(2015) 01 DEL CK 0121

In the Delhi High Court

Case No : Co. Pet. 148/2014

Shahirealtech Private Limited APPELLANT

Vs

Celebration City Projects P. Ltd. RESPONDENT

Date of Decision : 13-01-2015

Acts Referred:

Citation : (2015) 01 DEL CK 0121

Hon'ble Judges : Sanjeev Sachdeva, J.

Bench : Single Bench

Advocate : Balbir Singh, for the Appellant; Sacchin Puri and Hrishika Pandit, Advocates for the Respondent

Judgement

Sanjeev Sachdeva, J.—The present petition has been filed by the Petitioner seeking winding up of the Respondent for the alleged failure to pay a sum of Rs. 17,26,41,591/-.

2. As per the Petitioner, the Respondent entered into a Joint Development Agreement (JDA) with the Petitioner for development of a Shopping Mall cum Multiplex. On the same day, in order to implement the JDA, a Collaboration Agreement was entered into between the parties for joint development of the project.

3. The contention of the Petitioner is that as per the agreement between the parties the Petitioner had to contribute Rs. 20,61,71,015/- towards the cost of the project. The balance cost was to be contributed by the Respondent. As per the JDA the Petitioner was entitled to a specified area in the project.

4. The contention of the Petitioner is that clause 2 of the agreement stipulates that the Respondent would procure a minimum specified rental for the area falling to the Petitioners'' allocation. The area has been divided into 2 categories "Regular Area" and "Additional Area".

5. As per the Petitioner, the Respondent had undertaken to lease out both the

Regular as well as the Additional area on the ground floor at Rs. 90 per square foot per month on the super area on or before 01st April 2010. The Respondent had also undertaken to rent out the Regular and the Additional area on the first floor at the rate of Rs. 70 per square foot per month. The same has been specified as the minimum rental.

6. As per the Petitioner, the agreement stipulates that in the event Respondent is unable to rent out any part of the said space at the minimum rental agreed upon, the Respondent shall pay to the Petitioner the minimum rental as monthly return till such time the space is rented out.

7. The agreement further stipulates that in case the space is rented out at a rate higher than the minimum rental then the Petitioner shall pay to the Respondent additional cost per square foot on the super area towards its contribution for the space stipulated under the agreement.

8. The contention of the Petitioner is that the Respondent under the agreement is responsible for finding the tenants and for renting out the space allocated to the Petitioner. The Collaboration Agreement stipulates that the Respondent has represented that space in the project has already been committed by the renowned companies as lessees as mentioned in the annexure annexed to the Collaboration Agreement. The agreement further stipulates that the sum that the Respondent is obliged to pay to the Petitioner shall be deemed to be a liquidated sum.

9. As per the Petitioner, the Petitioner has already paid to the Respondent the entire amount that the Petitioner had agreed to contribute towards the project. The Petitioner has paid to the Respondent the sum of Rs. 20,42,18,913/-. As per the Petitioner there was no other obligation on Petitioner under the Joint Development Agreement and the Collaboration Agreement.

10. As per the Petitioner, the Respondent was to rent out the space falling to the allocation of the Petitioner on or before 01st October 2010 and in case the Respondent was not able to lease out the same, the Respondent was liable to pay the estimated monies to the Petitioner on account of loss of rental income that the Petitioner would have derived from the said space.

11. The contention of the Petitioner is that as per the Agreements, the project was to be ready for fit outs by 01st June 2010 and the project was to be operational by 30th September 2010. As per the Petitioner, the Respondent did not have sufficient money to complete the project and as such the project has not been completed.

12. The Petitioner in the circumstances contends that the Respondent is liable to pay to the Petitioner the minimum rental that the Petitioner was promised for the space falling to the allocation of the Petitioner in terms of the agreement between the parties.

13. As per the Petitioner, the Respondent is liable to pay to the Petitioner a sum

of Rs. 17,26,41,591/- towards the admitted pre estimated liquidated damages at the minimum guaranteed rental as set out in the agreements besides interest due thereon.

14. The Respondent has filed a short reply taking only a preliminary objection that since the petition has been filed on account of alleged recovery of liquidated damages, such a petition is not maintainable till such time the damages were adjudicated finally by a court of law. Leading counsel for the Respondent submitted that the Respondent reserved its liberty to file a detailed reply to the petition in case the preliminary objection was held against the Respondent.

15. Since the preliminary objection was raised that the petition was not maintainable, the arguments were heard only on the preliminary objection.

