

(2017) 10 DEL CK 0316

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 368 Of 2017

Anant Raj Limited

APPELLANT

Vs

Raghunath Builders Pvt.Ltd.

RESPONDENT

Date of Decision : 16-10-2017

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 34

Citation : (2017) 10 DEL CK 0316

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Harish Malhotra, Rekha Dwivedi, S.C. Ladi, Deeksha L. Kakar, R.K. Alagh, Vinod Jain, Rajesh Jain

Final Decision : Allowed

Judgement

Sanjeev Sachdeva, J

CAV.893/2017

Since learned counsel for the respondent/caveator enters appearance, the caveat stands discharged.

IA No.11925/ 2017(exemption)

Exemption is allowed subject to all just exceptions.

O.M.P. (COMM) 368/2017 & IA No.11924/2017(stay)

1. The petitioner, by this petition under Section 34 of the Arbitration & Conciliation (hereinafter referred to as "the Act") seeks setting aside of

Award dated 09.09.2017.

2. Learned Arbitrator by the Impugned award has inter-alia returned the finding that the period of 60 months stipulated in the agreement commenced

from the date of the execution of the agreement and the vacant possession of

the land and necessary sanctions were to be obtained within the said period of 60 months from the date of execution of the Agreement. Learned Arbitrator returned a finding that the petitioner had not obtained the necessary sanctions within the period of five years from the date of the agreement and was thus in breach of the agreement. Learned arbitrator further held that the Petitioner is not in joint possession of the project land and no right or interest was created in favour of the petitioner under the agreements.

3. The respondent is the owner of a land measuring 27740 sq. yards, commonly known as 'Jaipuria Mill' at 6926, Clock Tower, Subzi Mandi, Delhi.

4. The petitioner and the respondent entered into an agreement dated 12.06.2007 to develop a residential-cum-commercial complex on the said land.

5. The agreement noticed in the recital that out of 27740 sq. yards of land, certain portion had already been sold out to third parties, certain portion was in occupation of some tenants, certain portion of the land was available as vacant land and some portion was being used as roads & open spaces.

6. As per the agreement, the petitioner had to develop the project at its own cost. The petitioner was also required to have the tenants evicted from the various portions by negotiations/litigations. The petitioner, at its own cost, was to have the plan sanctioned from the concerned authorities and to use its own resources to develop the said project. The entire cost and expenses were to be borne by the petitioner for eviction of tenants, obtaining sanctions & permissions and to develop the project. After the project was developed, the same was to be sold and the sale proceeds divided in the manner stipulated in the agreement.

7. The petitioner paid a sum of Rs.1.50 crores to the respondent towards part payment, as stipulated in the agreement.

8. As per the petitioner, the respondent failed to cooperate with the petitioner in seeking eviction/vacation of the various tenants and the respondent also threatened to revoke the Power of Attorney executed in favour of the petitioner without any justifiable cause of action. It was contended that since the Power of Attorney was for valuable consideration, the same even, otherwise, was irrevocable.

9. The respondent, by notice dated 03.03.2014, revoked the Power of Attorney executed in favour of the petitioner. The petitioner, thereafter, invoked

the arbitration clause by notice dated 17.10.2014 and requested the respondent to concur in the nomination of the Arbitrator.

10. As per the petitioner, the respondent, instead of consenting to referring the disputes to Arbitration, sought to terminate the contract by the notice dated 17.10.2014. Thereafter, the petitioner filed a petition under Section 11 of the Act, in which a sole arbitrator was appointed through intervention of the Court.

11. The petitioner filed the claims, inter alia, seeking specific performance of Agreement dated 12.06.2007 and direction to the respondent to have a joint sale of the project to a third party in terms of Clause 19(b) of the agreement. The petitioner also, alternatively, sought appointment of a Local Commissioner for the purpose of sale of the project premises and disbursement of the sale proceeds in terms of Clause 19(b) of the Agreement. The petitioner further sought refund of a sum of Rs.5,11,09,797/- being the amount spent in settling with some of the tenants to secure their eviction besides, certain other expenses incurred by the petitioner.

