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

% ***Date of decision: 15th December, 2023***

\+ **O.M.P.(I) 6/2023, I.As. 25205/2023, 25206/2023, 25207/2023**

ASHISH ABROL & ANR. ..... Petitioners

Through: Mr. Keshav Thakur, Mr. Ritik Kumar, Ms. Palak Mathur & Mr. Prithvi Thakur, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ANR. ..... Respondents

Through: Mr. Preet Singh Oberoi, Advocate for R-2.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T ***(oral)***

1. The present Petition under Section 9 of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as* "A & C Act, 1996"*)* has been filed on behalf of the petitioners seeking following prayers: -

> *"(a) Restraining the respondent No. 1 for demanding Rs. 8,07,80,964/- (Rupees Eight Crore Seven Lakh Eighty Thousand Nine Hundred Sixty Four Only) and taking any further coercive action under the SARFAESI Act, 2002 against the petitioners;*
> *(b) Restraining the respondent No. 2 for cancelling the allotment of the said property and handling over the possession of the said property to the respondent No. 1"*

2. Notice issued.

3. Mr. Preet Singh Oberoi, learned counsel for the respondent No. 2 accepts notice.

4. The *facts in brief* are that the petitioners applied for a flat in a Project, namely, India Bulls Sky Forest for a consideration of Rs. 10,50,21,260/- and opted the payment plan-interest subvention of 20:80 scheme. On

15.05.2013, the petitioners submitted the application form with the respondent No. 2 and paid 20% of the consideration amount i.e., Rs. 2,01,95,241/- on 22.04.2013 and 21.05.2013 to the respondent No. 2.

5. A sum amounting to 75% of the total sale consideration was arranged under Loan Facility by the respondent No. 2 from its sister concern/respondent No. 1. The petitioners signed the loan documents as they had no other alternative option. On 05.07.2013, the petitioners were provided the Loan Documentation Booklet and seven blank undated signed Cheques bearing No. from 105451 to 105457 of Account No. 0268101062728 in the Canara Bank, East of Kailash, New Delhi-110065 were handed over to the respondent No. 1.

6. The respondent No. 1 on 10.07.2013 provisionally reserved the 4 BHK Flat bearing Flat No. 2901, 29th Floor, Tower-N having 2089 sq. feet usable carpet area and 4262 sq. feet saleable area along with three car parking spaces. As per the Loan Agreement, the possession of the flat was to be delivered within three years. The petitioners submitted the signed Loan Agreement dated 06.08.2013 to the respondent No. 1.

7. The petitioners thereafter signed another Tripartite Agreement with the respondent Nos. 1 and 2 on 31.08.2013. As per the Tripartite Agreement, it was specifically recited that the respondent No. 2 and the petitioners had jointly approached the respondent No. 1 for the loan of Rs. 8,07,80,964/- towards the payment of the apartment in the aforementioned Project.

8. **Clause 4 of the Tripartite Agreement** mentions that the respondent No. 2 has undertaken full liability for interest and joint and several liabilities for repayment during the '**liability period**' which means, **till the handover of the possession to the petitioners.**

9. **It is submitted by the petitioner that** respondent No. 2 has breached the agreed terms of the Tripartite Agreement and after the lapse of five years, the respondent No. 2 asked the petitioners on 04.07.2018 to execute an Agreement for Sale and take the possession in December, 2018, without payment of interest for delay in granting possession.

10. It is stated that the property was not ready on 04.07.2018, and is not ready even now. The respondent No. 2 unilaterally extended the date of possession to the year 2022 on the website of the Maharashtra Real Estate Regulatory Authority *(hereinafter referred to as* "RERA"*). Left with no option, the petitioners filed a Consumer Complaint on 09.09.2022 against the respondent Nos. 1 and 2 with RERA which is still pending adjudication.*

11. It is further submitted that despite the aforesaid complaint pending before the RERA, the respondent No. 1 has sent the Notice dated 14.09.2022 for non-creation of security for the loan *via* e-mail and has asked the petitioners to come forth for execution of the Agreement for Sale of the aforesaid suit property and then to deposit the Title Deeds with the respondent No. 1. It was further stated in the Notice that non-execution of the Agreement to Sell would amount to a default under the Loan Agreement. On the same date i.e., 14.09.2022, the Customer Care Department of R-1, India Bulls Group sent another e-mail to the petitioner No. 1 informing that the *Occupation Certificate* has been received for the Sky Forest Project.

