Tatvadarshi Bandhu Pvt. Ltd. Vs Omaxe Limited.

Court: Delhi High Court

Date of Decision: Aug. 4, 2014

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34

Citation: (2014) 4 ARBLR 87

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

Bench: Division Bench

Advocate: Amit Sibal, Sr. Advocate instructed by Tejaswi Kumar Pradhan, Advocate for the Appellant; J.P. Sengh, Sr. Advocate instructed by Shalabh Singhal, Sumeet Batra and Ankita, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.
We shall be referring to the parties as `Omaxe'' and `Tatvadarshi''.

2. On August 04, 2004 a collaboration agreement was entered into between Omaxe and Tatvadarshi. The next day, on August 05, 2004 an

addendum was executed.

3. In the agreement and the addendum, Tatvadarshi was referred to as the owner. Omaxe was referred to as the developer.

4. The collaboration agreement envisaged Tatvadarshi making available land to Omaxe for being developed by Omaxe. After development, the

utilizable land was to be shared half and half.

5. The land was in the revenue estate of village Anangpur. The recitals to the agreement recorded that total land in village Anangpur was 8420

bigha and 10.1 biswa out of which 7124 bigha and 10.7 biswa was Shamlat land. The village proprietors were the co-owners thereof. The recitals

record a history of litigation, terminating finally in the recital recording that 115 acres land in village Anangpur belonged to Tatvadarshi and said

land had to be developed by Omaxe. Under the caption `Approvals'', clause 3.1 and 3.2 recorded as under:-

3.1 The Owner(s) shall get all the clearances in respect of the land under the Agreement from the concerned consolidation department within a

period of 12 months to be reckoned from the date of signing of this Agreement. However, in case of failure to obtain such

approvals/permissions/clearances etc. from the consolidation department, the Developer shall have the right to determine/come out of this

Agreement after realizing the amount so paid to the Owner under this Agreement with an interest @ 12% p.a. till the date of actual payment from

the signing of this Agreement.

3.2 The Developers shall make all efforts to obtain approval of conversion of land use to residential followed by LOI and Licence of Anandvan at

the earliest. Land use of part f the land under Anandvan is designated as recreation. In case sanctions i.e. conversion of land use and LOI/Licence

in respect of Anandvan or a part thereof are not received within eighteen (18) months of this Agreement, then the arrangement under this

Agreement shall terminate on the sole discretion of the developers and the owners shall refund the deposit amount without any interest or expenses

incurred by the Developer within 4 months of the said period, failing which the owners shall be liable to pay interest on the amount due at the rate

of 15% per annum to be calculated after 22 months of this agreement.

In case the amount is not refunded within the expiry period then within a week of the expiry period the owners shall pay the amount outstanding in

three equal quarterly instalments by way of post dated cheques carrying interest @ 15% per annum. In case either the post dated cheques are not

given or any of the cheques is returned un-encashed the rate of interest shall be 18% instead of 15% till payment.

Till receipt of the entire amount of the deposit with interest the Developers shall continue to have lien on 60 acres of the land which shall also

continue to remain I joint possession of the Developers. Also in case change of land use/LOI is received after eighteen months of this agreement

but before completion of refund of deposit with interest, if any, the Developers right to develop lands in terms of the Agreement shall remain alive

unless specifically extinguished in writing by the Developers. The owners shall not be entitled to create any third party right in the land or the

project before refund of the entire deposit amount with interest. In case the owners desire to create any third party rights in the land or the project

before refund of the entire amount with interest, if any, then the Developers shall have no objection to become a confirming party to the same

subject to simultaneous refund of the amount with interest, if any, through a bank pay order.

6. Under the agreement Omaxe paid to Tatvadarshi Rs. 4 crores vide two cheques, the first dated July 17, 2004 in sum of Rs. 51 lacs and the

second dated July 22, 2004 in sum of Rs. 3.49 crores.

