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

Date of decision: 9th May, 2023

+ **ARB.P. 127/2023**

RADNIK EXPORTS Petitioner

Through: Mr.Aditya Bakshi, Adv.

versus

SUPERTECH REALTORS PVT LTD Respondent

Through: Ms.Aditi Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Allotment Letter dated 05.01.2018 whereby the respondent agreed to allot Penthouse 3905, Nova East, Plot No.3, Sector-94, Noida- 201301 (hereinafter referred to as the 'Subject Flat').

2. At the outset, it needs to be emphasized that the claim of the petitioner is for two distinct periods:-

- a) The first being for the period between 01.04.2018 to 10.12.2019; and
- b) The second being for the period thereafter, that is, after the taking over of the possession of the Subject Flat by the petitioner and allegedly leasing the same out to the respondent.

3. It is the case of the petitioner that the petitioner was promised possession of the Subject Flat to be delivered by the respondent by November, 2016. In case of default of the respondent to hand over the possession of the Subject Flat in a timely manner, the respondent was to pay penalties stipulated in the Allotment Letter itself. The petitioner further states that the total penalty amount payable by the respondent for the delay in handing over the possession of the Subject Flat works out to Rs.1,83,78,626/-, out of which the respondent has adjusted only a sum of Rs.64,52,078/-, leaving a balance of Rs.1,19,26,548/- for which the first set of the claim is made.

4. The second set of the claim is made by the petitioner stating that on taking over of the possession of the Subject Flat by the petitioner, the same was handed back to the respondent on lease. It is claimed that the respondent has failed to pay the rental amount, for which recovery is to be made through the Arbitration proceedings.

5. At the outset, it is further noticed that the Arbitration Agreement between the parties is contained in the Allotment Letter dated 05.01.2018, in form of Clause 47 thereof, which is reproduced hereinbelow:-

“47. THAT all or any disputes arising from or out of or touching upon or in relation to the terms or formation of this provisional Allotment or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof for the

time being in force. A sole arbitrator, appointed by the Developer, shall hold the arbitration proceedings at New Delhi. The decision of the Sole Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the Parties. The Allottee(s) hereby confirms that he/she shall have no objection to such appointment and proceedings of arbitration.”

6. The Arbitration Agreement between the parties, therefore, only covers the disputes arising from or out of or touching upon or in relation to terms or the formation of the provisional allotment or its termination, including the interpretation and validity thereof and the respective rights and obligations of the parties arising thereunder. Admittedly, the lease of the Subject Flat by the petitioner to the respondent is not covered by the Allotment Letter and therefore, cannot be made subject matter of the reference under the Allotment Letter.

7. The petitioner is, therefore, left to its own remedies as far as the claims towards the lease rental are concerned.

8. Coming back to the first set of the disputes, that is with respect to the amount payable for delay in handing over of the possession of the Subject Flat, the case of the respondent is that the petitioner had executed a handing/taking over document dated 26.12.2019 at the time of taking over of the possession of the Subject Flat. Clause ‘e’ thereof clearly records that all disputes and claims of the petitioner under the Allotment Letter stand settled and the petitioner shall have no further claims against the respondent in respect of the said flat. Clause ‘e’ of the handing/taking over document is reproduced hereinbelow:-

“e) The Allottee(s) acknowledge and declares that he/she has settled all dues, and payments fully and finally, with the Company and after taking over the physical possession of the Flat/Unit/Space, he/she shall not have claim of any nature, whatsoever, against the company in respect of said Flat/Unit/Space.”

9. The respondent further submits that after the taking over of the possession of the Subject Flat, the parties had also executed a Sale Deed dated 26.10.2020 for the Subject Flat. Clause 45 of the said Sale Deed records that no further dispute or differences relating to allotment would be entertained. It further records that all disputes in relation to the terms and conditions of the Sale Deed shall be settled through Arbitration which would be subject to the jurisdiction of the District Court at Gautam Budh Nagar and the High Court of Judicature at Allahabad. Clause 45 of the Sale Deed is reproduced hereinbelow:-

“45. That after this Deed is executed, no disputes or differences relating to the registration, booking and allotment and in all such matters as are instrumental to these and are likely to affect the mutual right, interest, privileges and claim of the Lessee/Sub-Lessee would be entertained. That all disputes, including arbitration, if any, still arising with regard to the terms and conditions of this deed and interpretation thereof, the same shall be subject to the jurisdiction of Distt. Court, Gautam Budh Nagar, and the High Court of Judicature at Allahabad.”

