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

Decided on : 24th November, 2020

\+ ARB.P. 589/2020

SANJEEV VERMA ..... Petitioner

Through Ms. Aditi Mohan and Ms. Abhipriya, Advs.

versus

AMITA ARORA ..... Respondent

Through Mr. Anshul Tyagi, Mr. Vaibhav Suri and Mr. Prithvi Sidhu, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% 24.11.2020

(Video-Conferencing)

C. HARI SHANKAR, J.

I.A.10437/2020

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

ARB.P. 589/2020

1. This petition, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), seeks the appointment of an arbitrator.

2. A reading of the petition reveals that the existence of an arbitrable dispute between the parties is not seriously contested, and that the necessity of filing this petition has arisen only because the parties have not been able to agree on the identity of the sole arbitrator, to arbitrate on the disputes between them.

3. For the sake of the record, the paragraphs, in the petition, which set out the controversy and dispute between the parties, may be reproduced thus, strictly without prejudice to the right of the respondent to dispute the same:

> "(i) The Petitioner is a well reputed builder in New Delhi and is presently residing at F-4/2, Vasant Vihar, New Delhi-110057.
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> (ii) That in the year of 2015, the Respondent approached the Petitioner or the purpose of re-developing/constructing the building (i.e. Basement, Stilt, Ground, First Floor, Second Floor and Third Floor) on Plot No. 9-A, North West Avenue, Punjabi Bagh, New Delhi-110026 owned by the Respondent (hereinafter referred to as the **"said property")** Accordingly, a Property Development Agreement dated 27.08.2015 (hereinafter referred to as **"the Property Development Agreement")** was executed between the Petitioner and the Respondent whereby *inter-alia,* the Petitioner was required to redevelop, construct and complete the building entirely at its own cost and expense and further pay an additional consideration of Rs. 4,55,00,000/- (Rupees Four Crores Fifty-Five Lacs only) as 'non-refundable amount' as per the schedule set out in Clause 2 therein. It is pertinent to note here, that the entire possession of the building was vested with the Petitioner by the Respondent for the redevelopment purpose. That as on 11.12.2015, a sum of Rs. 3,55,00,000/- (Rupees Three Crores Fifty-Five Lacs only) out of

Rs.4,55,00,000/- (Rupees Four Crores Fifty-Five Lacs only) stood paid to the Respondent by the Petitioner, as the non-refundable amount under the Property Development Agreement.

(iii) That in consideration of the Petitioner incurring each and every expense for the purpose of completion of the entire project coupled with the payment of Rs. 4,55,00,000/- (Rupees Four Crores Fifty-Five Lacs only) as nonrefundable amount, the Petitioner beanie entitled under the Agreement to the entire Second Floor of the Property along with 20% proportionate undivided share in the land underneath and 20% area in the stilt for the parking (hereinafter referred to as **"the Builder's Allocation")** upon completion of the project.

(iv) That it was further unequivocally agreed between the parties that upon completion of the structure of the building (i.e. casting of slabs of Basement, Stilt, Ground, first, Second, third and the entire brick work of all the floors) in the manner and mode set out in the Property Development Agreement, and upon further paying the balance consideration of Rs.1,00,00,000/(Rupees One Crore only), the Respondent would be required to execute the Sale Deed/Conveyance Deed of 50% of the demarcated area of the Builder's Allocation, as per the choice of the Petitioner in his favour.

(v) That it was further agreed that the Respondent would have no right to protest or object to the execution of the aforementioned Sale Deed. It may be pertinent to mention at this juncture, that in the event of default or delay in executing the sale deed by the Respondent, it was agreed that a penalty of Rs.5,00,000/-(Rupees Five Lacs only) per month would be payable to the Petitioner and the Petitioner would be entitled to further stop all construction if the Sale Deed was not executed.