12. Subsequently, on 11.08.2023, the representative of R-1, India Bulls Group, sent an e-mail to the petitioners asking them to make the payment for the Stamp Duty and registration of Rs. 58,72,000/- for execution of the Agreement to Sell.

13. The petitioners *vide* Reply dated 25.08.2023 informed that the

complaint for refund of the amount paid for the allotment along with interest is pending in RERA and that the e-mails being sent by the respondents were for *mala fide* intention to create trouble for the petitioners.

14. On 29.09.2023, the respondent No. 1 sent another intimation *via* e-mail to the petitioners mentioning that EMI of Rs. 13,18,977/- would be deducted towards the loan account of the petitioners on 05.10.2023 and asked the petitioners to make arrangements for the requisite funds.

15. The petitioners replied to the said e-mail on 04.10.2023 clarifying that their consumer complaint was pending in RERA and also asked the respondent No. 1 to neither deposit any cheque in the account of the petitioners nor to debit their account till the matter is pending in RERA. The petitioners also requested that no action be taken till the Consumer Complaint is decided.

16. Despite the said correspondence, the respondent No. 1 sent a Notice dated 18.10.2023 stating that for the loan of Rs. 7,57,32,154/- under the Loan Agreement, the Builder/respondent No.2 has issued permission to mortgage the flat in favour of the respondent No. 1. As on 18.10.2023, the amount of Rs. 40,34,287/- is overdue which is payable by the petitioners towards the pending Pre-EMI Interest and which respondent No.1 asked the petitioners to clear within seven days from the date of receipt of the communication.

17. Within 10 days, the impugned Notice dated 27.10.2023 under Section 13(2) of the SARFAESI Act was sent by the respondent No. 1 demanding the payment of Rs.8,07,80,964 to be paid within a period of 60 days failing which the respondent No. 1 threatened to take further coercive action under the Act.

18. A second Notice was sent on the same day asking respondent No. 2 to cancel the allotment in favour of the petitioners and hand over the possession of the flat to the respondent No. 1 and the refund of total dues to respondent No. 1. Respondent No.1 also threatened of coercive action under Section 138 of the Negotiable Instruments Act against the undated blank signed cheques issued by the petitioners in favour of them.

19. Further, on 05.12.2023 the respondent No. 2 sent an intimation *via* e-mail to the petitioners in regard to the provisional reservation of Apartment No. A3-2901 in the aforementioned Project at Mumbai and claimed that there was an outstanding due of Rs. 1,38,46,452/- against the said property. It was mentioned that in case the payment is not made, the provisional reservation of the said flat would be cancelled and the money already paid by the petitioners, would stand forfeited.

20. The petitioners have asserted that the respondent No. 2 still has an amount of Rs. 2,01,95,241/- given in the year 2013 despite which the property has not been delivered as per the Agreement. It is reiterated that the Consumer Complaint for refund of the amount is still pending adjudication in RERA about which the respondent No. 1 is aware, being a party in the said proceedings.

21. Hence, the prayer is made to restrain the respondent No. 1 from demanding Rs. 8,07,80,964/- and taking any further coercive action under the SARFAESI Act, 2002 against the petitioners and also to restrain the respondent No. 2 from cancelling the allotment of the said property and handing over the possession of the same to respondent No. 1.

22. **Learned counsel on behalf of the respondent No. 2 has appeared on advance notice and has vehemently opposed the present petition.**

23. It is submitted by the learned counsel for the respondent No. 2 that while *vide* Consumer Complaint filed before the RERA, the petitioners have sought cancellation of the allotment, the prayer made against the respondent No. 2 in the present petition is to restrain the respondent No. 2 from cancelling the allotment of the said property and to restrain the respondent No. 2 from handing over of the possession to respondent No. 1. It is thus asserted that the contradictory prayers have been made by the petitioners which are not sustainable.