12. The respondent, while denying the contention of the petitioner, had contended before the Arbitrator that the petitioner was in breach of its obligations under the contract and had not taken any steps towards performance of its obligations. The respondent also lodged a counter-claim seeking a declaration that invocation of Clause 19(a) of the Agreement, permitting the respondent to terminate the contract, was valid.

13. Further direction was sought against the petitioner to remove its employees, security personnel and a restraint from forcibly occupying the portion got vacated from the tenants.

14. Learned Arbitrator by the impugned award, while rejecting the claims of the petitioner, directed refund of Rs. 1.50 Crores paid as advance, without any interest. Learned Arbitrator allowed the counter claims and declared that the Agreement dated 12.06.2007 and the Power of Attorneys dated 13.06.2007 were validly terminated and further directed the petitioner to remove its employees, security personnel and representatives etc from the project land.

15. Learned senior counsel appearing for the petitioner has contended, inter alia, that the Arbitrator has erred in interpreting the clauses between the parties and holding that the period stipulated for completion of the project, i.e.

60 months, commenced from the date of the agreement and not from the date when the tenants were evicted.

16. It is contended that the Arbitrator has fallen in error in returning a finding that the period of 60 months commenced from the date of the agreement. It is contended that the award is liable to be set aside as the Arbitrator has returned the finding that the petitioner was in breach of its obligation based on the finding that the period of 60 months commenced from the date of the agreement.

17. Learned senior counsel for the petitioner contends that the Arbitrator erred in not appreciating that the respondent was in breach of its obligations, not cooperate with the petitioner, inducted new tenants and did not furnish the complete details of all the tenants, thereby, enabling the petitioner to take appropriate steps for evicting the tenants. It is further contended that the fact that the Arbitrator holds that 32 occupants were got evicted by the Petitioner and those 32 comprised only 14 tenancies, establishes the fact that there was no cooperation from the respondent because correct and complete information was not provided by the Respondent to enable the petitioner to settle with the tenants. It is contended that on account of lack of correct information, the petitioner was made to settle with 32 occupants believing that there were 32 tenancies, whereas, as per the respondent, the 32 occupants covered by only 14 tenancies.

18. It is further contended that the Arbitrator has erred in not taking into account the payment made by the petitioner in settling with the tenants for securing their eviction. It is contended that if the agreement is held to be validly terminated, the benefit of the vacated portion would be available to the respondent.

19. Per contra, learned senior counsel for the respondent contends that the interpretation rendered by the Arbitrator does not warrant any interference by the Court inasmuch as the Arbitrator has interpreted the Clauses in consonance with normal commercial parlance.

20. It is contended that the Arbitrator has rightly held that in commercial transaction of this nature, there cannot be an indefinite period for performance. It is contended that if interpretation of the petitioner were to be accepted then there would have been an indefinite period available to the petitioner for performance of the contract, which can never be the intention

of the parties. It is further contended that it was not the respondent but the petitioner, who was in breach of the obligations under the contract by failing to take steps to seek eviction of the tenants.

21. It is submitted that in the first three years of the signing of the agreement not a single tenant was evicted and after the expiry of approximately eight years, only 14 tenants out of approximately 200 had been got evicted. It is further contended that as the petitioner failed to take any steps, respondent was constraint to initiate proceedings against the existing tenants and the respondent, on account of its sole efforts, has been able to secure eviction order in respect of approximately 40 tenancies.

22. Learned senior counsel for the respondent contends that in commercial contracts, the contracts have to be interpreted to make commercial sense and cannot be construed by adopting narrow, pedantic or legalistic approach. It is contended that a reasonable time for commencement and completion of the project is expected to be taken into consideration by the parties.

23. Learned senior counsel for the respondent contends that the Arbitrator has taken the only possible interpretation of the terms of the contract and thus the Award does not warrant any interference.

24. Since the entire basis of the award of the Arbitrator is the finding that the period of 60 months commenced from the date of the agreement, it would be expedient to examine the relevant clauses of the agreement. The Arbitrator has based his finding on the reading of clauses 6 and 19 of the Agreement. The said clauses read as under:

6. That the FIRST PARTY in association with the SECOND PARTY shall get the sanction of the project using its resources to have the same granted at the earliest. The sanction and permission for the project are expected to be granted within sixty months from the date of getting the tenanted area vacated or in case part is vacated and as per law part plan can be sanctioned then it will be got sanctioned accordingly. The time of sanction and permission may be extended considering the then prevailing circumstances.

