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

+ **ARB.P. 294/2021**

MAYANK AGRAWAL

..... Petitioner

Through: Mr. PK Agrawal & Mr.
Rishabh Tomar, Advs.

versus

JAIPRAKASH ASSOCIATES LIMITED Respondent

Through: Mr. Anil Dutt, Mr. Sumeet
Sharma & Ms. Debolina Roy,
Advs.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER (ORAL)

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13.09.2021

(Video-Conferencing)

1. The petitioner seeks reference of the disputes with the respondent to arbitration.

2. Mr. Anil Dutt, learned counsel for the respondent, has opposed the petition essentially on the following three grounds:

(i) This Court does not possess territorial jurisdiction to decide the present petition.

(ii) By virtue of Clause 2 of Sub-lease Deed dated 18th April, 2019, executed between the petitioner and the respondent, all claims of the petitioner stood settled. No arbitrable dispute, therefore, survives for consideration.

(iii) Clause 7.9 of the aforesaid Sub-lease Deed vested exclusive jurisdiction, in disputes pertaining thereto, with courts at Gautam Budh Nagar, and with the High Court at Allahabad. For this reason, too, this court is *coram non judice* in the present matter.

3. Clearly, the first and third objections are interlinked.

4. The dispute between the parties pertains to allotment, to the petitioner, by the respondent, of Apartment No. K-10/1103, Jaypee Greens, Sector 128, Noida. A provisional letter of allotment dated 19th September, 2009, was issued to the petitioner by the respondent, against a consideration of ₹ 1,46,02,720/-. The standard terms and conditions in the application for allotment were treated as a part of the provisional allotment letter.

5. The petitioner alleges that there was delay in construction of the aforesaid project, and, consequently, delay in grant of possession, to the petitioner, of the apartment. It is alleged that after nine years, possession of an incomplete apartment was granted to the petitioner by the respondent on 13th November, 2018. It is further asserted that, left with no option, the petitioner executed a Sub-lease Deed, pertaining to the said Apartment in favour of the petitioner, on 18th April, 2019. Thereafter, on 28th January, 2020, it is stated that the respondent offered an amount of ₹8,42,000/- to the petitioner, for completion of the work relating to the apartment, by the petitioner itself. In these circumstances, the petitioner submits that it was driven to take

possession of the aforesaid apartment and have the apartment completed out of its own resources.

6. Even so, according to the petitioner, an amount of ₹ 15,12,862/- was payable by the respondent to the petitioner.

7. Apart from this, the petitioner claims, from the respondent, liquidated damages to the tune of ₹31,47,209.10 and ₹50 lakh towards damages. The total claim of the petitioner, therefore works out to ₹1,05,02,071/-.

8. It is this dispute that the petitioner seeks reference to arbitration.

9. In this background, I may advert to the three objections raised by Mr. Anil Dutt, learned counsel for the respondent.

10. The first objection relates to territorial jurisdiction. Mr. Dutt, submits that, by operation of Clause 10.6 of the Standard Terms and Conditions (hereinafter, “STC”), and Clauses 7.8 and 7.9 of the Sub-lease Deed, this court is divested of jurisdiction to decide the present matter, such jurisdiction vesting exclusively in courts in Gautam Budh Nagar or with the High Court of Allahabad.

11. I am unable to agree.

12. For ready reference, Clauses 10.6 and 10.9 of the STC, and Clauses 7.8 and 7.9 of the Sub-lease Deed may be reproduced thus:

“10.6 Governing Law and Jurisdiction: The Provisional Allotment shall be governed and interpreted by and construed in accordance with the Laws of India, without giving effect, applicable, to the principles of conflict of laws, thereof or there under and subject to the provisions of Clause 10.9 hereof, the Courts at Gautam Budh Nagar, U.P., India shall have jurisdiction over all matters arising out of or relating to this Provisional Allotment.

10.9 Dispute Resolution: Any and all disputes arising out of or in connection with or in relation hereto shall so far as possible, in the first instance, be amicably settled between the Company and the Applicant. In the event of disputes, claim and/or differences not being amicably resolved such disputes shall be referred to sole arbitration of a person not below the rank of General Manager nominated for the purpose by Chairman of the Company. The proceedings of the Arbitration shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996, as amended from time to time, or any rules made there under. The Applicant hereby gives his consent to the appointment of the sole arbitrator as specified herein above and waives any objections that he may have to such appointment or to the award that may be given by the Arbitrator. The venue of the arbitration shall be New Delhi, India.

