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

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Date of decision: 11.03.2020

+ O.M.P.(I) (COMM.) 49/2020

M/S PVR LIMITED

..... Petitioner

Through: Mr. Tanuj Khurana, Advocate

versus

M/S AKSHAR PHC REALCON & ANR.

..... Respondents

Through: None

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act').

2. Affidavit of service has been filed by the petitioner. It is stated in the affidavit that an attempt was made to serve the Respondents through *Dasti* process, but notices were 'refused'. It is also stated in the affidavit that Respondents have been served through the process of courier. Tracking report has been appended with the affidavit. Petitioner has also served the Respondents through electronic mode as clearly stated in para 3 of the affidavit.

3. Despite second call, there is no appearance on behalf of the Respondents, who have been duly served. It appears that the Respondents are not interested in contesting the matter. Respondents are

accordingly proceeded *ex-parte*. Since the Respondents have chosen not to contest the matter and have been proceeded *ex-parte*, the averments made in the petition are deemed to be admitted, being un rebutted.

4. It is the case of the petitioner that in January 2016, Respondent No.1 through its partner, Respondent No.2, approached the petitioner and represented that Respondent No.1 had an unfettered right on the land, on which, Respondent No.1 being the Developer was proposing to construct an Integrated Retail cum Shopping Complex / Mall and Entertainment Centre called 'Akshar Pavilion Mall', situated at New 30 Meter Dandiabazar-Bhayli Road, Before Priya Talikes, Gotri, Vadodara. Respondent No.1 further represented that it had a total area of approximately 1 Lakh sq. ft. dedicated towards Hyper Market, Departmental Stores, Restaurants, Entertainment Zones, etc., out of which one unit of 30,847 sq. ft. super area (24,678 sq. ft. carpet area plus 25% loading) subject to actual area calculation/ measurement, based on CAD drawings in A-Wing on 4th, 5th and 6th Floors was planned for 5 screens Multi-Screen Cinema. It was also represented that the super area will also include a space of 250 sq. ft. on Ground Floor Atrium or next to the main entrance of the Mall, for cinema marketing or showcase space. Respondent No.1 further represented that as a 'Developer' it had an absolute right to develop the proposed 'Integrated Retail cum Shopping Mall and Entertainment Centre' and had exclusive right to operate, manage, lease, license or make use of in any manner of any built-up unit, shops, food court, multiplex, car parking, etc. and is entitled to execute Lease Deed, Revenue Sharing Agreement, etc. and receive the

consideration thereof. Significantly, Respondent No.1 also undertook that it will furnish all necessary sanctions / approvals of the Building Plans, including the Area meant for the Multiplex Space (for 5 screens), from various local / State Government Authorities concerned, in accordance with Cinematograph Rules, applicable for the State of Gujarat, within six months of signing of the Memorandum of Understanding (hereinafter referred to as the MOU). Both parties thereafter entered into an MOU dated 19.01.2016 and the mutually agreed terms and conditions were reduced into writing. Some of the relevant conditions of the MOU are as under :-

<i>Description of Multiplex Space</i>	<i>:</i>	<i>Approx. 30,847 Sq. Ft. Super Area (approx. 24,678 Sq. Ft. Carpet Area plus 25% loading) subject to actual area calculation / measurement, based on CAD drawings on the 4th, 5th and 6th Floors which includes a space of 250 square feet on; Ground Floor atrium or next to the main entrance of the Mall for Box Office/Permitted Use. Number of seats tentatively are 950-1000 (Approx.) and number of screens are 5. The Multiplex Drawings as agreed between the Parties are annexed hereto as Annexure-A.</i>
<i>Permitted use</i>	<i>:</i>	<i>Cinema and other alternate entertainment content e.g. Sports exhibition, F & B activities, Food & Beverage Counter, sale, marketing, advertisement and promotional activities, ATM for ticket generation, cinema/movie merchandise and memorabilia and allied activities.</i>

