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

Date of Decision: 20.03.2023

+ O.M.P. (COMM) 318/2022 & I.A. 11937/2022, I.A.
11938/2022, I.A. 11939/2022.

ANAND DIVINE DEVELOPERS PVT LTD Petitioner

Through: Mr. Krish Kalra, Advocate for
Mr. Kartik Nayar, Advocate
[9953095583].

versus

SOHAN BAHADUR GURONG Respondent

Through: Mr. Rajesh Yadav, Sr. Adv.
with Mr. Udayan Khandelwar,
Mr. Shubhankar Sharma,
Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"], the petitioner- Anand Divine Developers Private Limited [hereinafter, "Anand"] assails an arbitral award dated 28.02.2022, passed by a learned sole Arbitrator in arbitral proceedings arising out a Memorandum of Understanding dated 08.05.2014 between the parties [hereinafter, "the MoU"].

Signature Not Verified

Digitally Signed By: SHITU

NAGPAL

Signing Date: 23.03.2023

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2. An objection had initially been raised by Mr. Rajesh Yadav, learned Senior Counsel for the respondent- Mr. Sohan Bahadur Gurong [hereinafter, “Sohan”], as to delay in filing of the present petition. By the order dated 15.03.2023, the Registry was directed to place the log information with regard to the filing on the record and to supply copies thereof to learned counsel for the parties. Mr. Yadav today states that, having looked into the log information, he does not wish to press the objection with regard to delay in filing the petition.

3. I have heard Mr. Krish Kalra, learned counsel for Anand, and Mr. Yadav on the merits of the matter.

4. The transaction between the parties concerns an apartment in a housing project (*apartment bearing No. 8082 in ATS Triumph, Sector 104, Gurugram, Haryana*) [hereinafter, “the property”], which was being developed by Anand. The parties entered into three agreements, all dated 08.05.2014- (i) a “*Buyer’s Agreement*”, by which Sohan agreed to purchase the property from Anand [hereinafter, “the Buyer’s Agreement”]; (ii) the *MoU*, which contemplated surrender of the property by Sohan to Anand upon the terms and conditions contained therein; and (iii) a “*Tripartite Agreement*” between the parties herein and ICICI Bank Limited [hereinafter, “the Bank”], for partial financing of the purchase¹.

¹ While the Tripartite Agreement has not been placed on record in the present petition, a copy thereof was handed over in Court, and with the consent of learned counsel for the parties, it has been taken on record. It is undisputed that the Tripartite Agreement was also a part of the arbitral record.

5. The claim of Sohan in the arbitral proceedings related to the failure of Anand to accept his request for surrender of the property in line with the terms and conditions in the MoU. Anand's case, however, was that Sohan had not fulfilled the terms and conditions of the MoU, inasmuch as he had not produced a No Objection Certificate [hereinafter, "NoC"] from the Bank with regard to surrender of the property to it.

6. The learned Arbitrator has found against Anand on these contentions. It has been held that the NoC of the Bank was not required for Sohan to exercise his rights under the MoU, and also that no such condition had been imposed in the contemporaneous communications addressed by Anand to Sohan. The learned Arbitrator has also rejected Anand's submission that the MoU had been extended by a period of one year, and had not been invoked afresh by Sohan, as required.

7. In assailing the award, Mr. Kalra submits that the conditions of the Buyer's Agreement and the Tripartite Agreement, when read with the MoU, would clearly establish that the consent of the Bank was required for any transfer of the property, including for surrender by Sohan to Anand itself. In support of this contention, Mr. Kalra draws my attention to Clause 17 of the Buyer's Agreement, which reads as follows: -

"17. Transfer by way of Nomination:

The Allottee shall have no right to assign the allotment in favour of any third party without obtaining prior written consent of the Company. The Company may at its sole discretion give or deny the consent to such request. In case the consent is given by the

Company the same shall always be subject to applicable laws and notifications as well as all directions of the government in force and shall also be subject to the terms, conditions and administrative charges as the, Company may impose from time to time in this regard. However, in case of death of the Allottee substitution of name of legal heirs are sought, no administrative charges shall be payable. The Allottee shall solely be liable and responsible for legal, monetary and all other, consequences that may follow because of such transferee/nominee/assignee shall also be bound by the terms and conditions of this Agreement. It is made clear to the Allottee that no permission for nomination/transfer, assignment shall be given by the Company to the Allottee after the grant of occupancy certificate. In any of the above cases, the transfer shall be done by way of endorsement.