7.8 Save and except the Standard Terms and Conditions as contained in the Application Form, this **Sub-Lease Deed** supersedes and overrides all understanding and agreements, whether oral or written, between the **Parties**. Provided that in the event of inconsistency between the Standard Terms and Conditions and this **Sub-Lease Deed**, the provisions of this **Sub-Lease Deed** shall prevail.

7.9 This **Sub-Lease Deed** shall be construed and interpreted in accordance with and governed by the laws of Union of India. The local Courts of Gautam Budh Nagar (UP) and Hon'ble High Court of Judicature at Allahabad shall have exclusive jurisdiction over all matters arising out of or relating to this **Sub-Lease Deed**.”

13. Clearly, Clause 10.6 is subject to Clause 10.9.

14. Clause 10.9 specifically fixes the venue of arbitration as New

Delhi. No separate clause, fixing the seat of arbitration at any place other than New Delhi, is contained in any agreement between the parties, i.e., either in the STC or in the Sub-lease Deed. In such circumstances, it is well settled that the venue of arbitration is to be treated as the seat of arbitration.

15. Clause 10.9 having overriding effect over Clause 10.6, following the law laid down by the Supreme Court in *Mankastu Impex Pvt Ltd v. Airvisual Ltd*¹ and of this Court in *My Preferred Transformation and Hospitality Pvt Ltd v. Sumithra Inn*², this court, having territorial jurisdiction over the venue/seat of arbitration, would also have jurisdiction to adjudicate disputes relating to the STC.

16. In so far as Clauses 7.8 and 7.9 of the Sub-lease Deed are concerned, Mr. Dutt has emphasised the fact that Clause 7.8 “supersedes and overrides all understanding and agreements, whether oral or written, between the parties”. This, he submits, would include the STC. He further points out that Clause 7.8 orates that, in the event of inconsistency between the STC and the Sub-lease Deed, the Sub-lease Deed would prevail. This is an additional circumstance, according to Mr. Dutt, for ignoring the Clauses of the STC and deciding the present petition solely by reference to the Sub-lease Deed.

17. Again, I am unable to agree.

¹ (2020) 5 SCC 399

² (2021) Arb LR 59

18. As Mr. Agrawal, learned counsel for the petitioner, correctly points out, Clause 7.8 saves the STC, by its opening recital, which reads, “same and except the standard terms and conditions as contained in the application form.....”. All subsequent recitals in Clause 7.8 have, therefore, necessarily, to be subject to the opening caveat, which saves the STC and, therefore, incorporates by reference, the STC into the Sub-lease Deed.

19. There is no provision, in the Sub-lease Deed, providing for arbitration of disputes. As such, the reliance by Mr. Dutt, on the concluding recital in Clause 7.8 which pertains to inconsistency between the STC and the Sub-lease Deed, can be of no assistance to him. There is no provision in the Sub-lease Deed, which is inconsistent with Clause 10.9 of the STC. This fact, seen with the opening recital in Clause 7.8 of the Sub-lease Deed, would save the applicability of Clause 10.9 of the STC and would, therefore, vest jurisdiction in this court, to decide on the reference of arbitrable disputes between the parties, to arbitration.

20. Clause 7.9 of the Sub-lease Deed does not refer to arbitration. It is a “governing law” Clause. It has, therefore, to cede place to Clause 10.9 of the STC, especially in view of the opening saving caveat in Clause 7.8 of the Sub-lease Deed. Clause 7.9 of the Sub-lease Deed cannot, therefore, divest this court of jurisdiction in the present matter.

21. Besides this fact, Mr. Agrawal has drawn my attention to a communication dated 13th November, 2018, from the respondent to

the petitioner, in which the respondent has acknowledged that an amount of ₹15,12,862.25/- is payable by the respondent to the petitioner. Without burdening this order by a reproduction of the said letter –as this is an aspect which would more appropriately be decided in arbitration - the submission, *prima facie*, merits consideration.

