

\$~2, 3 & 4

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

Date of Decision: 25th November, 2021

+ **O.M.P. (COMM) 23/2021, I.As. 947/2021 & 948/2021**

DCM LTD.

... Petitioner

Through: Mr. Anil K. Airi, Senior Advocate with Mr. Gaurav Mitra, Mrs. Bindiya Logawney, Mr. Aman Gupta, Mr. Mudit Ruhella, Mr. Manit Moorjani & Mr. Dheeraj, Advocates.

versus

DHAN SINGH BAWA & ORS.

... Respondents

Through: Mr. P Nagesh, Sr. Advocate with Mr. Shivam Wadhwa and Mr. Akshay Sharma, Advocates for R-3

+ **O.M.P. (COMM) 24/2021, I.As. 950/2021 & 951/2021**

DCM LTD.

... Petitioner

Through: Mr. Anil K. Airi, Sr. Advocate, Mr. Gaurav Mitra, Mrs. Bindiya Logawney, Mr. Aman Gupta, Mr. Mudit Ruhella, Mr. Manit Moorjani & Mr. Dheeraj, Advocates.

versus

DHAN SINGH BAWA & ORS.

... Respondent

Through: Mr. P Nagesh, Sr. Advocate with Mr. Shivam Wadhwa and Mr. Akshay Sharma, Advocates for R-3.

+ **O.M.P. (COMM) 25/2021**

DCM LTD.

... Petitioner

Through: Mr. Anil K. Airi, Sr. Advocate, Mr. Gaurav Mitra, Mrs. Bindiya

Logawney, Mr. Aman Gupta, Mr.
Mudit Ruhella, Mr. Manit Moorjani
& Mr. Dheeraj, Advocates.

versus

DHAN SINGH BAWA & ORS.

... Respondents

Through: Mr. P Nagesh, Sr. Advocate with Mr.
Shivam Wadhwa and Mr. Akshay
Sharma, Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as 'the Act'*] have been filed seeking setting aside of a common arbitral award dated 06th January 2020 [*hereinafter referred to as 'impugned award'*] arising from common arbitral proceedings. As disputes raised and the grounds of appeal argued are also common, the court deems it fit to dispose of the petitions by a common order.

2. The prayers sought therein, as pressed, are to the limited extent of seeking:- (i) rate of interest awarded to the Petitioner/Claimant [*hereinafter referred to as 'DCM'*] by the Sole Arbitrator be enhanced to 12% instead of 6% p.a. as awarded, and, (ii) the time period for award of interest be extended to begin from 01st January 1996 instead of 01st January 1999.

3. The facts giving rise to the disputes between the parties are captured in brief, as follows:

- 3.1. Respondents No. 1 to 4,¹ [*hereinafter collectively known as the ‘Sellers’*] are the tenants-in-common / owners of BMS Building at 14, Barakhamba Road, New Delhi-110001 [*hereinafter referred to as ‘Premises’*].
- 3.2. The Sellers entered into three separate Sale Agreements, all dated 19th December 1992, with:- M/s. Bishan Finance Pvt. Ltd. for the 8th floor;² M/s. Duplex Properties Pvt Ltd. for 9th Floor;³ and, M/s. Sulabh Properties Pvt. Ltd. for 10th floor of the Premises;⁴ [*hereinafter collectively referred to as ‘Purchasers’*] each measuring 10,000 sq. ft., for a total sale consideration of Rs. 4.5 crores.
- 3.3. The Sellers were required to hand over the premises to the Purchasers on or before 31st December 1995. Yet, by the end of 1995, the Property was not constructed by the Sellers, and thus aggrieved by the delay, the Purchasers invoked arbitration through notices dated 29th October 1998. Later, Court was approached under Section 11 of the Act, and *vide* Order dated 07th August 2002, Retd. Justice P. K. Bahri was appointed as the common Sole Arbitrator to adjudicate the disputes between the parties.
- 3.4. It is important to note that the Sellers had got sanctioned building

¹ Comprising of: Respondent No. 1 (Late Shri Dhan Singh Bawa), Respondent No. 2 (Smt. Savitri Bawa, widow of R-1), Respondent No. 3 (Shri. Anand Singh Bawa, Son of R-1 and R-2) and Respondent No. 4 (Late Shri Anoop Singh Bawa, Son of R-1 and R-2; now represented through successors).

² Impleaded as Respondent No. 5 in OMP (Comm) 24/2021.

³ Impleaded as Respondent No. 5 in OMP (Comm) 23/2021.