*In case the Allottee seeks any transfer/assignment/nomination of the Agreement in favour of his nominee, he shall request in writing to the Company. **The said request letter would be duly signed by all the concerned parties and would be accompanied by a no-objection letter/certificate from the concerned Financial Institution/Bank, in case Allottee has obtained loans from any financial institution/banks against the said Apartment.***²

8. Mr. Kalra also submits that the Tripartite Agreement was categorical in providing for the consent of the Bank to any transfer of the property whatsoever. In this connection, Mr. Kalra cites clauses 4, 12, 21 and 24 of the Tripartite Agreement, which read as follows: -

“xxxxx

xxxxx

xxxx

*4. The Borrower undertakes that without the prior written consent of ICICI Bank he/she/they **shall not further mortgage/charge transfer/sell/assign or part with the possession** of the said Apartment to any person/bank/financial institution.*

xxxxx

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*12. **The Borrower shall diligently and faithfully observe the terms and conditions of this Agreement and Apartment Buyers Agreement along with the terms and conditions of any other documents or agreements as may have been executed by the***

² Emphasis supplied.

Borrower with ICICI Bank or Borrower with the Developer. *The sale deed/deed of conveyance which would be executed and registered by the Developer in favor of the Borrower will not in any way be contradictory to the terms and conditions of the Apartment Buyers Agreement.*

xxxxx

xxxxx

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21. The Owner/ Developer/ and Allottee/ Borrower(s) hereby agree;

i. not to create any charge or mortgage over and in respect of the said Flat except in favor of the Bank

ii. **The Owner/Developer shall not entertain any request of transfer of the Flat without the prior written consent of the Bank.**

iii. Not to permit any other person to occupy the said Flat without prior written permission of the Bank.

xxxxx

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24. The Developer shall note the creation of mortgage on the said Apartment in favour of ICICI Bank on the relevant books and records of the Developer subject to the terms hereof, and **shall not accede to any request from the Borrower during the currency of this Agreement, for transfer of the Borrower's rights in the said Apartment to any other person without the prior written consent of ICICI Bank.** In the event the Developer has to terminate and cancel the Allotment and recover the dues payable to it by the Borrower, then the Developer shall refund the amount (interests, costs and other charges) paid by ICICI Bank under the Loan Amount Agreement out of the total consideration received against the apartment & have the right and liberty to take such action as it may deem fit and in the event of any cancellation of allotment and the same shall be in accordance with the terms and conditions of the Apartment Buyers Agreement.”³

9. Some of the correspondence which was placed before the learned Arbitrator may also be referenced in this context:

³ Emphasis supplied.

- A. By a letter dated 10.02.2017, Anand *inter alia* committed to abiding by the terms and conditions of the MoU, if Sohan chooses to exit from the Agreement⁴.
- B. *Vide* a communication dated 13.02.2017, Sohan informed Anand that he was not interested to continue with the property due to financial crisis, and sought to surrender the same by buy-back scheme as per the Agreement⁵.
- C. After some further correspondence from Sohan, Anand addressed a letter dated 03.04.2017 to him, stating that the MoU was extended for a period of 12 months, keeping all other terms and conditions intact. Anand further committed to abide by the terms and conditions of the MoU, and sought a confirmation of the extension by Sohan⁶.
- D. Anand addressed a further letter dated 02.06.2017, to Sohan, *inter alia* calculating the amount due under the MoU⁷.
- E. However, by a further communication dated 10.11.2017, Anand took the position that the exercise of the surrender option by Sohan was not in accordance with the MoU⁸.
10. The learned Arbitrator has negated Anand's contentions herein with the following findings:

"40. I am of the opinion that the Tripartite Agreement primarily secured the interest of the bank and governed the

⁴ Refer page No. 166 of the petitioner's list of documents.

⁵ Refer page No. 105 of the petitioner's list of documents.

⁶ Refer page No. 170 of the petitioner's list of documents.

⁷ Refer page Nos. 106-107 of the petitioner's list of documents.

⁸ Refer page Nos. 109-110 of the petitioner's list of documents.

relation inter se the bank and the parties before this Tribunal as the bank was funding the investment on behalf of the claimant in the project. The clauses of the MOU also protect the interest of the bank; whose loan is to be discharged at a priority. The same is clear from clauses 5 and 8 of the MOU; which are extracted as under:

“5. The Purchaser/Investor shall be liable to pay the loan processing charges to the bank for obtaining the bank loan. However, upon buy back after expiry of 36 months the Owner/Developer shall be liable for foreclosure charges, processing fees and any other charges levied by the bank on the Purchaser/Investor.

8. It is hereby agreed by the parties that the Purchaser/Investor, within a time frame of 33 months from the date of booking to 36 months from the date of booking, shall be entitled to call upon the Owner/Developer in writing, to purchase the aforesaid Apartment at a premium of Rs.1500/- per square feet and in such a case the Owner/Developer shall repurchase the said Apartment within 30 days of expiry of 36 months from the date of booking. It is hereby clarified that the Owner/Developer shall over and above the premium amount shall also be liable to refund the entire amount paid by the Purchaser/Investor alongwith service tax till date to the Owner/Developer by the Purchaser/Investor.

