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

\+ **ARB. P. 623/2023**

AANCHAL JAIN & Anr. ..... Petitioner

Through: Mr. Yogesh Sharma Mr. Yugant Parihar, Ms. Pratima Ravi and Mr. Yogeshwer Singh, Advocates (M. 9911440242)

versus

OMAXE LTD. THROUGH ITS DIRECTORS ..... Respondents

Through: Mr. Tarun Sharma with Mr. Abid Ali and Mr. Manek Sharma, Advocates (M. 9811027856)

CORAM:
JUSTICE PRATHIBA M. SINGH

ORDER

% **02.05.2024**

1. This hearing has been done through hybrid mode.

2. This is a petition filed by the Petitioners-Ms. Aanchal Jain and Mr. Diwakar Sharma, under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter, '*the Act*') seeking appointment of an Arbitrator in terms of the lease agreement dated 23rd February, 2016 (hereinafter*, 'the Agreement'*).

3. It is the case of the Petitioners that they paid a sum of Rs. 20,15,734/- for allotment of the property- 223.35 sq. ft. of commercial space in the lower ground floor called "Omaxe Connaught Place" situated at Beta-II, Greater Noida, District Gautam Budh Nagar, Uttar Pradesh (hereinafter, '*suit property*'). The Petitioners claim that vide allotment letter dated 6th November, 2015, the Respondent had agreed to deliver the possession of the

premises within 24 months. The Petitioners further state that the aforesaid allotment letter was followed by an addendum letter dated 29th December, 2015 according to which the Respondent had promised to pay a fixed monthly rental of Rs. 22,218/-

4. The case of the Petitioners is that they paid the full amounts for the suit property in terms of the aforesaid agreement. The Respondent however, neither gave the possession of the suit property nor paid the aforesaid monthly rental which has led to filing of this petition seeking appointment of the Arbitrator. According to the Petitioners, the space of the Petitioners is not identifiable and the assured rental is also not being paid. Hence an Arbitrator ought to be appointed.

5. Ld. Counsel for the Respondent submits that the possession of the suit property was given on 17th January, 2017 itself and all the dues have been cleared in terms of Clause 4.2 of the agreement up until 21st December, 2022. The outstanding amount of Rs. 70,225/- as mentioned in the previous orders has also been cleared. It is his submission that no arbitral dispute exists in this matter. Since the only dispute is in respect of possession and the outstanding dues, no arbitral dispute even survives in this matter.

6. The matter was heard in brief on 11th March, 2024 and the submission of the Petitioners on the said date was that only an alleged fit out possession was given in 2017 and that there was no identified physical possession of the space. The Petitioners also alleged that the mall is almost non-functional and hence, there was an arbitrable dispute between the parties.

7. The Court was of the opinion that the actual status of the mall deserves to be ascertained and accordingly, a Local Commissioner (hereinafter referred to as 'LC') was appointed with the following mandate:

> *"7. Under these circumstances, before the appointment of an Arbitrator, it is deemed appropriate to appoint a Local Commissioner (LC). Ms. Sapna Jha (M:8447641801), Advocate who is present in Court is appointed as a Local Commissioner to visit the said premises. The mandate of the Local Commissioner is as under:*
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> *i. The LC shall ascertain the position of the mall, the status of completion and whether the same is occupied and if so to what extent.*
>
> *ii. The Respondent shall identify the premises which is allotted to the Petitioner and the LC shall ascertain as to whether, it is in a position of being commercially used by the Petitioner for deriving any rental or lease income.*
>
> *iii. The LC is free to take photographs and videograph of the proceedings. The mall shall also be photographed and videographed.*
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> *8. The LC shall be paid a fee of Rs.50,000/- by the Petitioner. Subject to the LC's report if the Respondent is to pay any fee qua the LC, the same shall be considered on the next date of hearing."*

8. The LC's Report was, thereafter, received and the same showed that the mall was hardly functional, except in few areas. In fact, the Petitioners' shop was not even identifiable, as per the LC's Report. The extracts of the LC Report are as under:

"5. Upon visiting the Mall, it has been observed that the Mall consists of Lower Ground Floor, Upper Ground Floor, Ground Floor, First Floor and Second Floor. Pertinently, only the Upper Ground Floor was operational and functional, however, the other floors were below partially functional as the same were mostly vacant. Photographs depicting different floors of the Mall are annexed herewith and marked as Annexure C.

6. That most of the shop premises were non-operational and the same is evident from the photographs taken during the inspection. Photographs of huge board covering various parts of the Mall is annexed herewith and marked as Annexure D.

7. That with respect to said Premises, the Authorised Representative of the Respondent during the inspection, shown the Premises allotted to the Petitioner. 1 have noted that the same is situated on the lower ground floor of the Mall. The said Premises was unidentifiable as the same was not separately demarcated. The said Premises of the Petitioner forms part of the unit namely "Shop No. F-09". Photographs depicting the Shop No. F-09 is annexed herewith and marked as Annexure E.

8. It is submitted that as per the aforesaid observation, it is understood that Premises is not fit to be used commercially by the Petitioner for deriving any rental or lease income as the same has not been demarcated and is unidentifiable."

9. The images placed by the LC in the report are also extracted below:

10. On 29th April, 2024, after hearing some submissions, ld. Counsel for the Respondent had submitted that he would like to seek instructions if the Respondent is willing to refund the amount to the Petitioners with interest.

11. Today, it is submitted by Mr. Sharma that an Arbitrator may be appointed, though no claims, in fact, have been quantified by the Petitioners.

12. Clearly, there are arbitrable disputes that have arisen in the matter. The Court has perused the arbitration clause. Considering the extent of the claim and the amount paid by the Petitioners, a sole Arbitrator, ***Ms. Rashmi Kathpalia, Advocate (M:9810050146)*** is appointed to adjudicate the disputes between the parties.

13. The Arbitrator shall take into consideration the Local Commissioner's Report, which has been filed in the present case.

14. The Petitioners may now file its claim/ case before the ld. Arbitrator and the arbitration shall take place under the aegis of the Delhi International Arbitration Centre (hereinafter, '*DIAC*').

15. The Respondent is free to file counterclaim thereto, if any.

16. The arbitration proceedings shall be conducted under the Rules of DIAC.

17. The Petitioner is free to seek adjustment of the LC's fee, which has already been paid in the arbitral proceedings.

18. The fee of the ld. Sole Arbitrator shall be as per the Fourth Schedule of the Act, as amended by the DIAC Rules, 2023.

19. List before the DIAC on 22nd May, 2024.

20. Let a copy of the present order be emailed to Secretary, DIAC on the email id- delhiarbitrationcentre@gmail.com.

PRATHIBA M. SINGH, J

MAY 2, 2024/*PB/bh*