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

\+ FAO(OS) (COMM) 6/2018

ATEN CAPITAL PRIVATE LIMITED ..... Appellant
Through Mr. Rajat Navet and Mr. Kushagra Pandit, Advs.

versus

CANDOR GURGAON TWO DEVELOPERS ..... Respondent
Through Mr. Akhil Sibal, Sr. Adv. with Mr. Sanjeev Kapoor, Mr. Rajat Jariwal, Mr. Aakash Bajaj, Ms. Shagun Jagii, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

O R D E R

% **15.01.2018**

CM Nos. 1428/2018 and 1429/2018 (exemption)

Allowed subject to all just exception.

FAO(OS) (COMM) 6/2018 and CM Nos. 1427/2018 (direction)

1. This appeal by Aten Capital Pvt. Ltd. under Section 37 of the Arbitration and Conciliation Act, 1996 (Act, for short) read with Section 13 (1) of the Commercial Courts Act, 2015 impugns judgment and order dated 30.11.2017 passed in OMP (Comm.) No. 424/2017, whereby objections filed by the appellant under Section 34 of the Act have been dismissed upholding the award dated 09.10.2017.

2. The appellant accepts and admits having received Rs.45 crores, Rs.30 crores and Rs.18 crores advanced by the respondent, Unitech Developers & Project Ltd. now known as Candor Gurgaon Two Developers, vide three Inter Corporate Deposit Agreements (ICDAs) dated 04.10.2012, 06.11.2012 and 06.12.2012, respectively.

3. As per written and agreed terms of the ICDAs, the appellant was to repay Rs.93 Crores was to the respondent by 03.03.2013. However, by an agreement in writing signed by the appellant and the respondent dated 02.03.2013, the date of repayment of ICDAs was extended to 02.03.2014.

4. The appellant between March, 2014 to May, 2014 repaid Rs. 90 crores. Balance amount of Rs.3 crores was not paid. To this extent there is no doubt and debate.

5. The respondent thereupon had invoked the arbitration clause and pursuant court order disputes were referred to Arbitration..

6. Award dated 09.10.2017 substantially accepts the claim of the respondent, and holds:-

> *"(a) The claimant is entitled to the refund of the principal amount of Rs.3 crores. The Claimant is awarded the interest at 16% p.a. plus 2% p.a. default interest on the Outstanding Principal Amount i.e. Rs.3 Crores from 31.05.2014 till the payment is made as per the 'Interest' clause of the Agreement.*
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> *(b) The Respondent is to pay the awarded sum within 6 weeks from today, failing which the Respondent will be liable to pay the said amount along with an interest at the rate of 2% higher than the current rate of interest prevalent on the date of award as per Section 31(7) (b) of the Arbitration and*

Conciliation Act, 1996 as per annum from the date of award to the date of payment."

7. The appellant while admitting that they had not paid Rs.3 crores, had propounded an alleged oral settlement or agreement on 14.03.2014 between the representatives of the appellant and the representatives of the respondent company. The appellant asserts that group companies of the respondent, namely M/S Unitech Advitisors Pvt Ltd., Unitech Ltd. and M/S Prakausali Investment (India) Pvt. Ltd (which got merged with another group company M/S MayFair Capital Pvt Ltd.) were liable to pay them Rs. 1crores, Rs. 35 lacs towards principal and interest and Rs.1 crore 10 lacs, respectively. Thus, liability to pay Rs.3 crores was denied.

8. The award rejects and does not accept the plea of oral settlement. The appellant it is observed was unable to prove the oral settlement as propounded. Reference was made to correspondence exchanged vide letters dated 28.05.2014 by IDFC Ltd. and 04.06.2014 by Unitech Corporate Parks Pvt. Ltd. and legal notice dated 09.01.2015 on behalf of the respondent seeking payment of the balance amount of Rs.3 crores. The appellant had failed to respond to the first and second letter. In response to the legal notice, the appellant had stated that they would seek legal opinion and reply. However, no reply was given. Oral agreement was propunded for the first time belatedly in reply to the application under section 9 of the Act filed on 11th May, 205. There was complete silence between March, 2014 till May, 2015. ICDAs had a specific stipulation that no

amendment in the agreement shall be binding unless written and signed by the authorised representative of each party.

9. On the basis of the aforesaid reasoning and after examining the material on record, learned Arbitrator came to the conclusion that the appellant has not been able to establish and prove oral settlement, modifying and amending the terms of ICDAs.

10. Learned counsel for the appellant has referred to paragraph 5.8 of the award and submitted that the aforesaid findings are contrary to the earlier findings.

11. Paragraph 5.8 of the Arbitral Award states that the appellant had paid Rs.90 crores out of Rs.93 crores which lends credence to the plea that there was understanding to defer or adjust payments. We do not read this observation as a conclusion or final finding formed by the learned Arbitrator. Use of the word "credence" indicates that this was a factor or a ground taken into consideration by the learned Arbitrator. The final conclusion arrived at after factoring and considering all aspects and evidence was against the appellant. It has been held that alleged oral settlement was not proved and established. Moreover as noticed above, ICDAs had a specific stipulation that no amendment to the agreement would be binding unless in writing and signed by authorised representatives of each party.

12. The second contention of the appellant is that the letters dated 28.05.2014 and 04.06.2014 were written by IDFC Ltd. and Unitech Corporate Parks Pvt. Ltd., not by the respondent company. We do not find any merit in the said contention. It is accepted and admitted that IDFC had 40% share and Unitech Corporate Parks Pvt. Ltd. had 60%

share in the respondent company at that time. Moreover the legal notice dated 09.01.2015 was issued by the respondent company. The appellant had not propound an oral agreement in the reply. There is no proof that there was an oral settlement.

13. We do not find any reason and ground to interfere in the findings of the Single Judge accepting the award and rejecting the plea of the oral settlement.

14. Accordingly, the appeal has no merit and is dismissed in *limine*. No Costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

JANUARY 15, 2018
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