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Arb. O.P(Com.Div). No.598 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2023

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THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb. O.P(Com.Div).No.598 of 2022

1.R.Sivasankaran

2.Annapurna Sivasankaran

... Petitioners

Vs.

M/s.Harmony Residences Private Limited,

Rep. by Director S.Ramakrishnan,

Having registered office at

“Sai Prasad”,

New No.11, Old No.42, 12th Avenue,

Ashok Nagar, Chennai – 600 083.

... Respondent

PRAYER : Original Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation Act 2021 (3 of 2021) praying to pass an order of appointing a sole arbitrator to resolve the dispute between the petitioners and the respondent arising out of and in connection with the agreement for development dated 05.02.2018.

For Petitioners : Mr.S.Rajasekar

For Respondent : Mr.K.S.Viswanathan, Senior Counsel
for Mr.G.Ilamurugu



ORDER

WEB COPY This petition has been filed under Section 11(5) of Arbitration and Conciliation Act, 1996, (hereinafter referred as “the Act”), seeking to appoint a Sole Arbitrator to resolve the dispute between the petitioners and the respondent arising out of and in connection with the agreement for development dated 05.02.2018.

2.Learned counsel appearing for the petitioners would submit that the petitioners gave their landed property admeasuring 4800 sq.ft to the respondent / builder for a joint development and entered into an Agreement for Development dated 05.02.2018, at Chennai for construction of luxury residential apartments. As per the said agreement, the respondent would construct the apartment out of which, the petitioners are entitle to retain 943 sq.ft of undivided share of land and a flat measuring 1814 sq.ft along with a monetary consideration of Rs.7.25 Crores.

3.The grievance of the petitioners is that in terms of the said agreement, within a period of 18 months from the date of obtaining the plan approval, the respondent supposed to complete the construction of apartment and handover the same to the petitioner. The planing permission was obtained on 09.03.2019



and therefore, the respondent supposed to have handedover the flats on 19.09.2020. However, the respondent handed over the flats only on 12.07.2021.

Hence, the petitioner is entitled for the damages in terms of the said agreement.

That apart, the respondent supposed to pay a sum Rs.7.25 Crores immediately upon the registration of UDS. However, even after the Registration of UDS between 11.07.2019 and 11.01.2021, the respondent failed to make the payment. Therefore, the respondent is liable to pay the interest on the delay payment at the rate of 9% per annum on the principal amount to the petitioner.

The respondent admitted the lapses on their part and agreed to pay the interest at the rate of 9% per annum and also acted upon such assurances by making three interest payments during February to April 2021. Thereafter, the respondent declined to pay the interest. Hence, to resolve the such dispute, by invoking Clause 11 of the Joint Development Agreement dated 05.02.2018, the petitioners have sent a notice under Section 21 of the Act on 23.08.2022 by nominating Mr.Madhivanan to act as Arbitrator. However, the respondent by their reply letter expressed their unwillingness for the appointment of Arbitrator. Hence, the petitioners have filed the present petition seeking for appointment of Arbitrator.



4.Per contra, Mr.K.S.Viswanathan, learned Senior Counsel appearing on behalf of the learned counsel for the respondent strongly opposed for appointment of Arbitrator. He would submit that the present dispute pertains to the payment of 9% interest and no where in the contract, the parties agreed for payment of interest. In the absence of any such provision of payment, the respondent is not liable to pay interest and hence, this petition is liable to be dismissed. However, with regard to the delay in handing over the flats, as per the provision of the agreement, the respondent agreed to pay a sum of Rs.50,000/- per month and Rs.20 per sq.ft as compensation, in which there is no dispute at all. Hence, he prayed for dismissal of the petition.

5.Heard the learned counsel appearing for the petitioner as well as the respondent and perused the materials available on record.

6.For better appreciation, Clause 27 of the AMD Agreement is reproduced hereunder:

“CLAUSE 11. RESOLUTION OF DISPUTES

“Any dispute, controversy or difference which may arise between the parties out of or in relation to or in connection with the Agreement, shall first be resolved by amicable negotiations. If no resolution is reached by



amicable negotiations, the dispute shall be submitted for resolution by arbitration under the Indian Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof.

The sole arbitrator shall be appointed both by the OWNERS and the DEVELOPER. The venue for the arbitration proceedings shall be at Chennai. The language to be used in the arbitration shall be English. The existence of any dispute shall not release the parties of their respective obligation under this Agreement. The parties herein hereby agree and give their consent that the reference shall be made to a single Arbitrator, mutually nominated and appointed by the OWNERS and DEVELOPER.

The parties herein irrevocably agree that the courts at Chennai shall have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement and that accordingly any such action or proceeding arising out of or in connection with this Agreement may be instituted in such courts only.

This Agreement shall be in full force until all the transactions contemplated herein are fully and effectively completed and until such time this Agreement shall be irrevocable.”



7. Upon hearing, it is seen that the dispute in the present case pertains to the payment of 9% interest for the delay in handing over the flats. A perusal of the agreement shows that, as contended by the learned Senior Counsel there is no clause for payment of interest at the rate of 9%. However, there was a E-mail communication between the petitioners and the respondent on 21.07.2021, 15.06.2022, 01.07.2022 and 06.12.2022. All these E-mail correspondences would show that there was a discussion about the 9% interest between the petitioner and the respondent and the respondent has also made the interest payment for three months and thereafter failed to do so. Further, as per Section 7 (4) (b) of the Act, an exchange of letters, telex, telegrams or other mean of telecommunication provide a record of the agreement.

8. In the present case, there was a communication between the petitioners and the respondent by virtue of electronic mode and *prima facie* it appears that the parties have agreed for 9% interest for the lapses on their part. However, the respondent is now disputing the payment of interest. Therefore, all these issues cannot be decided at this stage before this Court and the same has to be decided by examining the parties. In such circumstances, this Court is of the view that the petitioners have made out a case for appointment of the Arbitrator for adjudication of the dispute between the parties. Accordingly, this Court passes



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the following order:

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9.The Hon'ble Mr.Justice M.Vijayaraghavan (Retd), residing at Door No.2/15, Dr.T.V.Naidu Road, Flat No.2B, Abirami Foliage, Chetpet, Chennai, (Phone No.9003268968), is appointed as the Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties. The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the Order, without influencing any of the observations made by this Court in this order. The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, fixed by him and the same shall be borne by the parties equally.

10.This Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondent to seek other reliefs under the provisions of Arbitration and Conciliation Act 1996 before the Arbitrator.

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KRISHNAN RAMASAMY. J.,
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