(vi) That in so far as the execution of the remaining 50% Sale Deed of the Builder's Allocation in favour of the Petitioner is concerned, it was agreed that the Petitioner would become entitled to the same upon the completion of the project and upon handover of the physical possession of the Respondent's allocated share i.e. the Owner's share in the said property, after full development of the project.

(vii) That soon after demolishing the building and obtaining the sanctions from the municipal authorities to commence the construction work of the project, the Petitioner came to know that not only was the said property under a prior attachment from the Central Bank, which fact was deliberately and willfully concealed from the Petitioner at the time of executing the Property Development Agreement but also there were pending dues to be paid to the Excise Department by the Respondent.

(viii) That the Respondent had willfully and fraudulently misrepresented to the Petitioner at the time of signing the Property Development Agreement that the said Property was free of all encumbrances, legal impediments, etc. The Respondent had willfully suppressed the pending litigation from the Petitioner where the Respondent had undertaken to not sell, alienate or create any third party interest in the said property in any manner, before the Hon'ble High Court of Delhi.

(ix) That shortly thereafter, the Petitioner approached the Respondent being fearful of losing the capital already invested in the project on account of the gross violation of the warranties and representations made by the Respondent to the Petitioner and the disrepute caused to the project because of the attachment by the bank and the pending litigations surrounding the property.

(x) In the aforementioned background, in October 2016, it was offered by the Respondent and agreed by the Petitioner that in the event, the Builder’s Allocation i.e. the Second Floor remained unsold by the Petitioner during the pendency of the construction of the building and additionally, the Respondent offered an advance/earnest money of Rs. 2,00,00,000/- (Rupees Two Crores only) to the Petitioner, then the Respondent would buy back the Builder's allocation from the Petitioner for a total sale consideration of Rs.28,00,00,000 (Rs. Twenty-Eight Crores only). That on 18.10.2016 the Petitioner and the Respondent formally executed a Buy Back Agreement to encapsulate the aforesaid understanding (hereinafter referred to as **“the Buy Back Agreement”).**

(xi) That it is a matter of record that the Respondent was unable to honour the commitments to buy-back the Builder's allocation i.e. the second Floor as per the terms of the Buy Back Agreement on account of the Respondent's financial inability to do so and failed to offer the advance/earnest amount of Rs. 2,00,00,000/- (Rupees Two Crores only) to the Petitioner, despite providing repeated assurances regarding the security of the Petitioner's investment in the project.

(xii) That it is pertinent to point out at the juncture, that sometime in October/November 2018 itself, the Petitioner had already completed the structure of the building as per the agreed standard of construction within the agreed period (including the period extended from time to time by mutual consent between the parties) without any delay being attributable to the Petitioner thereby, becoming fully entitled to obtain the Sale Deed in respect of 50% of the Builder's Allocation in the Petitioner's favour. Subsequently, the same was also accepted by the Respondent and the Respondent had agreed to execute the sale deed in favour of the Petitioner. However, under some pretext or the other the Respondent kept avoiding the execution of the Sale Deed, in favour of the Petitioner.

(xiii) That after several rounds of discussion and negotiation sometime in November 2019, the Respondent again approached the Petitioner requesting the handover of the possession of the Basement, Second Floor and Third Floor for the purpose of letting out the same to a tenant and also requested for a no objection certificate (NOC) from the Petitioner to this effect. The Petitioner agreed to give its NOC with respect to the handover of possession of the Basement, Second Floor and Third Floor for executing a Lease deed with the Tenant purely, in order to mitigate its losses in the said property.

(xiv) That with a view to facilitate the handover of the possession of the Basement and Third Floor from the Petitioner and further to obtain the possession of the Petitioner's builder's allocation i.e. the Second Floor, the Respondent requested the Petitioner to execute an Addendum to the Property Development Agreement pursuant to which, the Petitioner could handover the possession of the Basement, Second Floor and the Third Floor for the limited purpose of carrying out fit outs to the prospective Tenant.