19 (a) That in case no permission(s), CLU, clearances, plans, etc. are allowed/sanctioned for the project, within the period of sixty months or such period as may be agreed mutually between the parties in writing, the

either party may terminate this Agreement and in that event, the SECOND PARTY shall pay/refund to the FIRST PARTY the advance money without any interest, upon the FIRST PARTY handing over possession to, the SECOND PARTY. Upon refund of the advance, the FIRST PARTY shall not be entitled to joint possession of the property and the present agreement shall stand cancelled. Under no circumstances, the SECOND PARTY shall be liable to pay the costs, expenses, charges etc. incurred by the FIRST PARTY in respect of said project.

19(b) Notwithstanding anything contained in this agreement, in case the construction of the project does not commence due to any reason

within sixty months either party may opt to sell the project ""as it is"" at any time and in such case the agreed value of the land contributed by

the SECOND PARTY shall be taken at Rs. 50,00,00,000/- (Rupees Fifty Crores only) instead of Rs. 25,00,00,000/- (Rupees Twenty Five

Crores only) excluding the land mentioned in Para 11 supra. Further, the amount spent in evacuating the tenants and other costs, expenses

and charges etc. incurred by the FIRST PARTY in the said project and the agreed value of land shall be recovered by selling the land to

third party (ies) and the amount so recovered shall be proportionately shared between the FIRST PARTY and SECOND PARTY in the

ratio of their investment till date and the agreed value of land which in such case shall be Rs. 50,00,00,000/-(Rupees Fifty Crores only)

excluding the land mentioned in Para 11 supra. The balance sale proceeds, after adjustment of agreed value of land and entire costs,

expenses and charges incurred by the FIRST PARTY, shall be shared in the ratio of 50: 50. However, this option of selling the land to third

party(ies) shall be resorted to only as a last option.

25. The Arbitrator has interpreted the said clauses in the following manner:-

6.23 The next major area of controversy is as to whether period of 60 months for obtaining the necessary sanctions for construction is

to commence from the date the agreement was executed or from the date when vacant possession was obtained of the tenanted premises.

According to the Claimant, the period of 60 months is to commence from the date vacant possession of the land is available for development

and construction. The Respondent submits that the 60 months commenced from

the date of execution of the agreement.

6.24 In my opinion Clause 6 of the agreement expresses an expectation that the Claimant shall endeavor to obtain the sanctions for the

project at the earliest. It is estimated that the sanctions would be available within 60 months from the date of getting the tenanted area

vacated. Even though time may not be of essence, this provision cannot be read to mean that the Claimant is given an indefinite period to

obtain the necessary sanctions. It appears to me that the intention of the parties was that the necessary sanctions would be obtained within

60 months of the execution of the agreement. Five years is not too short a period to be envisaged as the period required to evict the tenants

from the project land. It would be absurd to conclude that the Claimant had been given an eternity to obtain the necessary sanctions. This

would destroy the very foundation of the agreement dated 12.06.2007. The only reasonable interpretation of clause 6 would be that the

parties had estimated a maximum or ultimate period of 60 months to obtain vacant possession of the land. The Claimant was expected to

simultaneously obtain the necessary sanctions to develop the residential cum commercial complex. Mr. Ladi, in my opinion correctly

submitted that a building project cannot be contemplated without setting a completion date for the same. Therefore the parties had agreed

that the construction would commence within five years of the date when the agreement was executed. In my opinion clause 6 has to be read

alongwith clause 19(a) and 19(b) to ascertain the date from which the period of five years is to commence. Both the clauses 19(a) and 19(b)

do not use the expressions ""from the date of getting the tenanted area vacated"". Thus a harmonious reading of clause 6 and clause 19(a)

and 19(b) would tend to show that the parties intended the necessary sanctions to be obtained within five years from the date of the

agreement.