24. Furthermore, there is an *arbitration clause* in the *Allotment Application* between the plaintiff and Respondent No.1, wherein the jurisdiction/venue of arbitration is stated to be of Mumbai but R-2 is not a party to it. Delhi is the jurisdiction agreed in the *Loan Agreement* but this Agreement is only between the petitioners and respondent No. 2 to which R-1 is not a party. The only *Agreement* between all the parties to the present application is the *Tripartite Agreement*, however, *there is no arbitration clause* in this Agreement . Therefore, present Petition under Section 9 of the Arbitration and Conciliation Act, 1996 cannot be invoked vis-a-vis the Tripartite Agreement. It is, therefore, stated that the present petition is liable to be dismissed.

25. **Submissions heard.**

26. Section 9 of the Arbitration and Conciliation Act, 1996 provides that any party may approach the Court "*before or during arbitral proceedings or at any time after the making of the arbitral award but before it is endorsed in accordance with Section 36,"* for interim measures. Clause (2) of Section 9 further provides that *where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection*

under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

27. From the bare perusal of the Section 9 of A & C Act, 1996, it is evident that there has to be an *arbitration clause inter se* the parties and that the petitioner has already given a Notice of Invocation of arbitration or is in the process of invoking arbitration for the dispute in respect of which an interim relief is sought.

28. In the present case, there are three Agreements *inter se* the parties; **first** is the *Application Form* between the plaintiff and Respondent No.2 wherein the jurisdiction/venue of arbitration is stated to be of Mumbai. The disputes had arisen sometime in the year 2022 and the petitioners had sufficient time for invoking arbitration, which the petitioners have clearly failed to do. The petitioners instead chose to approach RERA in the year 2022 where they have sought cancellation of the allotment and refund of money. However, in the present petition, the petitioners have sought the directions against respondent No. 2 to restrain it from cancelling the allotment. During the course of arguments, being cognizant of the fact that they have already approached RERA with their grievances and have sought cancellation of allotment while a contrary plea has been taken in the present petition, the Petitioners did not insist on any interim relief against respondent No. 2.

29. The second document between the Petitioners and both the respondents delineating their *inter se* rights and obligations is the *Tripartite Agreement* dated 31.08.2013, but significantly it has no Arbitration clause.

30. It is pertinent to mention that no reference has been made to any

Arbitration clause in the entire petition. However, the petitioner in the synopsis makes a reference to Article 11 of the *Loan Agreement* which provides for adjudication of disputes through arbitration in New Delhi. The obvious reason is because the *Loan Agreement* is only between the respondent No. 1 and the petitioners; the respondent No. 2 is not even a party to the said Arbitration Agreement. The petitioner cannot invoke Section 9 of the Act, 1996 when there is no arbitration agreement between the parties.

31. The actual grievance of the petitioners is the Notice dated 18.10.2023 has been issued by respondent No. 1 to respondent No. 2 permitting the mortgage of the suit flat. Thereafter, the Notice dated 27.10.2023 under Section 13(2) of the SARFAESI Act, 2002 making a demand of about Rs. 8,00,00,000/- had been made against the petitioners by respondent No. 1.

32. The respondent No. 2 has explained that the flat is ready and the Notice has already been given to the petitioners for taking the possession after the payment of the balance amount due and also payment of requisite Stamp Duty and registration fee, despite which the petitioners have not come forth. In fact, the petitioners intend to not take possession of the flat which is ready; instead has sought to defeat the bonafide steps taken by respondent no. 1 under SARFESI Act to recover the loan amount. Undoubtedly, there exists an Arbitration Clause in the Loan Agreement between Petitioners and Respondent No.1 but the jurisdiction/ seat of arbitration has been agreed as Delhi. **Apparently,** there is not a word mentioned in the entire petition about any Arbitration Agreement between the parties or about the intention of the petitioners to take its disputes to arbitration for the obvious reason that there exists no Arbitration Clause in

the Tripartite Agreement. In the absence of the Arbitration Agreement, no relief can be granted under Section 9 of the Arbitration Conciliation Act, 1996.