***The Purchaser/Investor will execute the necessary documents to surrender the allotted units in favour of the Owner/Developer upon receipt of payment.** The Purchaser/Investor shall execute such necessary deed, documents in favour of Owner/Developer and the payment for repurchase price is subject to applicable tax laws. In case of delay in making the payment of repurchase price by the Owner/Developer to the Purchaser/Developer [sic: Investor] beyond 30 days, the Owner/Developer shall be liable to pay interest @18% per annum for the period of delay on the total repurchase price payable to the Purchaser/Investor. It is hereby clarified that till the time the repurchase price is fully paid to by the Owner/Developer to the Purchaser/Investor, the Owner/Developer shall also be liable to pay to the Bank all instalments. Pre possession EMI interest to the bank directly and keep the Purchaser/Investor fully indemnified in this regards.”*

41. From the foregoing clauses, it appears that upon the claimant opting for the buy-back option within the provided window of time, the respondent was to pay the claimant upfront as well as pay the charges to the bank for closure of the loan. The obligation of the claimant to execute the necessary documents for the transfer of the apartment was only “upon receipt of payment”; measuring thereby that the amount was to be refunded to the claimant and later, the documents were to be executed. The period in between would be used to discharge the loan of the bank whereby relieving the parties of their obligations under the Tripartite Agreement and only then, the claimant was to transfer the apartment to the respondent. To put it simply, upon the reading of the MOU and the Tripartite Agreement in conjunction, the following order emerges for the performance of reciprocal promises:

- a. The claimant was to exercise its option of calling upon the respondent to buy-back the apartment within a time frame of 33 to 36 months of the date of booking.
- b. The respondent was then obligated to refund the entire amount paid (either by the claimant or on his behalf by the bank) along with premium to the claimant;
- c. Thereafter, the claimant was to discharge the loan of the bank whereby relieving the parties from their obligations under the Tripartite Agreement or obtaining no objection from the bank;
- d. At the time of foreclosure of the loan, the charges for the same were to be borne by the respondent;
- e. Only thereafter, the claimant was to execute the necessary documents for surrendering the apartment;
- f. The entire process was to be concluded within 30 days of the expiry of 36 months.

42. The clauses of the agreements are clear and unambiguous not permitting any other interpretation. It is settled law that if the terms of the document are clear and unambiguous, extrinsic evidence to ascertain the true intention of the parties is inadmissible [see **Raj Kumar Rajinder Singh vs. State of H.P., (1990) 4 SCC 320 (para 19)**]. If the interpretation advanced by the respondent is to be accepted, the clause 8 of the MOU would be rendered otiose and redundant and the only mechanism for surrender would be under clause 13 of the Buyer’s Agreement. Further, the order of performance of the contracts would lead to absurd consequences whereby the claimant would be obligated to obtain the permission and the original documents from the bank,

entailing the discharge of the loan from his pocket only to be reimbursed by the respondent later. This cannot be the intention of the parties especially in view of clause 5 of the MOU.

43. *The entire case of the respondent is built on the aspect that the claimant had failed to exercise the buy-back option validly owing to the absence of the prior written consent from the bank. For the foregoing reasons, **I hold that the prior written consent was not required from the bank.** I am fortified in my conclusion by the correspondence exchanged between the parties.”⁹*

11. The learned Arbitrator has also analysed the correspondence between the parties and come to the conclusion that Anand’s letter dated 10.02.2017 “*clearly negates the stand of the respondent that the MOU was no longer valid and binding in view of the Tripartite Agreement or the Buyer’s Agreement.*”¹⁰

12. The learned Arbitrator has also found that Sohan had not accepted Anand’s extension of the MoU. For this purpose, the learned Arbitrator has *inter alia* considered Sohan’s letter dated 13.02.2017 and subsequent reminder as well as Anand’s communications dated 13.02.2017 and 02.06.2017¹¹.

13. On the basis of these findings, the learned Arbitrator has issued the following operative directions in the impugned award:

“58. In view of the conclusion drawn in the foregoing paragraphs, the claimant is entitled to the award on the following terms:

a. The respondent is directed to specifically perform the MoU between the parties.

⁹ Emphasis supplied.

¹⁰ Refer paragraph 45 of the impugned award (page No. 25 of the petitioner’s list of documents).

¹¹ Refer paragraphs 46-47 of the impugned award (page Nos. 25-27 of the petitioner’s list of documents).

