(2018) 12 DEL CK 0512

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) 237 Of 2018

Lt Col (Retd) H S Bedi & Anr — APPELLANT

Vs

M/S North Star Apartment Pvt Ltd. & Anr — RESPONDENT

Date of Decision : 12-12-2018

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 9, 34

Citation : (2018) 12 DEL CK 0512

Hon'ble Judges : S. Ravindra Bhat, J;Prateek Jalan, J

Bench : Division Bench

Advocate : Ashin Vachher

Final Decision : Dismissed

Judgement

Prateek Jalan, J

1. This appeal is directed against a judgment dated 21.02.2018 passed by the learned Single Judge dismissing the appellants' petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), which had sought setting aside of an arbitral award dated 18.07.2017 (as amended on 28.08.2017).

2. By a flat buyers' agreement dated 17.05.2007 (hereinafter referred to as the "Agreement"), the appellants had agreed to purchase a flat in a building which was under construction by the respondents. It was mentioned in the agreement that the approximate super area of the proposed flat was 7875 sq. ft. and the parties agreed to a sale consideration of Rs. 4,80,37,500/- for the same. For the purposes of the present appeal, Clause 1.2 (d) and Clause 7.2 of the Agreement are relevant. They are set out below:-

"Clause 1.2(d)

"Super Area"

It is made clear that the super area of the FLAT as defined in Annexure-II is tentative and subject to change till the construction of the GROUP HOUSING COMPLEX is complete. The SALE PRICE payable shall be recalculated upon confirmation by the DEVELOPER of the final super area of the said FLAT and any increase or reduction in the super area of the said FLAT shall be payable or refundable, without any interest, at the same rate per square feet as agreed herein above. If there shall be an increase in super area, the FLAT BUYER(S) agrees and undertakes to pay for the increase in super area immediately on demand by the DEVELOPER and if there shall be a reduction in the super area, then the refundable amount due to the FLAT BUYER(S) shall be adjusted by the DEVELOPER from the final Installment as set forth in the schedule of payments appended in Annexure 1.

Clause 7.2

Major Alternation/Modification

In case of any major alternation/modification resulting in excess of 10% change in the super area of the FLAT in the sole opinion of the DEVELOPER any time prior to and upon the grant of occupation certificate, the DEVELOPER shall intimate the FLAT BUYER(S) in writing the changes thereof and the resultant change, if any, in the SALE PRICE of the FLAT to be paid by him/her and the FLAT BUYER(S) agrees to deliver to the DEVELOPER in the SALE PRICE of the FLAT to be paid by him/her and the FLAT BUYER(S) agrees to deliver to the DEVELOPER in writing his/her/their consent or objections to the changes within thirty (30) days from the date of dispatch by the DEVELOPER of such notice failing which the FLAT BUYER(S) shall be deemed to have given his/her/their full consent to all such alternations/modifications and for payments, if any, to be paid in consequence thereof. If the written notice of the FLAT BUYER(S) is received by the DEVELOPER within thirty (30) days of intimation in writing by the DEVELOPER indicating his/her/their non-consent/objections to such alternations/ modifications as intimated by the DEVELOPER to the FLAT BUYERS, then in such case alone this Agreement shall be cancelled without further notice and the DEVELOPER shall refund the money received from the FLAT BUYERS(S) within sixty (60) days from the date of intimation received by the DEVELOPER from the Flat Buyers. On payment of the money after making deductions as stated above the developer shall be released and discharged from all its obligations and liabilities under this Agreement. In such a situation, the DEVELOPER shall have an absolute and unfettered right to allot, transfer, sell and assign the FLAT and all attendant rights and liabilities to a third party. It being specifically agreed that irrespective of any outstanding amount payable by the DEVELOPER to the FLAT BUYER(S), the FLAT BUYER(S) shall have no right lien or change on the FLAT in respect of which refund as contemplated by this clause is payable."

3. It appears that, at the time of offering the possession of the flat, by a letter dated 28.01.2014, the respondent informed the appellants that the constructed flat was of a super area of 13,000 sq. ft. and demanded an additional amount of ☐ 3,77,64,767/- under various heads. This led to considerable correspondence

between the parties, and, ultimately, institution of proceedings before a Sole Arbitrator. The appellants also approached this Court under Section 9 of the Act wherein this Court passed an order dated 13.01.2016, restraining the respondent from transferring and alienating the flat in question. Before the learned arbitrator, the appellants claimed possession of the flat of the area mentioned in the agreement, and interest upon the amount paid by the appellants to the claimant. The claimants made an alternative prayer for refund of the amount paid alongwith interest. Certain counter claims were also raised by the respondent with which we are not concerned in these proceedings.

4. The learned arbitrator ultimately made an award dated 25.02.2016 wherein he held that the increase in the super area was contractually permissible, but found that the appellants had objected to the same by their communication dated 02.02.2014. The learned arbitrator therefore, awarded the alternative claim of the appellants for the refund of the amount paid by them. However, the learned arbitrator declined the prayer for interest on the ground that the appellants had not sought cancellation of the agreement and return of their payments, and had instead throughout contended that the increase in the super area was itself impermissible.

5. Against the award, both parties approached this Court under Section 34 of the Act and both the petitions have been dismissed by the impugned order. The contention of the appellants herein was that they were entitled to interest upon the payment made which had been wrongly declined by the arbitrator. The learned Single Judge has upheld the reasoning and the conclusion of the learned arbitrator.

6. Learned counsel for the appellants submitted that the obligation of the respondent to refund the payment made by the appellants arose automatically under Clause 7.2 of the agreement once they had objected to the increase in the super area. Such refund not having being made within 60 days, he submits that the respondent was liable to pay interest there upon.

7. We are unable to agree with this contention. Clause 7.2 properly interpreted admits of only two possibilities: either the allottee accepts the increase in the super area and makes payment accordingly, or the allottee objects and the agreement is cancelled leading to a refund of the amount paid. The appellants chose neither of these options at the outset but insisted upon performance of the agreement at the original stipulated super area. The injunction passed by this Court at their instance deprived the respondent of the opportunity to sell the flat to any other willing buyer at the time. Even before the arbitrator, the principal contention of the appellants was that the flat as originally agreed ought to be allotted to them. Their contention in the proceedings under Section 34 of the Act is wholly inconsistent with this stand, as they now claim an automatic entitlement to the refund, alongwith interest, by operation of Clause 7.2. The Arbitral Award is based on a reasonable interpretation of the agreement and an appreciation of the correspondence placed by the parties. In our view, the

conclusion reached by the learned arbitrator cannot in these circumstances be interfered with under Section 34 of the Act.

8. For the reasons aforesaid, the appeal is dismissed, but without any order on costs.