(2014) 07 DEL CK 0027

Delhi High Court

Case No: FAO(OS) 191/2014

Omaxe Limited		APPELLANT
	Vs	
Vikas Malhotra		RESPONDENT

Date of Decision: July 28, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34

Citation: (2014) 6 AD 709 : (2014) 4 ARBLR 82

Hon'ble Judges: Pradeep Nandrajog, J; Mukta Gupta, J

Bench: Division Bench

Advocate: Sukumar Pattjoshi, Sr. Advocate instructed by Shalabh Singhal, Advocate for the Appellant; Manish Sharma and M.P. Sahay, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.

Admitted case of the parties before the learned Arbitrator was that under a letter of allotment dated February 20, 2007 Omaxe allotted space No. 01 and 02 on the ground floor to Vikas Malhotra and Vishal Malhotra indicating that its approximate super area would be 141.60 sq.meters. An addendum of even date recorded the terms of the allotment. The units to be allotted were in a building under construction named by Omaxe ''Wedding Mall Agra''. As we would be noting hereinafter, the contract between the parties was more in the nature of an investment made by the Malhotras with a guarantee of a fixed return. 95% sale price fixed was paid immediately and remaining 5% had to be pad when possession was offered. As per clause 26 of the Addendum the construction had to be completed within 30 months, which date would be July 20, 2009. Under the same clause Omaxe had to obtain a certificate of occupation and only thereafter offer possession of the two units. Under the same clause Omaxe agreed to pay Rs. 10/- per sq.ft. per month of the super area if there was delay in offering possession. Under clause 1 Omaxe were to pay a monthly return of Rs. 1,04,406/- till possession of the unit was handed

over. The said clause also enjoyed upon Omaxe to lease the unit to a third party before offering the same. Under clause 2 the liability of Omaxe would cease on offering possession of the two units duly leased.

2. The agreement is typical of advertisement which we see in the newspapers. Builders offering commercial space at assured returns. Small units are offered to investors. The larger space is leased to multi-nationals. Most of the sale price is received by the builders at the time of the agreement. A monthly return till construction is completed is assured. The builder gets the capital without any hassles. The investor gets a good return. But neither is without a security cover other than the appreciation in the value of the property. The future market is uncertain both as regards rentals and the market value of the property. The end result is bound to be litigation.

3. Omaxe had assured that upon completion the two units and along with a few others would be leased to M/s Aero Club Woodland.

4. Omaxe paid Malhotras Rs. 1,04,406/- till January 31, 2010 and for the month of February paid Rs. 67,967/-, presumably for the part-month till February 20, 2010. Subsequently, it paid no money to Malhotras.

5. The reason was that on February 20, 2010 Omaxe offered to Malhotras possession of the property informing that it had leased the same to M/s Aero Club Woodland and informed Malhotras that as per the agreement between it and Malhotras, henceforward Malhotras could receive the lease rental from the tenant. Omaxe demanded 5% balance sale price. As per Malhotras said letter was not to be treated as a letter offering possession for the reason the contract between the parties obliged Omaxe to obtain a completion certificate. The dispute festered. Claims started mounting. Omaxe started demanding maintenance and energy charges as also holding charges and interest on balance sum payable being 5% of the agreed sale price. Malhotras stood their ground that letter offering possession on February 20, 2010 was not as per contract because Omaxe had not obtained a certificate of occupancy from the municipal authorities. Malhotras also took the stand that copy of the alleged lease deed with Aero Club Woodland being not supplied to them, there could be no lease; and as a matter of fact additionally took the stand that the property had not been leased to Aero Club Woodland.

6. The contract between the parties had an arbitration clause which was adhered to by the parties. An arbitrator was appointed.

7. Malhotras raised the following claims before the Arbitrator.

"1(a) For specific performance of the terms and conditions of the allotment letter dated 20.2.2007 as well as the Addendum dated 20.2.2007 specifically pertaining to execution of conveyance deed and possession in terms of allotment letter and the Addendum.

(b) In terms of the allotment letter and Addendum respondent should be directed to pay a sum of Rs. 22,74,746.22 paise which includes

(i) A sum of Rs. 35,248/- towards difference in the price of the super area along with a sum of Rs. 17,976,98 towards interest @ 12% per annum from 20.2.2007 till May 2011.

(ii) A sum of Rs. 3,20,077.08 towards delay in completion of project/unit calculated @ Rs. 10/- per sq. ft. per month from 20.8.2009 upto 31.5.2011 along with a sum of Rs. 67,216.34 towards interest @ 12% per annum for the aforesaid period.

(iii) A sum of Rs. 28,890/- on account of short payment for the month of February 2010 towards monthly return along with a sum of Rs. 4000.50 towards interest @ 12% per annum up till May 2011.

(iv) A sum of Rs. 15,66,090/- towards arrears of principal amount of monthly return upto 31.5.2011 along with a sum of Rs. 2,34,913.50 towards interest @ 12% per annum up till 31.5.2011.

(v) A sum of Rs. 1,04,406/- per month after May, 2011 till the unit is put on rent to a third party by the respondent company and till the said third party starts paying rent to them (claimants), and/or in case the premises is not let out, then the respondent company to continue to pay the aforesaid amount per month.