⁴ Impleaded as Respondent No. 5 in OMP (Comm) 25/2021.

plans for demolition and subsequent construction upon the Premises, from the NDMC on 31st July 1971, but the NDMC declined to revalidate the plans after expiry of two years. It demanded that due to change in Floor Area Ratio ('FAR') norms from 400 to 150, the Sellers were required to prepare fresh building plans on the basis of FAR 150, which, the Sellers claimed, would have adversely affected the areas already constructed.

- 3.5. This decision of NDMC was thus challenged by the Sellers in various rounds of litigation,⁵ and is presently pending before the Supreme Court. There exists, however, an interim order for maintaining status quo at the Premises.⁶ Thus, the construction cannot be completed, and Completion Certificate cannot be obtained by the Sellers till the vacation of said order by the Apex Court.
- 3.6. Meanwhile, by way of an MOU dated 17th September 2002, the Purchasers transferred their rights in respect of the Sale Agreements in favour of DCM.
- 3.7. In light of the above-stated litigation, the arbitral proceedings, which were at the stage of final arguments, were suspended on 27th May 2006 upon joint request of the parties. The same were revived by DCM after a period of 13 years *vide* letter dated 08th October 2019

⁵ A single bench of this court decided WP(C) No. 355/1974 filed by the Sellers on 6-1-2008 giving directions to the NDMC to re-examine the matter as to whether the owners had complied with conditions of the sanctioned plans if so then to revalidate the sanctioned plans. The NDMC filed LPA No. 210/2009 which was allowed by the court on 18-9-2012. A Review Petition was filed by the Sellers but it was dismissed on 11-1-2013. The Sellers then filed a SLP which was admitted, and thus Civil Appeals No. 2810/2013 and 2811 /2013 are still pending before the Apex Court.

⁶ In Civil Appeals No. 2810/2013 and 2811/2013.

sent to the arbitrator.

- 3.8. It is an admitted position that the Sale Agreements and MOU were entered into by the parties in full knowledge of the stand of NDMC and the pending litigations.
- 3.9. Before the Arbitrator, DCM argued that the Sellers were contractually bound to complete the construction of the building and give possession of the floors as per clause 4.1(c) of the Sale Agreements on or before 31st December 1995. However, the construction has been at a stand still since December 1994. DCM thus sought return of the amount of sale consideration already paid (along with interest), as well as damages under the Sale Agreements for breach of contract.
- 3.10. Admittedly, during the course of arbitral proceedings, Sellers repaid the principal amount in Claim No. 1 to DCM to the tune of Rs. 4.5 crores, in 4 tranches through cheques between 30th September, 2019 to 9th October 2019. The impugned award in fact records that Claim No. 1 thus stood satisfied.
- 3.11. On 06th January 2020, the Sole Arbitrator passed the impugned award.

DCM'S CONTENTIONS:

4. Mr. Anil Airi, senior counsel along with Mr. Gaurav Mitra, counsel for DCM, impugns the award by making the following submissions:
 - 4.1. The impugned award, denying interest between 01st January 1996 and 01st January 1999, is a non-speaking award, passed without any reason, and a thus a nullity in law. Moreover, there is no justifiable reason for denying the interest for the said period. Even the Sellers

have not offered any reasons to justify the deprivation of claim of interest for the said period, before the Arbitral Tribunal.

- 4.2. The rate of interest @ 10% p.a. is in accordance with various judgments of the Supreme Court on pre-award interest in case of frustration of contracts.
- 4.3. Even after 1.5 years from the passing of the impugned award, not even 6% interest has been paid by the Sellers till date. This shows that the Sellers are interested in enjoying the interest accrued upon the said sums.
- 4.4. The clock should run from 1st January 1996, instead of 1999, for the reason that the Sellers were contractually required to hand over the premises to the Purchasers by 31st December 1995.
- 4.5. The interest should more accurately be calculated from the date on which the Sale Consideration was paid by the Purchasers to the Sellers (on various dates between 1992-1994).
- 4.6. The impugned award ignores the following aspects of the contract between the parties:
 - a. Clause 4.3 of the Sale Agreements clearly provides for interest @ 22.5% p.a. if the building above 9th floor is not allowed.
 - b. The Sellers very well knew that there was no possibility of being able to construct the area which was agreed to be sold.
 - c. Neither any frustration was pleaded nor can be set up as the Sellers had contemplated the circumstances and agreed to pay the interest @ 22.5% p.a.
 - d. The very fact that the Sellers filed Counter claim for specific performance itself shows that they never claimed frustration.