<i>The Leasable Area shall be the Super Area</i>	<i>:</i>	Approx. 30,847 Sq. Ft. Super Area (approx. 24,678 Sq. ft. Carpet Area plus 25% loading) subject to actual area calculation / measurement, based on CAD drawings on the 4th, 5th, & 6th Floors which includes a space of 250 square feet on Ground Floor atrium or next to the main entrance of the Mall for Box Office/Permitted Use. Number of seats are 950-1000 (Approx.) and number of screens are 5. The Carpet Area shall not include lift lobbies, all staircases, exit corridors, etc.
<i>Term</i>	<i>:</i>	21 (Twenty One) years from the date of commencement of commercial operations of Multiplex Space. The Parties may renew the Term on the mutual terms and conditions.
<i>Lock in period for PVR and Notice Period for Termination</i>	<i>:</i>	5 (Five) years from the date of commencement of commercial operations of Multiplex Space or as per E-Tax Policy of the State of Gujarat, whichever is higher. 3 (Three) months notice of termination post expiry of Lock-In Period.
<i>Commencement of Arrangement</i>	<i>:</i>	The Developer shall handover the Multiplex Space to PVR after completing its pre-requisite scope of work like civil work, water proofing, sanitary, plumbing, etc. of Multiplex Space. The Developer shall provide 240 (Two Hundred and Forty) Days Rent Free Fit-Outs Period to PVR from the Handover Date.

	<i>Rent and CAM Charges shall be payable subject to fulfillment of CONDITIONS PRECEDENT as mentioned herein below:</i> <i>1. In the event the E-Tax policy is applicable, the Developer shall comply with requirements pertaining to the grant of entertainment tax exemption in the name of PVR. The Developer shall procure the eligibility certificate for the grant of Entertainment Tax Exemption benefit prior to the commencement of the commercial operations of the Multiplex Space. In case the Developer has already got the exemption in principal approval in its name then in such case the Developer shall get the exemption transferred in the name and beneficial interest of the PVR. Only the official cost for the transfer of exemption in the name of PVR shall be borne by PVR.</i> <i>2. Availability of the Completion Certificates CC/OC/FIRE NOC from competent authorities e.g. Municipal Corporation within 180 days of the Hand-Over Date for Fit- Outs to PVR.</i> <i>3. Mall attains 50% occupancy including the Multiplex Area. However, till the time the Mall attains 50% occupancy, only Revenue Share at the rate of 12% shall be payable to the Developer.</i>
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<i>One time Interest Free Refundable Security Deposit (IFRSD)</i>	<i>: An amount of Rs.70,33,116/- shall be paid as under:</i> <i>(i) An amount of Rs.11,72,186/- (Rupees Eleven Lacs Seventy Two Thousand One Hundred and Eighty Six Only) to be paid within 15 (Fifteen) days of signing of this MOU.</i> <i>(ii) An amount of Rs.11,72,186/- (Rupees Eleven Lacs Seventy Two Thousand One Hundred and Eighty Six Only) to be paid post legal Due Diligence and at the time of execution of Agreement to Lease and start of Construction of the Mall.</i> <i>(iii) An amount of Rs.23,44,372/- (Rupees Twenty Three Lacs Forty Four Thousand Three Hundred Seventy Two Only) to be paid at the time of Handover of Multiplex Space for Fit-Outs.</i> <i>(iv) An amount of Rs.23,44,372/- (Rupees Twenty Three Lacs Forty Four Thousand Three Hundred Seventy Two Only) to be paid at the time of signing the Lease Deed, which shall be executed at the time of commencement of commercial operations of Multiplex;</i> <i>The IFRSD payable shall be deposited with the Developer during the subsistence of the MOU/ Definitive Agreement and shall be refunded back to PVR simultaneous returning the vacant possession of the Multiplex Space back to the Developer.</i>
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5. Mr. Khurana, learned counsel for the petitioner has drawn the attention of the Court to the Time Schedule within which the sanctions had to be taken including the grace period, which are as under :-