6.25 It is settled proposition of law that commercial contracts must be interpreted to make commercial sense. The contract must not be

construed by adopting a narrow, pedantic, or legalistic approach. The documents must be read in such a way as to make commercial sense

to a person having the necessary background knowledge which would be

available to a party placed in a situation when the contract was executed. In this case both parties are involved in the construction industry. Therefore a reasonable time limit for the commencement and completion of the project would be expected to be taken into consideration by the parties. No reasonable person involved in the building trade would expect the owner of the land to grant a builder an indefinite period to complete the project. It would make no commercial sense.

6.28 In this case the parties have entered into an agreement to jointly develop a residential cum commercial complex on the land exclusively owned by the Respondent. The object of the agreement is to obtain vacant possession from the tenants by either reaching settlements or by obtaining court orders. Both parties are to cooperate in the effort. The Claimant is solely responsible for obtaining all the necessary permissions /sanctions for undertaking the development project. The Respondent would contribute to the cost of the project by making available the land on which the complex can be built. The Claimant is to finance the entire project. This would include the expenses to be incurred on litigation and the amount of money to be paid to the tenants for surrendering the tenancy rights. Upon completion of the project the profits are to be shared by the parties in accordance with clauses 12 and 13 of the agreement.

6.29 This would make it quite evident that the Claimant would have stipulated a reasonable period in which the necessary sanctions ought to be obtained for commencement of construction. I therefore find merit in the submission of Mr. Ladi on behalf of the Respondent that the period of five years for commencement of the project is from the date the agreement was executed and not from the date vacant possession was received from the tenants. Since the necessary sanctions were not obtained by the Claimant within 60 months, the Respondent has revoked the POAs through letter dated 03.03.2014.

6.30 As noticed earlier the Claimant submits that the Respondent has failed to perform its contractual obligations and therefore cannot be permitted to take advantage of its own wrong. This apart the POAs being irrevocable and coupled with any interest could not be terminated.

6.31 It has been noticed earlier that the Claimant has not obtained the necessary sanctions within a period of five years from the date of the agreement. Rather it is the case of the Claimant that the period of five years will commence only from the date vacant possession of the land is made available. Both the parties have placed on record numerous documents to show that the parties have been continuously blaming each other for non-performance of reciprocal obligations under the agreement. It would be appropriate to make a reference to a few of the documents. It appears that parties held a meeting on 26.08.2009. A perusal of the same would show that even at that stage, the Respondent had offered to refund the advance to the Claimant in case it does not wish to continue with the agreement for the development. However, it was mutually decided that the Respondent would provide to the Claimant list of tenants ready to vacate alongwith the amount payable to them. The Claimant was to make available an architect in the next meeting and to initiate work for preparation of lay out plan. This shows that even after two years the project was still at the initial stage.

26. The Arbitrator, in his Award, has interpreted Clause 6 to hold that the period of 60 months, stipulated for completion of the project, would commence from the date of the Agreement. The Arbitrator has negated the contention of the petitioner that the period of 60 months would commence from the date of eviction of all the tenants.

27. The reason given by the Arbitrator is that the provision cannot be read to mean that the petitioner would be given an indefinite period to obtain necessary sanctions. The Arbitrator has held that it would be absurd to conclude that the petitioner had been given an eternity to obtain the necessary sanctions. The Arbitrator has held that the reasonable interpretation of Clause 6 would be that the parties had estimated a maximum or ultimate period of 60 months to obtain vacant possession of the land and the petitioner was expected to simultaneously obtain the necessary sanctions to develop the residential-cum-commercial complex and, accordingly, returned a finding that the parties had agreed that constructions would commence within five years from the date when the agreement was executed.

28. Interpretation of Clause 6, as rendered by the Arbitrator, is also based on the fact that the Clause 19(a) and 19(b) do not use the expression

â??from the date of getting tenanted area vacatedâ?. The Arbitrator has, in his view, rendered a harmonious reading of Clause 6 with Clause 19 to

returned a finding that the period of 5 years were to commence from the date of the agreement and the petitioner was also obliged to simultaneously

permission from the concerned authorities.

29. In my view, learned Arbitrator has clearly fallen in error. Neither clause 6 nor clause 19 refer to the date of the execution of the agreement.

