IN THE COURT OF MS. HEMANI MALHOTRA,
DISTRICT JUDGE (COMMERCIAL COURT)-02, WEST,
ROOM NO. 209: EXT. BLOCK:TIS HAZARI COURTS, DELHI

DLWT010024252023

OMP (COMM)/12/2023

M/S NORTH WEST SALES & MARKETING LTD
THROUGH ITS AR HAVING ITS REGISTERED OFFICE AT
PLOT NO.40, BLOCK-A, MAIN JAWALA HERI MARKET ROAD
COMMUNITY CENTRE, PASCHIM VIHAR
NEW DELHI-110063

…… PETITIONER/OBJECTOR

Vs.

MRS. SUNITA ARORA
W/O SH. PARVEEN ARORA
R/O A-4/55, PASCHIM VIHAR
NEW DELHI-110063

..…….RESPONDENT

Date of institution	:	17.03.2023
Date of conclusion of arguments	:	30.09.2024
Date of announcement of order	:	21.10.2024

ORDER

1. This petition under Section 34 of the Arbitration and Conciliation Act,1996 (hereinafter referred to as The Act) is directed against an Arbitral Award dated 05.12.2022.

2. The dispute between the parties relates to sale and purchase of a

commercial space in the project developed by petitioner emanating from Agreement dated 09.02.2013 (hereinafter referred to as The Agreement). The respondent upon learning of the project, approached the petitioner on 09.02.2013 to purchase shop number T-254 on the third floor of the "Mall the ARSS Felix" and accordingly entered into the agreement with the petitioner to purchase the said shop for the sale consideration of Rs.48,94,117.28. The respondent paid Rs.11,00,000/- as booking amount to petitioner and as per the terms and conditions of The Agreement was to pay the remaining amount in installments as and when each stage of construction is completed. Between 09.02.2013 and 07.05.2013, respondent made further payments, thus making total amount of payment of Rs.35,82,290/-. Accordingly, an amount of Rs. 13,06,327.38 out of the contractual amount remained to be paid. As per Clause 14 of The Agreement, the petitioner was expected to deliver possession of the shop within 24 months from the date of The Agreement i.e. by 08.02.2015. The said clause also stipulated that *if any delay occurred due to reasons beyond its control, the respondent shall not claim any damage or compensation*. Clause 16 of The Agreement gave right to the petitioner to charge 18% from the respondent in case of delay in paying installments whereas , clause 17 of The Agreement gave right to the petitioner to cancel the allotment in case of non payment of installments by respondent. Clause 22 of The Agreement gave right to the respondent to cancel the allotment subject to forfeiture of 10% of the booking amount alongwith interest @18% on due amount of installments for delay in payment. Further, clause 30 of The Agreement was the arbitration clause which stated that *any financial disputes among the parties herein shall be referred to arbitration ……. and the award thereof shall be binding on both the parties*.

3. It is the case of petitioner that due to unavoidable circumstances, particularly on account of refusal on part of the lender of the project (IFCI Limited) to issue the necessary NOCs for the shops, the registration of the said shop was getting delayed. Accordingly, the petitioner on 26.05.2015 gave a written declaration to which the respondent agreed of compensation for the delay by making payment of 1% o**f** total amount received from the respondent till then. The petitioner accordingly started making payment of Rs.35,000/- per month and the last payment was made on 20.12.2016. The petitioner had thus made a payment of Rs. 6,29,500/- to the respondent which was received by respondent without any demur or protest. Ultimately, on 06.03.2017, IFCI Limited agreed to issue NOC for the subject shop, whereafter petitioner specifically requested the respondent in writing to make the balance payment and get the subject shop registered at the earliest.

4. Instead of making the payment, the respondent sought cancellation of allotment of subject shop and sought refund of the amount paid to petitioner with interest, which was in breach of terms and conditions of The Agreement. The petitioner once again in the month of March'2018 asked the respondent to make the balance payment and get the subject shop registered but the respondent vide letter dated 02.04.2018 rejected the offer and reiterated her demand. Once again on 19.04.2018, the petitioner issued another letter to the same effect and eventually served a notice dated 26.06.2018 to the respondent under Clause 22 of The Agreement. Instead of complying with notice dated 26.06.2018, the respondent got issued a legal notice for recovery cum reply on 06.07.2018 wherein the respondent admitted that petitioner had made

several written offers to fulfill its obligation under The Agreement.

5. However, to the dismay of petitioner, the respondent filed a civil suit before the Court of Learned ADJ, Tis Hazari Couts, wherein an application was moved by the petitioner under Section 8 of The Act. Resultantly, the suit of respondent was dismissed. Subsequent thereto, the respondent vide notice dated 21.12.2019 sought appointment of Mr. H.K.Walia as sole Arbitrator which was rejected by the petitioner. In September'2020, the petitioner vide petition under Section 11 of The Act sought appointment of Arbitrator which was allowed by the Hon'ble Delhi High Court on 12.10.2020 appointing Mr. Pragyan Sharma as Sole Arbitrator to adjudicate the dispute between the parties.

6. On 17.11.2020, the Learned Arbitrator issued notice to both the parties and on 19.02.2021, the pleadings were completed. On 05.12.2022, the Learned Arbitrator passed the impugned award dated 05.12.2022 primarily granting relief in favour of respondent which according to the petitioner is against the mandate of statute, as well as against the settled principles of law as propounded by Hon'ble Supreme Court and various High Courts.