10. The learned counsel for the respondent submits that in view of the above Clauses, all claims of the petitioner, if any, stood settled/waived off by the petitioner, and in view of this full and final settlement, the disputes, if any, in relation to the Allotment Letter cannot be now referred to arbitration. She submits that the Arbitration Agreement stood exhausted with the execution of the above two documents.

11. On the other hand, the learned counsel for the petitioner submits that the document of handing/taking over of possession was executed by the petitioner on the assurance and representation of the respondent that the petitioner would raise a debit note for the period of delay between 01.04.2018 to 10.12.2019, whereafter the same will be paid. In view of this understanding, the petitioner raised a debit note on 26.12.2019 itself, that is, the date of handing over/taking over of the possession letter. This claim was thereafter raised by the petitioner through various letters, being dated 27.10.2020, 10.02.2021, 20.07.2021, 16.09.2021, 03.02.2022, and even by legal notices dated 28.03.2022 and 23.08.2022. The respondent, however, did not respond to any of these letters nor raised a defence that these claims would not be entertained due to Clause 'e' of the letter of handing/taking over of the possession or the Sale Deed.

12. The learned counsel for the petitioner submits that, therefore, Clause 'e' of the handing/taking over of the possession letter and/or Clause 45 of the Sale Deed cannot defeat the rights of the petitioner to claim compensation for delayed possession in terms of the Allotment Letter. He submits that there was never any intent to fully and finally settle the said claim by these two documents, as the documents were executed with the understanding that the respondent would be paying this claim to the petitioner.

13. Though, the above averments are denied by the learned counsel for the respondent, it becomes apparent that on the very day of execution of the letter of handing/taking over of the possession, the petitioner had raised a claim for the delayed possession for the period

between 01.04.2018 to 10.12.2019, stating therein that the same is being raised in accordance with the decision taken in the meeting on 11.12.2019. It is the case of the petitioner that the respondent did not refute at any time the contents of the letter dated 26.12.2019 or the subsequent letters which made similar references and claims.

14. In the limited exercise of jurisdiction under Section 11 of the Act, this Court cannot enter into a detailed investigation on the claims and counter-claims of the parties or to adjudicate them finally. The Court is only to arrive at a *prima facie* conclusion of the existence of the Arbitration Agreement. In ***Vidya Drolia & Ors. v. Durga Trading Corporation***, (2021) 2 SCC 1, the Supreme Court authoritatively laid down the following:-

“153. Accordingly, we hold that the expression “existence of an arbitration agreement” in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even

post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. *Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*

154.3. *The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

154.4. *Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”*

15. The Arbitration Agreement as contained in the Allotment Letter is not disputed. The only claim of the respondent is that the same

stood exhausted by a full and final settlement of the disputes in relation to the Allotment Letter. This is a disputed question of fact, which has to be left to be adjudicated by the learned Arbitrator.

16. In view of the above, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Allotment Letter.

17. I accordingly, appoint Ms. Anjana Gosain, Advocate, Tel. No. 9810100674 as a Sole Arbitrator.

18. The Arbitrator shall give a disclosure under Section 12 of the Act before proceeding with the reference.

19. The fee of the Arbitrator shall be governed by Schedule IV of the Act.

20. It is made clear that any and all observations made hereinabove are only *prima facie* in nature and for the purposes of the exercise of limited jurisdiction vested in this Court under Section 11 of the Act. The same shall not bind or influence the learned Arbitrator while adjudicating the disputes between the parties on merit. All objections of the respondent shall remain open to be taken before the learned Arbitrator.

21. The petition is allowed in the above terms.

NAVIN CHAWLA, J

MAY 9, 2023/rv