Clause 6 uses the expression â??within sixty months from the date of getting the tenanted area vacated or in case part is vacated and as per

law part plan can be sanctioned then it will be got sanctioned accordingly. The time of sanction and permission may be extended

considering the then prevailing circumstances.â??

30. Clause 6 contemplates two alternative conditions, (i) within sixty months from the date of getting the tenanted area vacated and (ii) in case part is

vacated and as per law part plan can be sanctioned then it will be got sanctioned accordingly. In the first condition the period is sixty months after the

vacation of the entire tenanted area. The alternative condition is that if part is vacated and as per law plan could be sanctioned in part, then sixty

months would commence from the said date.

31. Further, reading of clause 6 shows that parties were aware, that keeping in view the number of tenancies, it may not be possible to get all the

tenancies vacated within a reasonable period. Therefore, they stipulated the second condition of part vacation.

32. Learned arbitrator has based his finding taking into consideration only the first condition. He has completely overlooked the alternative second

condition of part vacation. Learned Arbitrator has held that if the period were to be counted from the vacation of all the tenanted portions, then it

would amount to giving an indefinite period to the Petitioner. This, however, is not the case.

33. If parties had intended that the period of sixty months would commence from the date of the agreement, then the agreement would have stipulated

so. The parties were aware, keeping in mind the number of tenants, that vacation of all tenants would take some time. That is the reason why the

parties have stipulated that the period of sixty months would commence from the eviction of the tenants or if part plan can be sanctioned, the from the

date such portion is vacated in respect of which part plan could be sanctioned.

34. Clause 6 of the contract contemplates only two eventualities and that is the reason it uses the term "sanction and permission for the project are

expected to be granted within sixty months from the date of getting the tenanted area vacated" and, secondly, "or in case part is vacated and as

per law part plan can be sanctioned then it will be got sanctioned accordingly".

35. Reading of clause 6 shows that the parties were conscious of the fact that it may not be possible to get all the tenants vacated within a reasonable

time and, accordingly, it was stipulated that if petitioner were to get all the tenants vacated within a reasonable time then the petitioner would be

obliged to get necessary sanctions and complete the project etc. within a period of 60 months. However, if it was not possible to get all the tenants

vacated within a reasonable time, then vacation of such number of tenants which would enable the petitioner to obtain sanction of plan for part area as

per law, so that part of the project could be executed and in that situation the petitioner would be obliged to get the sanction for part of the project and

make necessary constructions.

36. The apprehension expressed by the learned Arbitrator, that if the period of sixty months were to be contemplated from the date of eviction of the

last tenant, it would tantamount to giving an indefinite period to the petitioner to perform, is misplaced in view of the alternative condition stipulated in

the agreement i.e. of part vacation and part sanction of plan.

37. Though, it is today contended that the petitioner had defaulted in not even complying with this obligation, perusal of the Award shows that the such

a plea, that part of the area was available for which part plan could be sanctioned and the petitioner has failed to get the same sanctioned, was not

even raised before the learned arbitrator and accordingly no such plea has been considered. There is no finding returned by the Arbitrator that the

petitioner had not taken reasonable steps to have even part of the area vacated. The Arbitrator has not gone into the aspect of alleged breach on the

part of the petitioner.

38. As noticed in Para 6.31 by the Arbitrator, both the parties had placed numerous documents to show that the parties had been continuously blaming

each other for non-performance of the reciprocal obligations under the agreement. The finding returned by the Arbitrator clearly is that since the

petitioner did not perform its obligations within a period of five years from the date of the agreement, the petitioner was not entitled to any relief.

39. The award is based on the interpretation of Clause 6 and the finding returned that the entire agreement had to be performed by the petitioner

within sixty months of the date of the agreement. As noted above, the Arbitrator has erred in not noticing the alternative stipulation in Clause 6

40. Further Clause 19(a), which was relied upon by learned Arbitrator in interpreting Clause 6 also does not support the interpretation rendered. The

term used in Clause 19(a) is "within the period of sixty months". Clause 19(a) uses the term "within the period of sixty months" and Clause

19(b) uses the term "within sixty months". The only other Clause, which refers to the period sixty months, is Clause 6. Clauses 19(a) and 19(b)

when read in conjunction with Clause 6 show that the period of sixty months, referred to in Clauses 19(a) and 19(b), is the period referred to in clause

6.