22. The net amount payable by the petitioner to the respondent has, in the letter dated 13th November, 2018, been indicated as “(₹1,512,862.25/-)”, the parenthesizing of the amount being reflective of the fact that it is, in fact, payable by the respondent to the petitioner and not vice-versa. As Mr. Agrawal points out, it is this amount, which was worked out much prior to the execution of Sub-lease Deed along with the amount of ₹8,42,000/-, relating to the allegedly incomplete nature of the apartment, along with liquidated and other damages, which constitutes the basis of the claim of the petitioner against the respondent. The claim, therefore, has its genesis prior to execution of the Sub-lease Deed and even for this reason, I find substance in the contention of Mr. Agrawal that the jurisdiction of this court does not stand divested by execution of the Sub-lease Deed.

23. Mr. Dutt, has also placed reliance on Clause 2 of the Sub-lease Deed, which states that the Sub-lease Deed “is in full and final settlement of all claims of all the parties”. In this regard, I may observe, in its decision in ***Vidya Drolia v. Durga Trading Corporation***³, a bench of the three Hon’ble Judges of the Supreme Court, has, even while noting that a plea of accord and satisfaction can

³(2021)2 SCC 1

be decided by the Section 11 Court while examining the arbitrability of the dispute, nonetheless observed that it would be more appropriate that this aspect is also left for decision by the arbitrator. I have also taken a similar view in the order passed by me in *ABC Experts and Engineers v. UOI*⁴.

24. In any event, the facts are not so clear as to enable this court to come to a conclusion, while exercising jurisdiction under Section 11, that there is no arbitrable dispute between the petitioner and the respondent. The court clarifies that this aspect is kept open and that no observation contained in this order should be treated as an expression of opinion, even, tentative, thereon.

25. Mr. Dutt has also placed reliance on the judgment of Supreme Court in *Andhra Pradesh Industrial Infrastructure Corporation Ltd.v. S.N. Raj Kumar*⁵, specifically on Para 15 thereof which reads thus:

“15. We do not find any merit in any of the aforesaid arguments. In the first instance, it needs to be emphasised that there is no such condition of completion of construction within a period of two years in the sale deed. Such a condition was only in the allotment letter. However, after the said allotment, the appellant Corporation not only received entire consideration but executed the sale deeds as well. In the sale deeds no such condition was stipulated. Therefore, the High Court is right in holding that after the sale of the property by the appellant Corporation to the respondents, whereby the respondents acquired absolute marketable title to the property, the appellant Corporation had no right to insist on the conditions mentioned in the allotment letter, which cease to have any effect after the execution of the sale deed.”

⁴ Order dated 11th August, 2021 in Arb. P. 170/2021

⁵ **2018 6 SCC 410**

26. A bare reading of the said paragraph makes it apparent, *prima facie*, that the decision turned on the facts before it. In the first case, the said decision does not relate to a dispute referred to or sought to be referred to arbitration at all. Secondly, the question before the court was whether the appellant corporation before the Supreme Court could insist on compliance with conditions mentioned in the allotment letter, on a condition of completion of construction within two years, postulated in the allotment letter whereby the property was allotted to the respondent (before the Supreme Court), having, in the interregnum received entire consideration against the allotment and having executed sale deeds as well, in the face of the fact that no such condition of completion of construction within two years was to be found in the sale deeds. It was in these circumstances that the Supreme Court held that the appellant corporation before it could not insist on compliance, by the respondent, with the stipulation of completion of construction within two years as no such stipulation found place in the sale deed. The applicability of the said decision appears, *prima facie*, to be debatable in the facts of the present case.

27. Besides, while exercising Section 11 jurisdiction, this court is not expected or called upon to enter into the merits of the dispute between the parties. It is always open to the respondent to rely on the decision in *Andhra Pradesh Industrial Infrastructure Corporation Ltd. v. S.N. Raj Kumar*⁵, or any other decision as it so chooses, during the arbitral proceedings. That would be a matter which would appropriately have to be decided by the arbitral tribunal.

28. I am of the opinion, therefore, that there is no substance in the objection of the respondent, opposing the prayer of the petitioner to refer the disputes to arbitration.

29. Accordingly, the dispute stands referred to arbitration by the Delhi International Arbitration Centre (DIAC), which may appoint a suitable arbitrator to arbitrate thereon.

30. The arbitration would proceed under the aegis of the DIAC and would be in accordance with its rules and regulations. The arbitrator would be entitled to fees in accordance with the schedule of fees maintained by the DIAC.

31. The petition stands allowed in the aforesaid terms with no order as to costs.

C.HARI SHANKAR, J

SEPTEMBER 13, 2021

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