7. The amendment to the collaboration agreement by the addendum was as under:-

1. That in partial modification of Para No.14.1 of the said Collaboration Agreement that on completion of payment of Rs. 4.00 crores on signing of

the Agreement the Owners shall permit use of 50% part of Anandvan built up office area for site office and other activities of the Developers

including planning, taking measurements, surveys, and contours and the Developers shall be deemed to be in joint physical possession of the 115

acres of land under Anandvan together with the owners. However, the owners shall also formally confirm the joint possession of the same in

writing to the Developers.

2. That if the Developers fails to obtain necessary approval from the Competent Authority within 12 months from the Collaboration Agreement in

respect of Anandvan or a part thereof the Developer shall deposit the PDCs for an amount of Rs. 4,00,00,00/- vide cheque No.882031 dated

4.8.2005 drawn on State Bank of Hyderabad and Rs. 48,00,000/- vide cheque No.882032 dated 4.8.2005 drawn on State Bank of Hyderabad

which is issued in favour of and handed over by the Owners to the Developers at the time of signing of this Addendum to Collaboration

Agreement.

3. That the cheque No.813219 dated 22.07.2004 for a sum of Rs. 3,49,00,000/- drawn on State Bank of India, Nehru Place, New Delhi stands

corrected and in place thereof Cheque No.813404 dated 22.07.2004 shall be taken on record and this correction in the cheque number is being

consented to by both the parties.

8. The project just could not take of. Omaxe did not obtain the license to develop the land. Permission had to be obtained from the competent

authority to change the land use to residential. Omaxe did not obtain the said permission. Neither did Tatvadarshi obtain the permission from the

consolidation authorities. As a matter of fact Omaxe did not even apply for a letter of intent. The post dated cheques handed over by Tatvadarshi

to Omaxe were presented for encashment by Omaxe and were dishonoured. Dispute arose between the parties which was referred to the sole

arbitration of Justice (Retd.) V.S.Aggarwal.

9. The claim of Omaxe was for refund of Rs. 4 crores paid by it to Tatvadarshi together with interest @ 12% per annum. Tatvadarshi filed a

counter claim in sum of Rs. 2.9 crores on the plea that under the agreement it was entitled to further sum of Rs. 16 crores as interest free security

within 90 days of the letter of intent as per clause 12.12 of the agreement. It was pleaded that since letter of intent was not obtained by Omaxe,

said amount did not reach the coffers of Tatvadarshi. Had it reached the coffers of Tatvadarshi it could have earned interest of Rs. 2.9 crores.

10. The rival versions were: as per Tatvadarshi its obligation to obtain the necessary permission from the consolidation authorities was not a

condition precedent for Omaxe to obtain approval of change of land use and a license to develop the land and obtain the letter of intent; as per

Omaxe unless Tatvadarshi obtained the necessary permission, it was not liable to perform its obligations.

11. The learned arbitrator took the view that the obligation of Omaxe to obtain the letter of intent was contingent upon Tatvadarshi obtaining the

clearance from the consolidation department.

12. In that view of the matter claim of Tatvadarshi has been dismissed and that of Omaxe has been allowed. The reasoning of the learned

Arbitrator, after noting clause 3.1 and 3.2 of the agreement is as under:-

Both the parties have filed self-servicing affidavits which requires no repetition. It is admitted that the respondent did not make available the

clearance with respect to the land from the Consolidation Department. There was no approval or permission that was obtained. Similarly, the

claimant also did not obtain the approval of conversion of land to residential followed by Letter of Intent and license.

The agreement does not show as to who was to bring forth the first document but in the present case in hand it is obvious that before the claimant

could make efforts to obtain approval for conversion of land to residential followed by Letter of Intent and license necessarily certain documents

must be accompanied with the application. This document as would be required and appears to common sense would be including the clearance

with respect to the land from the concerned Consolidation Department. It is this clearance which would show not only the title but even the

boundaries. In the absence of the same necessary license would an exercise in futility. Therefore, this no objection from the Consolidation

Department was sine qua non before the Letter of Intent. In fact this finding gets support from the fact that the agreement specifically provides that

in case the respondent fail to obtain the approval from the Consolidation Department the claimant will have the right to determine the agreement

and realize the amount paid with interest. There is no escape from the finding, therefore, the respondent would be held to be at fault.