“The Developer shall procure the Locational Clearance and Sanction -Plans of the Mall including Multiplex Space (for ‘5 screens’) from the competent authorities before handing over the Multiplex Space to PVR for Fit-Outs. The Developer represents to handover the possession towards multi screen cinema with its scope of work completed within 24 (Twenty Four) months from the signing of this MOU. In case of delay in handover a grace period of 3 (Three) months will be given to the Developer. However, if the Developer fails to handover the possession of the Multiplex Space beyond the timeline stipulated herein and grace period of 3 (Three) months post completion of 27 months from the date of procuring Sanction Plans (i.e. 24 months plus 3 months grace period), reverse rental of one day for each day of delay will be applicable on the Developer which shall be payable/adjustable from Rent commencement Date. However, if the Developer still fails to handover the possession of the Multiplex Space beyond 12 months post completion of 39 months (24 months plus 3 months grace period as stated above + 12 months grace period as stated above), PVR shall be entitled to either terminate this MOU / Definitive Agreement and seek refund of the IFRSD paid till such date alongwith interest @18% p.a. The date of possession has a bearing on PVR's resource planning hence the Parties agree that the present MOU is binding on the Parties and legally enforceable. The Parties shall adhere to the time lines in stricto sensu.”

6. Mr. Khurana further points out that timelines and the time schedule within which the payment had to be made by the petitioner to Respondent no.1 are as under :-

“Once the possession of the Multiplex is handed over to PVR for the purpose of fit-outs i.e., for 240 (Two Hundred and Forty) days, the Developer agrees to furnish the requisite permissions e.g., completion certificate of the Mall, OC, locational clearance, all approvals etc. i.e. Statutory obligations on the part of the Developer within 180 (One Hundred and Eighty) Days from the Hand Over Date.

It is further agreed that the Developer shall complete its post possession scope of work within 60 (Sixty) days of the Handover Date. Also, on the Handover Date the Developer shall provide PVR with the list and contact number of the contractors engaged by the Developer for executing the post possession works.

Out of the total period of 240 (Two Hundred and Forty) Days the last 60 (Sixty) days period shall be used by PVR for procuring the Cinema Operating Licenses with help of Developer subject to receipt of OC/CC and all other licenses, approvals, etc. within 180 days from Handover Date.

In case the Developer is unable to get the completion certificate of the Mall, during the above mentioned period then PVR will get the abetment of Rent i.e., for each day of delay there will be waiver of 2 (two) days Rent commencing from Rent commencement Date.”

7. Mr. Khurana submits that, subsequently, an Addendum was entered into between the parties, varying some conditions, which are as under :-

“An amount of Rs.70,33,116/- shall be paid as under:

(i) An amount of Rs.11,72,186/- (Rupees Eleven Lacs Seventy Two Thousand One Hundred and Eighty Six Only) to be paid within 15 (Fifteen) days of signing of this MOU.

(ii) An amount of Rs.11,72,186/- (Rupees Eleven Lacs Seventy Two Thousand One Hundred and Eighty Six Only) to be paid post legal Due Diligence and at the time of execution of Agreement to Lease and start of Construction of the Mall.

(iii) An amount of Rs.23,44,372/- (Rupees Twenty Three Lacs Forty Four Thousand Three Hundred Seventy Two Only) to be paid at the time of Handover of Multiplex Space for Fit-Outs.

(iv) An amount of Rs.23,44,372/- (Rupees Twenty Three Lacs Forty Four Thousand Three Hundred Seventy Two Only) to be paid at the time of signing the Lease Deed, which shall be executed at the time of commencement of commercial operations of Multiplex;

The IFRSD payable shall be deposited with the Developer during the subsistence of the MOU/ Definitive Agreement and shall be refunded back to PVR simultaneous returning the vacant possession of the Multiplex Space back to the Developer.”

