has awarded interest at the rate of 18% in favour of the respondents without considering that in the Award itself, the Arbitrator has stated the respondents were also negligent in enforcing their rights. He places reliance on the following observation made in the Impugned Award:-

“On the other hand, the Respondents having defaulted to get the executing of Conveyance Deed for a long time for no reason of delay or explanation forthcoming could be said to be in breach of the term of the Agreement to Sell dated 8th October 2010. From the conduct of the parties, post execution of the Agreement to Sell dated 8th October 2010, it appears that both the parties seem to be not serious as regards the time to be the essence of the completion of the terms of the Agreement to Sell dated 8th October 2010. If the Respondents had neglected or failed to get the Conveyance Deed executed for a long time and could be faulted on this account, the Claimants were also equally non-serious and responsible. This can be

*evidence from the fact that no action was taken by them against the Respondents. The above observation gets buttressed from the conduct of the Claimants in not even sending notice to the Respondents calling upon them to expedite the process of execution of Conveyance Deed or even seeking the reasons of delay. On the other hand, the Claimants continued making payments to the Respondents through M/s Royal Orchid, and which payment the Respondent No. 2 continued accepting. This **nonchalant attitude of the Claimants reflects that the Claimants seem to have some hidden agenda in not taking any action in this regard, and which gets surfaced from their entering into the Collaboration Agreement in respect of the property in question with a builder named Royal Orchid.***

9. He further submits that during the pendency of the present petition, the suit filed by M/s Royal Orchid against the petitioner and the respondents, being CS (OS) 1020/2015, has been decreed by the Court alongwith interest at the rate of 7% per annum. He submits that therefore, the award is liable to be set aside as the respondent cannot claim more than 7% as interest.

10. I am unable to agree with the submissions made by the learned counsel for the petitioners. Apart from the amount received from M/s Royal Orchid, the petitioners have admittedly received other amounts from the respondents directly. In any case, the suit was decreed against the respondents on a concession given by the respondents which is not the case in the present petition. In spite of being offered at an earlier stage

whether the petitioners would be agreeable to pay the amount awarded with interest at the rate 7%, learned counsel for the petitioners strongly refuted this offer from the learned senior counsel for the respondents. The petitioners having contested the disputes in arbitration and also before this Court, therefore, cannot claim parity with the suit where the respondents fairly conceded to the claim with the third party at a concessional rate of interest.

11. As far as the observation of the learned Arbitrator in the Impugned Award is concerned, the Arbitrator, while awarding interest in favour of the respondents has given the following reasons:-

“41. The Claimants have claimed interest @18% p.a. from the dated of payment. Having regard to the fact that the Respondents have enjoyed the sum of Rs. 6.50 Crores despite faulting in completing the transaction as discussed above, they are also liable to pay the interest to the Claimants. The claim of interest @ 18% p.a. is just and reasonable in such type of transactions and which is also justified under section 31(7) of the Arbitration and Conciliation Act, 1996. Accordingly, the Respondents are liable to pay Rs. 6.50 crores with Interest @ 18% p.a. in the following manner:

- (i) On Rs. 3/- crore from 08.10.2010 till the date of realization.*
- (ii) On Rs. 26 Lakhs – from 7th March 2012 till the date of realization and*

(iii) *On Rs. 3 Crore 24 Lakhs – from 13th April 2012 till the date of realization.”*

12. The award of interest being a matter of discretion of the Arbitrator, once the Arbitrator has given reasons for the same which are not found to be unreasonable or perverse, it would not be open to this Court to re-scrutinize the same in order to come to a different conclusion on a purported scale of reasonableness. Under Section 31(7) of the Act, the award of interest is to be at the discretion of the Arbitrator, provided the same is reasonable. Infact, prior to its amendment in 2015, the Act, in form of Section 31(7)(b), itself acknowledged interest at the rate of 18% per annum to be a reasonable rate of interest.

13. The last challenge of the petitioners is to the calculation of the amount awarded in favour of the respondents. The learned counsel for the petitioners submits that in the amount so awarded, the Arbitrator has also admitted the claim of the respondents of Rs. 1 crore as having been paid in cash at the time of execution of the Agreement. Relying upon the following terms of the Agreement to Sell, the learned counsel for the petitioners submits that in the Agreement to Sell there is no admission of receipt of this amount in cash:-

“That the First Party agreed to enter into the present Agreement to sale by executing the Agreement to sale document of the Plot No. B-14 Cosmopolitan Co-operative House Building Society Ltd. Mayfair Garden, Haus Khas, New Delhi in favour of the Second Party, if Second Party pay initially 15%

of the total agreed sum of Rs. 20.00 crore (twenty crore only) to the First Party.