- b. It is declared that the exercise of the buy-back option by the claimant was in terms of clause 8 of the MoU.*
- c. The respondent is directed to pay the entire pending loan amount with ICICI Bank Ltd. under loan account no.LBGUR00002089622 along with the accrued interest, closure charges or any other charges levied by the bank in accordance with clauses 5 and 8 of the MoU.*
- d. The respondent is directed to pay a sum of Rs. 28,78,782/- to the claimant having been paid by the claimant to the bank against EMIs, which were the obligation of the respondent under the MoU. All future EMIs would be paid by the respondent either to the bank directly or in the account of the claimant.*
- e. The respondent is directed to further refund a sum of Rs. 69,17,492/- as having been paid by the claimant under the Buyer's Agreement.*
- f. The respondent is also liable to pay Rs. 47,25,000/- as the premium to be paid under the MoU.*
- g. The respondent is also directed to pay interest at the rate of 18% on the sums under e. and f. w.e.f. 07.06.2017 till the date of actual payment to the claimant.*
- h. Upon receipt of the aforementioned sums and the closure of the loan account, the claimant is directed to execute the necessary documents for the surrender of the apartment.*
- i. The parties are directed to undertake the foregoing within a period of 30 days from the date of pronouncement of the award.*
- j. The letter bearing no. ATS Triumph/244/19-20 dated 07.06.2019 is set-aside in view of the exercise of the buy-back option by the claimant.*
- k. The claimant is entitled to costs of the arbitration proceedings assessed at Rs. 11,65,000/-. The costs shall be paid to the claimant within 2 months from the pronouncement of the award and in case of failure, the same shall bear interest at the rate of 12% till the date of actual payment.*
- l. The present award is printed on stamp paper of Rs. 100/-, the claimant is directed to pay the relevant stamp duty on the present award, which shall also form part of the costs to be paid by the respondent."*

14. Having heard learned counsel for the parties, I am of the view that the award does not call for interference within the parameters stipulated in Section 34 of the Act.

15. The learned Arbitrator, on an interpretation of the MoU under which the arbitral proceedings arose, alongwith other contemporaneous contractual arrangements, has come to a conclusion that the Bank's NoC was required only as a security against third-party transfers of the property by Sohan, and did not pertain to the exercise of Sohan's option to surrender the property in accordance with the MoU. The provisions of the Tripartite Agreement are consistent with this finding. The restrictions on transfer were clearly intended to protect the Bank against a third party transfer by Sohan, and Clause 12 thereof (cited by Mr. Kalra), in fact, suggests that all agreements between the parties (which would include the MoU also) must be faithfully implemented. Clauses 21 and 24 of the Tripartite Agreements apply to transfer of Sohan's interest, and not to surrender of the property to Anand itself under the MoU. The undisputed fact that the MoU was not within the knowledge of the Bank at the time of signing of the Tripartite Agreement, lends further credence to the position that the Tripartite Agreement was not intended to affect exercise of Sohan's rights thereunder. Significantly, there is no provision in the MoU corresponding to Clause 17 of the Buyer's Agreement, which provides for a NoC from the Bank in the event the allottee intends to transfer the property.

16. The analysis of the contractual arrangements in the award, therefore, appears to me to be quite reasonable, and certainly does not suffer from any perversity, as sought to be argued by Mr. Kalra.

17. Mr. Karla's second objection relates to the extension of the MoU. Here also, the learned Arbitrator has rendered a factual finding that the unilateral extension of the MoU in Anand's communication dated 03.04.2017 was not, in fact, agreed by Sohan. The finding is based upon the correspondence between the parties, which were part of the evidence on record. The learned Arbitrator has found that Anand required Sohan to sign a copy of the letter in token of his confirmation of the extension, which was factually not done. In these circumstances, the view taken by the learned Arbitrator is based on an appreciation of evidence which cannot be characterised as suffering from any such patent illegality so as to invite the interference of the Court under Section 34 of the Act.

18. In my view, the arguments advanced by Mr. Kalra, in fact, invite the Court to re-interpret the contract, and to reappreciate the evidence, far beyond the permissible scope of interference under Section 34 of the Act. The judgments of the Supreme Court *inter alia* in *Associate Builders vs. Delhi Development Authority*¹², *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)*¹³, and *Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited*¹⁴

¹² (2015) 3 SCC 49 [paragraphs 52 and 56].

¹³ (2019) 15 SCC 131 [paragraph 38].

¹⁴ (2022) 1 SCC 131 [paragraphs 26 to 29].

clearly lay down that both these aspects are within the province of the arbitral tribunal. The tribunal's reading of the contract and evidentiary assessment are liable to be interfered with only on very limited grounds of manifest arbitrariness or perversity. For the reasons outlined above, I do not find the present case to fall within that limited exception.

19. In these circumstances, the petition is dismissed, but with no order as to costs. All pending applications also stand disposed of.

PRATEEK JALAN, J

MARCH 20, 2023/ 'Bhupi'