41. As noticed above, Clause 6 stipulates only two situations, one where all the tenants have been evicted and the other, where such number of

tenants have been evicted, which would enable the petitioner to obtain sanction of plan for part of the area.

42. Since the Arbitrator has erred in not correctly interpreting Clause 6 of the agreement and rendering a finding only on the basis of the first part of

Clause 6, the Arbitrator clearly fell in error.

43. Perusal of the Award shows that that the Arbitrator has not specifically gone into the issue of the alleged failure of the parties to perform their

respective obligations, as contended by the parties. The contention of the respondent is that the petitioner was in breach of its obligations in performing

the contract. The Arbitrator in the Award has not gone into the aspect as to whether the petitioner was in breach or not on the facts as established but

has presumed breach on the interpretation that the period of sixty months commenced from the date of the agreement, which is erroneous in view of

the interpretation of clause 6 as noticed hereinabove.

44. Paragraphs 6.20 and 6.21 of the award read as under:

"6.20 It is true that the Respondent was expected to cooperate with the Claimant in perusing the litigation against the tenants who have

not vacated on the basis of settlements reached with the landlord. However, it is

apparent from the record that upto 2010 the Claimant was not able to evict even one tenant. According to the Respondent, the Claimant has been able to evict only 14 tenants over a period of eight years. The Claimant has however claimed that 32 tenants had been evicted. A list of such tenants was attached as Annexure â?" 25 with the Statement of Claim. The Respondent has however pointed out that 32 persons mentioned in the list were paid in respect of vacating only 14 units. The Respondent had relied on Annexure B to the Statement of Defence, which gives the lists of tenants evicted through the Claimant. This apart the Respondent claims to have filed more than 80 cases before different fora, which includes the cases for recovery of arrears of rent, for seeking permission from the Competent Authority, under Slum Area (Improvement and Development Act), 1956 as the property is situated within the area notified under the aforesaid Act for eviction of tenants from the said land. The Respondent has obtained favourable orders in about 40 matters. The Respondent has placed on record numerous documents giving the details of pending litigations.

6.21 Therefore, I am unable to conclude that the Respondent has not cooperated with the Claimant or has caused unnecessary hurdles in eviction of the tenants from the project land.â??

45. Reading of paragraphs 6.20 and 6.21 shows that the Arbitrator has considered the objections of the petitioner that the respondent was in breach but has returned a finding that he is unable to conclude that the respondent had not cooperated with the petitioner or had caused unnecessary hurdle in eviction of the tenants. The contention raised by the respondent that the petitioner was in breach of its obligations has not been gone into by the Arbitrator.

46. Though the arbitrator has noticed the contention of the petitioner that the respondent was in breach of the agreement as during the subsistence of the agreement, the respondent has inducted new tenants in the property and also renewed the leases of existing tenants without the consent of the petitioner but not dealt with the same.

47. The plea that the respondent has inducted new tenants and renewed the leases of existing tenants is a material allegation. The alleged fact, if

proved, would have a material bearing on the execution of the entire project. It may be noticed that the respondents in their reply to the said allegation

have not specifically denied the same. Though in paragraphs 6.36 of the award learned Arbitrator has held “These are some of the instances

which would tend to indicate that the progress on the project was stalled by both the parties adopting a rather rigid attitude.....”.

Despite noticing the plea and opining that project was stalled by both parties, learned Arbitrator erred in not specifically deciding on this aspect. The

entire reasoning of the learned Arbitrator is based on the interpretation that the period of sixty months commenced from the date of the agreement,

which as noticed above, is erroneous.

48. Since the said finding is an integral part of the award and cannot be separated/segregated from the remaining award, the entire award needs to be set aside.

49. In view of the above, I find merit in the contentions of the petitioner that the award suffers from infirmities and is liable to be set aside.

Accordingly, the petition is allowed, the Arbitral Award dated 09.09.2017 is set aside.

50. Parties are left to bear their own cost.