16. Learned counsel for the Respondent has relied on the decision of the Division Bench of this Court Tower Vision India Pvt. Ltd. Vs. Procall Private Limited, to contend that where the claim is for damages even though liquidated, no winding up petition would lie as there is no debt and the issue of damages is yet to be determined by the court.

17. The Division Bench in the case of TOWER VISION INDIA (SUPRA) has at the outset held as under:

2. As this issue came up subsequently in other two petitions, they have also been referred to the Division Bench. That is how we have heard these matters. It would be pertinent to point out that at the time of hearing, the counsel for all the parties in all these petitions agreed that it is not only the question which is formulated to be answered, but on the basis of answer given to the aforesaid question and applicability thereof in each case, the company petitions themselves be decided on merits as it would be reflected in our discussion, answer to the question cannot be in vacuum and may vary depending upon the facts of each case. In this backdrop, we resume our discussion by taking note of the facts in all these cases.

(Emphasis supplied)

18. The Division Bench thereafter held as under:

24. What follows from the above is that even if there is a clause of liquidated damages, in a given case, it is for the Court to determine as to whether it represents genuine pre- estimate of damages. In that eventuality, this provision only dispenses with the proof of "actual loss or damage". However, the person claiming the liquidated damages is still to prove that the legal injury resulted because of breach and he suffered some loss. In the process, he may also be called upon to show that he took all reasonable steps to mitigate the loss. It is only after proper enquiry into these aspects that the Court in a given case would rule as to whether liquidated damages as prescribed in the contract are to be awarded or not. Even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable

compensation for the injury sustained by him and what is stipulated in the contract is the outer limit beyond which he cannot claim. Unless this kind of determination is done by the Court, it does not result into "debt".

19. The Division Bench after answering the question referred to it for opinion, examined each case on merits to ascertain whether the ''debt'' had got crystallized or the matter required evidence.

20. In my view, the judgment does not lay down a general proposition that in every case where the claim is for damages the petition would not be maintainable. It would depend on the facts and circumstances of each case whether the debt has got crystallized or not or the matter required evidence and the disputes required adjudication before the Civil Court.

21. In the present case, the contention of the Petitioner is that the Petitioner had invested a substantial amount of money in the project and the Respondent had undertaken to complete the project by a particular date. Thereafter, the Respondent itself was responsible for renting out the portion falling to the share of the Petitioner at a minimum rental. As per the Petitioner, the Petitioner had invested in the project with a guarantee from the Respondent that the Petitioner would be assured a specified return on the investment.

22. As per the Petitioner, since the Petitioner was only to contribute a particular sum of money, the obligation on the Petitioner was duly fulfilled when the Petitioner had contributed the amounts that the Petitioner had agreed to contribute. The Respondent had undertaken to complete the project within a specified period and thereafter the Respondent was to rent out the space falling to the share of the Petitioner at a minimum guaranteed rental.

23. As per the Petitioner, the representation made by the Respondent was that the Respondent had prospective tenants who had shown an inclination in taking on rent the specified spaces. The agreement between the parties also stipulated the minimum amount at which the premises would be rented out by the Respondent. The agreement further stipulated that in case the Respondent was not able to rent of the premises and the specified rate the Respondent would pay to the Petitioner the said rate of rent, however, in case the premises were rented out at a rate higher than the amount stipulated between the parties the Petitioner would be liable to proportionately pay a higher amount as sale consideration for the space allocated to the Petitioner. The Respondent had even annexed with the agreement the list of tenants who had shown inclination to take on rent the spaces.

24. The Division Bench in the case of TOWER VISION INDIA (SUPRA) , in my view, does not lay down the principle that there would be a threshold bar in entertaining a petition for winding up in every case where the claim is for damages, on the other hand, in terms of the said judgment, the contention of the parties and the factual matrix would have to be examined on merits to ascertain whether the debt has got crystallized or not or the matter requires

evidence and the disputes require adjudication before the Civil Court.

25. As noticed hereinbefore, the Respondent has chosen to file only a short reply raising the issue of maintainability and has not filed a detailed reply on merits.

26. The Respondent has filed a short reply and chosen not to reply to the contentions on merits on its own volition and without seeking leave and liberty of the court. The Respondent has done so at its own risk.

27. However, in the interest of justice, subject to payment of costs of Rs. 10,000/- the Respondent is granted three weeks time to file a parawise reply to the petition. Rejoinder, if any, within four weeks thereafter.

28. List for directions before the roster bench on 16th March, 2015.