13. The award is in favour of Omaxe requiring Tatvadarshi to refund Rs. 5.92 crores together with interest @ 12% per annum.

14. Objections filed by Tatvadarshi to the award u/s 34 of the Arbitration and Conciliation Act, 1996 have resulted in a partial success. The

learned Single Judge has directed refund of Rs. 4 crores with interest @ 12% per annum from August 04, 2004 i.e. the date of the collaboration

agreement on the reasoning that Rs. 5.92 crores claimed had an element of pre-claim interest in sum of Rs. 1.92 crores. Directing interest on Rs.

5.92 crores would be meaning that interest upon interest was allowed is the reasoning to modify the award.

15. Learned senior counsel for the appellant referred to the Haryana Development and Regulation of Urban Area Act 1975 and the Rules made

thereunder to urge that there was no requirement in law to obtain permission from the consolidation authorities before applying for a license to

develop agricultural land into a colony and there was no need for any certificate to be obtained or permission to be obtained from the consolidation

authorities to apply for a change of land use to residential. Thus, learned Senior Counsel urged that the view taken by the learned Arbitrator that

common sense required it to be held that unless a clearance was obtained from the concerned consolidation department Omaxe could not process

the case with the Huda Authorities is a perverse finding.

16. Concededly the land to be developed is not contiguous i.e. does not form one chuck. It appears that for said reason, notwithstanding there

being no legal requirement for a certificate or a permission to be obtained from the consolidation authorities for land use to be converted to

residential, the parties penned clause 3.1 and 3.2 as standalone clauses. Under clause 3.1, the owner i.e. Tatvadarshi was obliged to obtain all the

clearances in respect of the land under the agreement from the concerned consolidation department within a period of twelve months to be

reckoned from the date of signing of the agreement. Independent of clause 3.1, under clause 3.2 Omaxe took upon itself the obligation to obtain

approval for conversion of land use to residential followed by LOI and the license from the competent authority. Clause 2 of the addendum also

throws light on what the parties intended. It reads :That if the Developers fails to obtain necessary approval from the Competent Authority within

12 months from the Collaboration Agreement in respect of Anandvan or a part thereof the Developer shall deposit the PDCs for an amount of Rs.

4,00,00,00/- vide cheque No.882031 dated 4.8.2005 drawn on State Bank of Hyderabad and Rs. 48,00,000/- vide cheque No.882032 dated

4.8.2005 drawn on State Bank of Hyderabad which is issued in favour of and handed over by the Owners to the Developers at the time of signing

of this Addendum to Collaboration Agreement.

17. There is an obvious typographic error. The same is in the first line where it is typed "that" if the developers fails to obtain necessary approval".

The word Rs. developers is a typographic error. In place it should be "owners"." The reason being that a party cannot be a beneficiary of its own

default. Admittedly, Tatvadarshi had issued post dated cheques in favour of Omaxe for return of Rs. 4 crores received by it when the collaboration

agreement was executed should Tatvadarshi be in default of its obligations under the collaboration agreement. Clause 2 of the addendum notes that

the cheques were handed over by the owners i.e. Tatvadarshi to the developers i.e. Omaxe. Under clause 3.1 of the agreement the owners were

to obtain clearance from the consolidation department within 12 months. It is this 12 months period which is referred to in clause 2 of the

addendum. The clause 2 of the addendum can only makes sense if it reads: That if the owners fails to obtain necessary approval from the

Competent Authority within 12 months from the Collaboration Agreement in respect of Anandvan or a part thereof the Developer shall deposit the

PDCs for an amount of Rs. 4,00,00,00/- vide cheque No.882031 dated 4.8.2005 drawn on State Bank of Hyderabad and Rs. 48,00,000/- vide

cheque No.882032 dated 4.8.2005 drawn on State Bank of Hyderabad which is issued in favour of and handed over by the Owners to the

Developers at the time of signing of this Addendum to Collaboration Agreement.

18. We find no merit in the appeal which is dismissed but without any order as to costs.

CM No.11927/2014

Dismissed as infructuous.