- e. The only finding of the Tribunal to justify grant of interest @ 6% p.a. is that the proceedings were kept in abeyance since long. This is perverse and thus liable to be set aside.

4.7. The impugned award ignores the fact that:

- a. While agreeing for abeyance between 27th May 2006 till October 2019, DCM did not waive its any rights to receive any compensation and did not waive any clause of the Sale Agreements. The abeyance of arbitral proceedings would have only allowed the Sellers to construct the building. The finding does not mean that Sellers can withhold the amount without paying the contractual rate of interest or the reasonable rate of interest.
- b. To keep the Arbitral Tribunal proceedings in abeyance cannot be construed as DCM having given up its right to claim compensation under Sale Agreements or in law and DCM cannot be penalized for the same.
- c. Admittedly, the Sellers had utilized the money from 1994 and had only refunded the principle amount on 9th October 2019. The rate of interest granted by Arbitral Tribunal is much lower than even the rate of interest which were prevalent on the Fixed Deposit rates fixed by Banks.

4.8. Reliance was placed on ***BDA v. Syndicate Bank***,⁷ to state that when the possession of the allotted plot/flat/house is not delivered within the specified time, the allottee is entitled to refund of the amount paid,

⁷ (2007) 6 SCC 711.

with reasonable interest thereon from the date of payment till the date of refund.

SELLERS' CONTENTION:

5. Mr. P. Nagesh, senior counsel for Respondent No. 3, on the other hand, controverts the above contentions on the following grounds:

- 5.1. The impugned award suffers from no perversity, and moreover DCM has not agitated any ground as mentioned under Section 34 of the Act, which would entitle it to seek indulgence of this court in interfering with the impugned award.
- 5.2. Relying on the maxim "*Nullus Commodum Capere Potest De Injuria Sua Propria*" (no one can derive an advantage from his own wrong), it is argued that DCM cannot be allowed to benefit from its own action of assenting to keep the proceedings in abeyance for 13 years, after reaching final arguments stage, in order to await the outcome of litigation.
- 5.3. Reliance was placed upon *Hyder Consulting v. State of Orissa*,⁸ to state that the purpose of awarding pre-award interest under Section 31(7)(a) of the Act is to ensure that proceedings are concluded without unnecessary delay.
- 5.4. DCM has not even disputed the factum of frustration of contract in the present petition, nor has a prayer been sought against the said findings.

⁸ 2015 2 SCC 189 at para 26.

- 5.5. The Purchasers were well aware of the pendency of litigation against NDMC at the time of entering into the Sale Agreements. They were also aware of the operation of an interim order in favour of the Sellers at that time (which was later vacated).
- 5.6. In the absence of any rate of interest specifically prescribed in the Sale Agreements, granting pre-award interest is at the sole discretion of the Arbitrator, to be exercised as per the facts and circumstances of the case. In this regard, reliance was placed upon *State of Haryana v. S. L. Arora*,⁹ and *B. Radhakrishnan v. Maharashtra Apex Corp. Ltd.*¹⁰
- 5.7. No ground has been raised by DCM to interfere with the interest amount arrived at by the Arbitrator through his own discretion by examining the facts and circumstances of the case.
- 5.8. The grant of post-award interest @ 10% p.a. shows that the Arbitrator has fairly appreciated the predicament of DCM. Thus, there is no need to increase the pre-award interest rate.
- 5.9. The Supreme Court in the case of *Project Director, NHAI v. M Hakeem*,¹¹ has held that a court does not have the power to modify the award.
- 5.10. Regarding the prayer of preponing of the period of interest to 01st January 1996, there is no contractual stipulation which allows any party to claim pre-reference award of interest. Rather, such interest can be awarded only if there was an agreement regarding the same between the parties. In this regard, reliance is placed on the judgment

⁹ 2010 3 SCC 690 at para 24.4 and 24.6.

¹⁰ 2017 4 MLJ 492 at para 4.

¹¹ 2021 SCC OnLine SC 473 at paras 29 and 40.

of the Supreme Court in *Superintending Engineer v. B. Subba Reddy*.¹²

5.11. DCM in its statement of claim only claimed for 12% interest on the market rent. Such market rent was never granted by the Arbitrator and DCM is not even claiming the same before this Court. Further, DCM never asked for interest on principal amount. DCM only asked for restitution of amount remitted and therefore, there was no prayer before the Arbitrator to grant any interest on the principal amount.