(xv) It was further assured to the Petitioner by the Respondent that the prospective tenant had agreed to pay a sum of Rs. 13,00,000/- (Rupees Thirteen Lacs only) per month as rent towards the Petitioner's Builder's Allocation i.e. the Second Floor and that the advance rent and security deposit as and when received from the Tenant would be handed over to the Petitioner. That it may be noted at this juncture, that the Respondent again avoided getting the Sale deed qua 50% of the Builder's Allocation executed in favour of the Petitioner and assured the Petitioner of its commitment to buy-back the second floor for a sum of Rs. 28,00,00,000/- (Rupees Twenty Eight Crores only).

(xvi) Moreover, the Respondent expressed her desire to avail a loan against rent discounting of the Basement, Second Floor and the Third Floor of the Property from the Bank/Financial Institution in order to secure the amount towards the consideration of the Second Floor to be paid to the Petitioner. It is a matter of record that the Respondent have been in a financially precarious situation since the inception of the Project in the year 2015 and have time and again breached and wriggled out its obligations and have till date failed to execute the Sale Deed in respect of 50% of the front portion of the Second Floor in favour of the Petitioner.

(xvii) That the Petitioner, again with a view to mitigate his losses in the project and upon the Respondent's insistence agreed to execute the Addendum dated 15.11.2019 to the Property Development Agreement (hereinafter referred to as the **"Addendum")** and the Agreement dated 15.11.2019 (hereinafter referred to as the **"Refreshed Buy Back")** despite having become entitled to the entire second floor and the execution of the Sale Deed qua 50% of the Builder's Allocation upon completion of the structure of the Building in December 2018 itself.

(xviii) That as per the specific terms of the Addendum and subsequently vide letter dated 11.11.2019, the Respondent had undertaken that the security deposit and the rent received from the Tenant towards the Petitioner allocation would be paid to the Petitioner. Further, in order to give effect to the aforementioned understanding the Respondent also took a No objection letter from the Petitioner prior to executing the Lease Agreement with the Tenant on 15.11.2019. It is a matter of record that not only have the Respondent failed to give the Petitioner any monies received from the prospective tenant towards the Petitioner's allocation nor have the Respondent disclosed the terms of the LOI or Lease Agreement executed with the Tenant till date, in complete contravention of the terms of the Addendum.

(xix) That further the Respondent reiterated its commitment to buy back the builder's allocation from the Petitioner for an agreed sale consideration of Rs. 28,00,00,000/- (Rupees Twenty Eight Crores only) in the Refreshed Buy-Back Agreement and it was agreed that a sum of Rs. 5,00,00,000/(Rupees Five Crores only) shall be paid on/before 01.01.2020 by the Respondent and, in the event of any delay or default the Petitioner would become entitled to the following: -

a) To stop development work of the said property and in such an event, would not be liable for any losses, if suffered by the Tenant and;

b) To retain the possession of the entire Ground Floor and First Floor, without carrying any liability, till such time the Sale Deed is executed by the Respondent towards the Second Floor allocation along with a penalty for the delay in payment @ Rs. 5,00,000/- (Rupees Five Lacs only) per month.

(xx) That further it was represented by the Respondent that the Respondent was availing a loan against rent discounting of the Basement, Second Floor and the Third Floor i.e. the leased premises, the possession of which was with the Petitioner and accordingly, requested the Petitioner to give his NOC to mortgage to the Bank/Financial Institution for the purpose of availing the rent discounting loan facility towards the aforementioned floors. It was further represented by the Respondent that out of such loan amount being sought from the Bank, a sum of Rs. 15,00,00,000/- (Rupees Fifteen Crores only) would directly be paid by the Bank to the Petitioner against the adjustment towards the sale consideration of the buy-back amount of Rs. 28,00,00,000/- (Rupees Twenty Eight Crores only).