8. It is submitted that upon entering into the MOU, petitioner paid a sum of Rs.11,72,186/- on 25.02.2016. It is further submitted that in terms of the subsequent Addendum, a further amount of Rs.77,814/- was paid by the petitioner to Respondent No.1, against an acknowledgement. Mr. Khurana further submits that a bare perusal of the MOU would show that Respondent No.1 had to procure the Locational Clearance and Sanction Plans of the Mall including Multiplex Space (for 5 screens)

from the Competent Authorities and was also to hand over the possession with its scope of work completed within 24 months from the date of signing of the MOU or within a grace period of three months i.e. on or before 18.04.2018.

9. Mr. Khurana contends that having made the complete payment as required by the Schedule, till April 2018, petitioner has fulfilled its contractual obligations. Thereafter, it approached the Respondents many times to share the Layouts with requisite plans and hand over the possession. Learned counsel draws the attention of the Court to the reminders and the Legal Notice sent to the Respondents, but to no avail. It is argued that despite notices, neither has the possession been given, nor the money paid by the petitioner to the Respondents, has been refunded. Therefore, it is the contention of the petitioner that the petitioner is now entitled to a refund of Rs.20,45,377/- from the Respondents along with interest as the money has been unauthorisedly held by them.

10. Mr. Khurana submits that there is an Arbitration Clause in the Agreement. The Arbitration Clause reads as under :-

“Any dispute or difference arising between the Parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any, shall be submitted to arbitration. The arbitration shall be conducted in accordance with the Provisions of the Arbitration and Conciliation Act, 1996, along with the rules framed there under and any amendments thereto by a sole arbitrator appointed mutually by both the Parties. The arbitration shall be conducted in English. The decision/ award of the

arbitrator shall be final/ conclusive and binding on the Parties. The seat of arbitration shall be at New Delhi.”

11. I have heard learned counsel for the petitioner.

12. As per the Arbitration Clause, clearly, the seat of the Arbitration is at Delhi and therefore, this Court has Territorial jurisdiction to entertain the present petition.

13. Mr. Khurana submits that at this stage he would be satisfied if prayer (a) is granted, which is as under :-

“a. Ad Interim order in favour of the Petitioner and against the Respondents, thereby restraining the Respondents from dealing with the property forming subject matter of the dispute(s) i.e. 1 (one) unit of 30,847 Sq. Ft. Super Area (24,678 Sq. ft. Carpet Area plus 25% loading) subject to actual area calculation/ measurement, based on CAD drawings in A-Wing on 4th , 5th & 6th Floors is planned for 5 screens Multi-Screen Cinema, including a space of 250 Sq. Ft. on Ground Floor atrium or next to the main entrance of the Mall for and/or cinema marketing or showcase space in "AKSHAR PAVILION MALL" situated at New 30 Meter Dandiabazar-Bhayli Road, Before Priya Talkies, Gotri, Vadodara, with any third party, in any manner whatsoever, during the pendency of the arbitral proceedings to be initiated between the parties;”

14. Having heard learned counsel for the petitioner, I am satisfied that the petitioner is entitled to relief claimed under prayer clause (a) to preserve the property in aid of the Arbitration proceedings which is the purpose and intent of Section 9 of the Act.

15. Accordingly, Respondents and their agents are hereby restrained from dealing with the property being One unit of 30,847 sq. ft. super area in A-Wing on 4th, 5th and 6th Floors in Akshar Pavilion Mall situated at New 30 Meter Dandiabazar-Bhayli Road, before Priya Talkies, Gotri, Vadodara including a space of 250 sq. ft. on Ground floor Atrium or next to the main entrance of the Mall, in any manner, including creating any third party rights.

16. Petitioner must take steps for constitution of the Arbitral Tribunal as the present interim order shall remain in operation only for the period prescribed in Section 9(2) of the Act. Parties are at liberty to move an application under Section 17 of the Act before the Tribunal, when constituted and the Tribunal will be free to pass such other and further orders on such an application being made.

17. It is made clear that this Court has not expressed any opinion/view on the merits of the case and the Arbitral Tribunal shall adjudicate the disputes raised before it by the parties, without being influenced by any observations made in the present order.

18. Petition is allowed in the aforesaid terms.

JYOTI SINGH, J

MARCH 11, 2020 /yg