5.12. The Claim of 12% interest on principal amount was never raised before the Arbitrator and therefore cannot be raised for the first before this Court as held in the case of *Harish Chandra & Co. v. State of U.P.*¹³

ANALYSIS:

6. The Court has considered the contentions of the parties. Let's first take note of the findings of the common Sole Arbitrator, which are as follows:

6.1. Even if the Sellers had completed the construction in the prescribed time, DCM could not have gotten possession till the time the matter with regard to applicable FAR was decided by the Apex Court.

6.2. Due to the uncertainty of time in which the final decision of the Apex Court would be rendered, and also due to the uncertainty of outcome/decision itself, the Sale Agreements are not likely to be completed in any reasonable time. Thus, the Sale Agreements stand

¹² 1994 4 SCC 423 at para 7.

¹³ (2016) 9 SCC 478 at Para 29.4.

frustrated, and it cannot be said that either party had committed breach of its obligations.

- 6.3. Thus, in line with Section 65 of the Indian Contract Act, 1872, DCM should thus be placed in the same economic position as if there was no contract.
- 6.4. As the principal amount stands refunded, DCM only has to be compensated by allowing interest on the principal amount from the date of service of notices demanding return of the principal amount.
- 6.5. As DCM itself agreed to keep the proceedings in abeyance, interest shall be payable @ 6% p.a. on the principal amount of Rs. 4.5 crores, from 01st January 1999 till the date of repayment of principal amount.
- 6.6. In case the Sellers do not pay the above sums within 2 months from the date of the impugned award, they shall pay interest @ 10% p.a. on the unpaid amount from the date of the impugned award till the date of payment.
7. The Arbitrator has arrived at a finding of fact that the Sale Agreements between the parties became void due to frustration as per Section 65 of the Indian Contract Act, 1872. This finding is made on the basis of the facts and circumstances noted in the impugned award, whereby the Arbitrator concluded that by virtue of the *status quo* order still in force, the owner cannot complete construction of the building or obtain any completion certificate, and thus, the Sale Agreements executed for the purchase of floors which cannot be built, shall stand frustrated. This finding of fact, in view of the orders passed by the Supreme Court, does not call for any interference by this Court in the present proceedings. The law in respect of frustration of contract under Section 65 of the Indian Contract Act, 1872,

which is no longer *res integra*. The adjudicating authority is allowed to infer that the foundation of a contract has disappeared, either on account of destruction of the subject matter of contract or by reason of prolonged delay or interruption in the performance.¹⁴ The arbitrator, having regard to the fact that there was no fault by either party, thus rightly noticed that the performance and objective of the Sale Agreements had been rendered frustrated. It thus flows from Section 65 of the Contract Act that such agreement is to be treated as void.

8. The effect of the afore-noted finding is also noted by the Arbitrator, in that, there is no question of DCM being entitled to any claim except for seeking interest on the principal amount invested by them as per the Sale Agreements. To this end, the Arbitrator has granted interest @ 6%. The grounds urged by DCM to challenge the impugned award as noted hereinabove are all seeking enforcement of the terms of the Agreements. However, in light of the finding that the Agreements was rendered void – the terms of a void agreement cannot be enforced, this would not be of any assistance to DCM. For this reason, the Court does not find any merit in these contentions.

9. No doubt, DCM had filed a claim for refund of the sale amount. However, it is noted that it had no reason to await the outcome of the decision of the Supreme Court – for 13 years – and could have proceeded for adjudication of its claim before the arbitrator.

10. The Arbitrator awarded interest from 1st January, 1999, i.e., immediately after DCM invoked arbitration on 29th October, 1998. The Arbitrator has noted that the proceedings were kept in abeyance with the

¹⁴ See: *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821.

consent and agreement of DCM. This further reasoned with him to award interest @ 6% p.a. In these circumstances, the analysis taken by the Arbitrator to restrict the rate of interest to 6%, is towards achieving the end of restoring the parties to the same position as if there was no contract, in view of the fact that Sale Agreements stood frustrated, is justified. This rate of interest thus awarded is only compensatory in nature. There being no finding of fault against the Sellers, the Court does not find any ground whatsoever to interfere with this reasoning of the Arbitrator.

11. In view of the above the Court finds no merit in the contentions raised by DCM and accordingly, the petitions, along with pending applications, are dismissed.

NOVEMBER 25, 2021

p

(Corrected and released on 4th December, 2021)

SANJEEV NARULA, J