(xxi) That it was explicitly agreed that no other mortgage could be done by the Respondent except the Basement, Second Floor and the Third Floor i.e. the leased premises. Further, it was stated that the aforesaid NOC was subject to the fulfillment of the Respondent obligation regarding the payments of Rs. 5,00,00,000/- (Rupees Five Crores only) by the Bank/Financial Institution and further the Bank/Financial Institution binding itself to pay a sum of Rs. 10,00,00,000/- (Rupees Ten Crores only) within 6 months from commencement of the rent.

(xxii) That to utter shock of the Petitioner, the Sanction Letter from Aditya Birla Finance Ltd. (hereinafter referred to as **"ABFL")** dated 20.01.2020 sent to the Petitioner on 29.01.2020 had no mention of any binding regarding the commitment to pay a sum of Rs, 10,00,00,000/- (Rupees Ten Crore: only) within 6 months from commencement of rent to the Petitioner, as envisaged in the terms of the Addendum and the Refreshed Buy-Back Agreement executed on 15.11.2019. Moreover, the Respondent surreptitiously offered to mortgage the Ground Floor in favour of ABFL, without having any authority to do so and in complete breach of the terms of the Agreements.

(xxiii) Moreover, the Refreshed Buy-Back Agreement had lapsed on 08.0l.2020 itself (after giving 1-week grace period w.e.f. 01.01.2020 by the Petitioner) coupled with the fact that the Respondent had failed to pay Rs. 5,00,00,000/(Rupees Five Crores only) to the Petitioner. Therefore, as per the terms of the Agreements executed on 15.11.2019 the Respondent again became liable to execute the 50% sale Deed of the Second Floor forthwith in favour of the Petitioner. That even though the Petitioner was entitled to stop work in the past as per the several Agreements, the Petitioner has always kept the interest of the Tenant as the paramount objective and has always continued to perform his obligations under the Agreements despite getting the sale deed executed in his favour till date.

(xxiv) That several rounds of correspondence were exchanged between the Petitioner and the Respondent on 12.02.2020, 18.02.2020, 24.02.2020 and 02.03.2020, wherein the Petitioner has time and again reiterated his willingness and readiness to honour the agreed terms.

(xxv) That furthermore, vide letter dated 06.03.2020, the remaining balance consideration of Rs. 1,00,00,000/- (Rupees One Crore only) was also offered by the Petitioner to the Respondent by Demand Draft drawn on Standard Chartered Bank however, it is pertinent to note that till date the Respondent has failed to either reject or accept the same. Obligation offered enough.

(xxvi) It is reiterated that the Petitioner is and has always been ready and willing to perform his obligations and has repeatedly informed the Respondent through his emails dated 12.02.2020, 18.02.2020, 24.02.2020, 02.03.2020,06.03.2020 and 16.03.2020 and also in person. It has been stated time and again, that the Petitioner is suffering huge losses on his investments since 2015 on account of the Respondent's continuous breaches and failure to perform its obligation on a day to day basis however, the Respondent has failed to rectify such breaches till date.

(xxvii)That the Respondent has repeatedly and unambiguously accepted its failure to perform its obligations under the several Agreements executed between the parties from time to time however, has till date failed to honour the same. In view of the above, several disputes including but not limited to the failure to execute the 50% Sale Deed of the front portion of the Petitioner builder's allocation in the said property, loss of rentals and profit caused on account of the Respondent's default, loss of opportunity cost, penalty ,compensation towards loss on account of misrepresentation by the Respondent, loss of goodwill and reputation, etc. have arisen between the parties in connection with or/and in relation to the Property development Agreement, Buy back Agreement, Addendum to the Property Development Agreement and the Refreshed Buy Back Agreement.

(xxviii) That in the above-mentioned circumstances, the Petitioner was constrained to issue Notice Invoking Arbitration dated 09.07.2020 thereby proposing the name of Hon'ble Mr. Justice Pradeep Nandrajog (Former Chief Justice of Bombay and Rajasthan High Court and Judge of Delhi High Court) as the Sole Arbitrator.