2. A sum of Rs. 5 lakhs or damages on account of mental and physical harassment.

3. A sum of Rs. 2 lakhs as litigation expenses.

4. Pendente lite and future interest @ 12% per annum."

8. Omaxe raised counter claims as under:-

"1(a) sum of Rs. 6,12,611.44 (which includes

(i) Rs. 1,91,523.44 towards unpaid basic sale price,

(ii) Rs. 1,51,888/- towards interest free maintenance security @ Rs. 100 per sq. ft.,

(iii) Rs. 2,27,832/- towards additional charges Rs. 150/- per sq. ft. and

(iv) Rs. 41,368/- towards meter connection charges of 12 k.w.) along with interest thereon @ 24% per annum from 22.3.2010 till actual payment.

2(a) Rs. 2,43,020.80 towards monthly holding charges from April 2010 till July 2011 along with cumulative interest @ 18% per annum on the monthly holding charges (i.e. Rs. 15188.80) from the end of that month till actual payment.

(b) Holding charges @ Rs. 15,188.80 per month from August 2011 rill actual date of possession along with cumulative interest @18% per annum on the monthly holding charges (i.e. on Rs. 15,188.80) from the end of that month till actual payment.

3(a) Rs. 4,99,179.52 towards monthly maintenance charges and energy charges from April, 2010 till July 2011 along with cumulative interest @ 18% per annum on the said monthly charges (i.e. on Rs. 31,198.72) from the end of that month till actual payment.

(b) A sum of Rs. 31,198.72 per month towards maintenance charges and energy charges from August 2011 till actual taking of possession along with cumulative interest @ 18% per annum upon the said charges from the end of that month till actual payment.

4. Rs. 2,50,000/- towards litigation charges."

9. Evidence was led.

10. It fell for consideration before the learned Arbitrator as to what was the effect of the appellant offering possession on February 20, 2010. The consideration had to be with reference to the clause in the letter of allotment enjoining upon Omaxe to first obtain a certificate of occupation from the municipal authorities before offering possession and using the unit.

11. The learned Arbitrator held that in view of the fact that the completion was granted by the municipal authorities on March 10, 2010, offering possession on February 22, 2010 was not as per the contract.

12. The learned Arbitrator found as a matter of fact that 5.30 square feet less super area was offered to the respondent and accordingly it would be liable to pay a lesser sum than what was agreed after proportionately deducting the less super area which was offered.

13. Perusal of the award would reveal that clauses 4, 26(c), 27(a), 27(b) and 28(a) of the letter of allotment dated February 20, 2007 fell for consideration.

14. The award would show that the learned Arbitrator has considered whether clauses 4, 27(a), 27(b) and 28(a) impact clause 26(c). View taken is that the said 4 clauses would trigger only after an offer of possession was made after clause 26(c).

15. Learned Arbitrator has taken note of various letters relied upon by the appellant but has returned a finding of fact that no possession was offered after the building was complete.

16. To put it pithily, the Arbitrator has performed a function required by law to be performed by the Arbitrator i.e. to interpret the various clauses of the contract and to appreciate the documentary evidence and returned findings of fact.

17. Challenge to the view taken by the learned Arbitrator has been rightly rejected by the learned Single Judge on the reasoning in paragraph 27 of the impugned decision.

18. We simply highlight that the bane of arbitration in India is that issues or fact urged before the Arbitrator and Issues concerning interpretation of a contract are re-urged in objections filed to the award as if objections u/s 34 of the Arbitration and Conciliation Act, 1996 is an appellate remedy available on law and facts; ignoring that grounds to challenge an award are restricted u/s 34 of the Arbitration and Conciliation Act, 1996. In further appeal against the decision of the learned Single Judge affirming the award, the same arguments are advanced as were advanced before the learned Arbitrator and again before the learned Single Judge when objections to the award were considered.

19. The issue concerning whether there was a subsisting lease between Omaxe and M/s Aero Club Woodland, the learned Arbitrator has considered the documentary evidence to return a finding that no tenancy had ever come into being. The learned Arbitrator had given reasons for the same which have been noted by the learned Single Judge in paragraph 28 and 29 of the impugned decision.

20. Concerning award on claim No. 1(b)(i) the learned Arbitrator decided the same on the evidence which showed that 5.30 square meters less super area was offered.

21. Award pertaining to claim No. 1(b)(ii) and 1(b)(iii) have been noted by the learned Single Judge with reference to clause 26(a) of the letter of allotment as per which the construction had to be completed by July 20, 2009. There was admittedly a delay.

22. Counter claims based on facts and interpretation of the contract have been noted by the learned Single Judge to have been deliberated upon by the arbitrator and rejected.

23. We simply highlight that no argument was advanced before us that a principle of law was ignored or misapplied by the learned Arbitrator. The entire gamut of the arguments in the appeal was a rehash of the contentions urged before the Arbitrator as also before the learned Single Judge. The thrust of the argument was that the findings returned are wrong. Whether the findings were right or wrong required us to re-appreciate the entire evidence led and reinterpret the contract as if we were to interpret the contract for the first time; a task which we refuse to perform because law prohibits us from doing so. The appeal is dismissed with cost assessed at Rs. 50,000/- to be paid by the appellant to the respondents.