33. Even otherwise no interim relief can be granted to the petitioners for evidently, the interim relief is essentially targeted against the action by respondent No. 1 which has initiated action for recovery of Loan under Section 13(2) of the SARFAESI Act, 2002 against which the remedy available to the petitioners is under Section 17 of the SARFAESI Act, 2002 which provides that an aggrieved borrower may approach the Debt Recovery Tribunal for the requisite reliefs under Section 17 of the Recovery Of Debts And Bankruptcy Act, 1993.

34. It was vehemently argued on behalf of the petitioners that a serious fraud was committed by the respondents on the plaintiffs and such a plea is arbitrable. The petitioner has placed heavy reliance on the judgement of *Mardia Chemicals and ors vs Union of India*, (2004) 4 SCC 311, wherein the extent of the bar on civil jurisdiction under section 34 of the SARFAESI Act, 2002 had been examined. It was explained that if measures have been taken under Section 13 (4) of the SARFAESI Act, 2002, it would be open for the borrower to approach the DRT under Section 17 of the SARFAESI Act, 2002 before the date of the sale or auction of the security and the DRT has the power to pass interim stay orders on such auction or sale procedures. The civil courts are barred from entertaining any matter that the falls within the jurisdiction of the DRT. However, an exception was carved to apropos matters under Section 13(4) of the SARFAESI Act, 2002 where the action of the secured creditor is alleged to be fraudulent in nature or the claim made by the creditor is absurd and untenable.

35. *Mardia Chemicals* (supra), thus states that in case of plea of fraud, the plaintiff is entitled to initiate civil proceedings against the respondent. But in the present case a remedy under Section 9 of the Arbitration Conciliation Act, 1996 would be available to the petitioner only if there exists an Arbitration Agreement between the parties. Pertinently, not even a whisper of an arbitration clause has been made in the petition.

36. In the present case, except for asserting that a fraud has been committed, there is no further explanation. As per the petitioners themselves, the Flat is ready for possession. The disputes that have arisen are in respect of delay in completion of the Project and the liability of the Petitioners to repay the Loan amounts which are disputed. The petitioners can take recourse to the civil remedy for determination of their rights and liabilities but in the present case the grievance is in regard to the action initiated under the SARFESI Act, 2002 against which the remedy lies before the DRT as already discussed.

37. The plea of fraud, no doubt can be agitated as a civil right by way of arbitration/ civil suit as the case may be but here the petitioner has alleged that the fraud has been committed by the respondents in connivance with each other. As discussed above, the Tripartite Agreement, which is the only agreement between all the parties, does not have an arbitration Clause.

38. The petitioners herein are seeking interim relief against the action taken by Respondent No.1 under the SARFAESI Act, 2002 for which the statute provides a complete mechanism under Recovery Of Debts And Bankruptcy Act, 1993.

39. The Learned Counsel on behalf of the petitioners has also made a misplaced reference to the judgement of this Court in *Diamond*

<u>*Entertainment Technologies vs Relegare Finvest Limited through its Authorised officer*</u>, 2023 SCC OnLine 95. It was observed in the said case that the Recovery Of Debts And Bankruptcy Act, 1993 does not confer DRT with the jurisdiction to entertain any independent action initiated by the borrower against the financial institution and it is limited to the actions initiated by the financial institutions.

40. Moreover the Apex Court in the case of <u>*Bank of Rajasthan Ltd. v. VCK Shares & Stock Broking Services Ltd.*</u>, (2023) 1 SCC 1, has observed that a suit filed by a borrower for an independent action, as long as it does not pertain to the DRT proceedings or matters falling within the jurisdiction of the DRT, is maintainable provided that such actions do not obstruct the proceedings before the DRT.

41. Therefore, the judgement of <u>*Diamond Entertainment*</u> (supra) is not applicable to the facts in hand.

42. In view of above discussion, it is held that the present petition is not maintainable as the Tripartite Agreement between all the parties to the petition does not have any arbitration Clause.

43. It is thus, held that the present petition is without merit and the same is hereby dismissed along with pending applications.

NEENA BANSAL KRISHNA
(JUDGE)

DECEMBER 15, 2023/*S.Sharma*