(xxix) That on 05.08.2020 the Petitioner received a perfunctory reply to the Notice Invoking Arbitration wherein, the Respondent conveyed its refusal to the appointment of the proposed name by the Petitioner and proposed the name of Hon'ble Mr. Justice V.N. Khare, Former Chief Justice of India as the Sole Arbitrator.

(xxx) That it is pertinent to mention that thereafter, the Petitioner and Respondent held a meeting wherein, the parties attempted to resolve their disputes. However, on 28.08.2020, the Respondent served a Termination-cum Demand letter of the Property Development Agreement upon the Petitioner raising superfluous and unsubstantiated claims and threatening to illegally terminate the Property Development Agreement, without having any right or authority to do so under the said Agreement."

(Emphasis as in Original)

4. Mr. Anshul Tyagi, learned counsel for the respondent, needless to say, disputes all the aforesaid allegations of the petitioner and submits that there were various other agreements and understandings between the petitioner and the respondent, regarding which the petition is not forthright. He submits that there is no liability of the respondent *qua* the petitioner.

5. Clearly, arbitrable disputes have arisen between the parties and, to be fair, neither of the learned Counsel disputed this position.

6. The petitioner invoked arbitration by his notice dated 9th July, 2020, and the respondent replied *vide* response dated 5th August, 2020, denying all allegations against her. Each of the parties suggested the name of a learned sole arbitrator, to arbitrate on the disputes between them, but neither party was agreeable to the name suggested by the other.

7. As such, there is an impasse, regarding the sole arbitrator who would arbitrate on the disputes between the parties, which has resulted in the petitioner moving this Court under Section 11(6) of the 1996 Arbitration Act.

8. The Arbitration Clause, in the Property Development Agreement, reads as under:

> "49. That in the event of any question or dispute arising under in connection with incidental to and or interpretation or scope of this agreement or relating hereto, the same shall be referred to any arbitrator mutually acceptable to both the parties and the decision of the arbitrator shall be final and conclusive. The provisions of the Arbitration and Conciliation Act, 1996 and the statutory modifications, amendment and or reenactment thereof from time to time shall apply to such arbitration. The parties shall bear and pay their own costs, charges and expenses of the proceedings for the arbitrator. The Place of the arbitration shall be at New Delhi."

9. As the existence of the arbitration clause, its application, and the existence of arbitrable disputes between the parties, is not contested by the respondent, and the difference is only with respect to the identity of the Sole Arbitrator to arbitrate on the disputes, this Court appoints Justice Nisar Ahmad Kakru, a former Chief Justice of the High Court of Andhra Pradesh, as the Sole Arbitrator to arbitrate on the aforesaid disputes between the parties. The learned Sole Arbitrator may be contacted at 078894 89805, and his address is, X-19 Top floor, Houz Khas, New Delhi -110016.

10. Needless to say, the above recital is only by way of an overview of the case set up by the petitioner, and does not amount to an expression of opinion by this Court on the merits of the allegations of the petitioner against the respondent. The respondent, would, therefore, be at liberty to contest the said allegations and all questions in this regard would remain open for debate by the parties before the learned Sole Arbitrator.

11. The learned Sole Arbitrator would arbitrate on the disputes in accordance with the 1996 Arbitration Act, and the fees of the learned Sole Arbitrator would also abide by the Fourth Schedule to the 1996 Arbitration Act.

12. The parties are directed to contact the learned Sole Arbitrator within 48 hours of being emailed a copy of this order by the Registry, in order to obtain the concurrence of the learned Sole Arbitrator and to fix a schedule of arbitration.

13. The learned Sole Arbitrator would also file the requisite disclosure, under Section 12(2) of the 1996 Act, within a week from entering on the reference.

14. With the aforesaid observations, this petition stands disposed of.

C.HARI SHANKAR, J.

NOVEMBER 24, 2020
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