<i>CASH/DD NO.</i>	<i>DATE</i>	<i>AMOUNT</i>	<i>DRAWN ON</i>
<i>CASH</i>	<i>8/10/2010</i>	<i>Rs. 1,00,00,000/-</i>	
	<i>8/10/2010</i>	<i>Rs. 1,50,00,000/-</i>	<i>HDFC</i>
			<i>HDFC</i>
			<i>BANK</i>
<i>BANK</i>	<i>8/10/2010</i>	<i>Rs. 50,00,000/-</i>	

That after receiving the above said initial part amount of 15% amount of the agreed amount, the both parties will expedite the process of allotment of the said plot in the name of the FIRST PARTY (Subhash Verma) with DDA and any other concerned authorities.”
(Emphasis supplied)

14.The learned counsel for the petitioners submits that by the use of words “if” and “after receiving the above said initial part amount”, clearly the Agreement to Sell itself does not acknowledge the receipt of the said amount in cash. He further submits that the petitioners have denied the receipt of this amount not only in their Statement of Defence before the Arbitrator but also by a letter dated 26.11.2012 addressed by the petitioner to the respondents, which has not been taken note of by the Arbitrator.

15.On the other hand, the learned senior counsel for the respondents submits that the date of payment of cash and the two cheques mentioned in the Agreement to Sell is the same, that is, 08.10.2010, that is, the date of Agreement to Sell.

Merely because the words “if” and “after receiving the above said initial part amount” are used in the Agreement to Sell, the same cannot in any manner denude it from acknowledging the receipt of the amount in cash.

16. He further submits that even as per the petitioners, the first protest of non-receipt of the said payment was made only on 26.11.2012, that is, after two years of entering into the Agreement to Sell. As far as the notice is concerned, he further submits that this notice was not placed before the Arbitrator till the very end of the arbitration proceedings and therefore, has not been admitted in evidence. He further places reliance on the following averments made in the Statement of Defence by the petitioner:-

“19. That Claimants never paid the initial payment of 15% and paid only 10% of the total sale consideration i.e. Rs. 2 Crores and thereafter as the claimants failed to make the payments the agreement dated 08.10.2010 stood cancelled and money was forfeited. Notice to this effect was also issued to the claimants and the claimants neither replied nor objected to the said notice. That the Claimants were aware and duly informed by the Respondents that sub lease is executed in favour of the Respondents in March 2011; thereafter permission was also obtained by the Respondent No. 2 from ASI in January 2012 and thereafter accordingly Respondent No. 2 had applied for sanction of building plans from MCD, in the month of March 2012. The Claimants assured that they will pay by 12.06.2012, however, in view of their failure to do so, the agreements were terminated on 12.06.2012 and the earnest money forfeited.”

(Emphasis Supplied)

17. He submits that the petitioner has asserted before the Arbitrator that the Agreement was terminated on 12.06.2012. This itself belies the notice dated 26.11.2012 purportedly sent by the petitioner to the respondents.

18. I have considered the submissions made by the learned counsels for the parties. The Arbitrator has placed reliance on the Agreement to Sell to state that Rs. 1 crore was indeed received in cash by the petitioners. The respondents have also claimed to have made other payments totaling about Rs. 1.25 crores, in cash and through RTGS. The Arbitrator disbelieved the said payments on the ground of there being lack of any proof of payment thereof in form of a receipt. The above being a matter of interpretation of the Agreement and appreciation of evidence led by the parties before the Arbitrator, it would not be open for this Court to re-appreciate the same in exercise of its power under Section 34 of the Act. Even otherwise, I find that the Clause being relied upon by the petitioners does not support their case. It merely states that this amount, if received, both the parties are to expedite the process of allotment of the plot in the name of Mr. Subhash Verma with DDA and any other concerned authorities. This does not state that this payment is to be made in some future period of time. In any case, as the petitioners having not denied the receipt of the payment for a

period of more than 2 years, the plea of the petitioners does not appear to be genuine. There is also a doubt on the letter dated 26.11.2012 purportedly addressed by the petitioners to the respondents. I, therefore, do not see any reason to interfere with the findings of the Arbitrator.

19. The learned senior counsel for the respondents in support of the petition filed by the respondents has submitted that the respondents, apart from having pleaded payment of consideration in form of cash, had also pleaded direct transfer of payments through RTGS in favour of M/s Gooddeal Marketing Private Limited, which is admittedly a company of Mr. Suresh Kumar Khera. He submits that the Arbitrator has therefore, erred in not awarding atleast the amount that was transferred through RTGS in favour of the company.

20. In my opinion, the said submission cannot be accepted, as this would again be a matter of appreciation of evidence. The Arbitrator has primarily proceeded on the basis that there is no evidence in respect of such payment to the petitioners. In any case, whether the payment made to M/s Gooddeal Marketing Private Limited is on account of the Agreement to Sell would be a matter of evidence. Apart from the amount received from M/s. Royal Orchid, which was admitted by the petitioner to having been received under the terms of the Agreement to Sell, there was no such admission for the amount in question.

21. In view of the above, I find no merit in both the petitions. The same are dismissed. The parties shall bear their own cost.

NAVIN CHAWLA, J

FEBRUARY 08, 2019

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