7. The petition reflects that the award dated 05.12.2022 is challenged on numerous grounds including the findings of Arbitral Tribunal on facts.

8. There is no denial to the fact that it is the settled proposition of law that the scope of Section 34 of The Act is extremely limited and the Court cannot reappriciate the facts as an Appellate Court over the findings of the Arbitral Tribunal . This proposition of law has been settled by a catena of decisions of the Hon'ble Supreme Court and

various High Courts. In a judgment titled as Angel Broking Pvt Ltd Vs. Urmil Modi decided on 29.04.2022 in FAO (OS) Commercial 147 of 2018, the Hon'ble DB of Delhi High Court, threadbare discussed the provision of Section 34 of The Act by referring to the judgment of the Hon'ble Supreme Court and that of Delhi High Court and observed as under:

> The main issue for adjudication in the present case is: whether the court has jurisdiction and the power to modify, alter an arbitral award under Section 34 of the Act, 1996. The relevant para of Section 34 of the Act reads as under :
> "34. Application for setting aside arbitral award-- xxx xxx xxx
> (2) An arbitral award may be set aside by the Court only if--
> (b) the Court finds that--
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
> (ii) the arbitral award is in conflict with the public policy of India.
> [Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
> (ii) it is in contravention with the fundamental policy of Indian law; or
> (iii) it is in conflict with the most basic notions of morality or justice.
> Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the 'fundamental policy of Indian law' shall not entail a review on the merits of the dispute.
> (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by 'patent illegality' appearing on the face of the award:
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.
> 13. Section 34 of the Act makes provision for the supervisory role of courts for review of arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, when an award is in conflict with the public policy of India, which includes cases of fraud, breach of fundamental policy of Indian law and breach of public

> morality. The other ground provided under Section 34 is patent illegality. It specifically provides that an award cannot be set aside on the ground of erroneous application of law or on re-appreciation of fact.

9. The Hon'ble High Court of Delhi in the judgment (supra) also discussed the decisions of MCDERMOTT INTERNATIONAL INC. VS. BURN STANDARD CO. LTD. (2006) 11 SCC 181, DYNA TECHNOLOGIES (P) LTD. VS. CROMPTION GREAVES LTD. (2019) 20 SCC 1,NUSSLI SWITZERLAND LTD. VS. ORGANIZING COMMITTEE, COMMONWEALTH GAMES, 2014 SCC online Del 4834, KINNARI MULLICK VS. GHANSHYAM DAS DAMANI (2018) 11 SCC 328, DAKSHIN HARYNA BIJLI VITRAN NIGAM LTD. VS. NAVIGANT TECHNOLOGIES (P) LTD. (2021) 7 SCC 657, NATIONAL HIGHWAY AUTHORITY OF INDIA VS. M. HAKEEM (2021) 9 SCC 1, wherein it was reaffirmed that while entertaining appeal under Section 34 of The Act, the Court is not actually sitting as the Court of Appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or reassess the evidence. It was thus concluded that "The scope of interference is only where the findings of the Tribunal is either contrary to the terms of the contract between the parties , or ex-facie, perverse, that interference by the Court is absolutely necessary. The Arbitrator/Tribunal is the final arbiter on facts as well as in law, and even error, factual or legal, which stop short of perversity, do not merit interference under Section 34 of The Act."

10. First and foremost, it was argued by learned counsel for petitioner that even though, the mandate of Arbitral Tribunal had expired under Section 29 A of The Act , yet the Arbitral Tribunal proceeded to pass the award which is, therefore, without jurisdiction. To support his contention, learned counsel for petitioner relied upon judgment titled as ROHAN BUILDERS (INDIA) PVT. LTD. VS. BERGER PAINTS INDIA LTD.,

reported as (2024) SCC Online SC2494.

11. This argument of learned counsel for petitioner was countered by learned counsel for respondent by relying upon judgment/order of Hon'ble Supreme Court in SUO MOTU WRIT PETITION (C) No. 3/2020 in RE:COGNIZANCE FOR EXTENSION OF LIMITATION. It was urged by learned counsel for respondent that due to onset of Covid-19, the period from 15.03.2020 upto 28.02.2022 stood excluded and, therefore, the mandate of Arbitral Tribunal did not terminate on completion of 12 months from the date of completion of pleadings.

12. The argument of learned counsel for petitioner, in my considered opinion, is without any merit and is not sustainable. It is a matter of record that the pleadings were completed on 19.02.2021, whereas the award was passed on 05.12.2022 i.e. in the span of 21 months and 16 days. In the judgment titled as SUO MOTU WRIT PETITION (C) No. 3/2020 in RE:COGNIZANCE FOR EXTENSION OF LIMITATION, the Hon'ble Supreme Court in para 5 (IV) categorically held that *the period from 15.03.2020 till 28.02.2022 shall also stands excluded in computing the period described under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996 ……..* The direction of the Hon'ble Supreme Court, in my view, did not demand that rigors of Section 29A (3) and (5) had to be met with and that the extension of the period of six months could only be granted on an application to the court. The argument of learned counsel for petitioner is, therefore, outrightly rejected.

13. The next argument which was put forth by learned counsel for petitioner was that the Statement of Claim of respondent was barred by

limitation as the refund, as per respondent's own case, was first sought in May 2015, whereas the civil suit was filed on 27.07.2018 i.e. after a period of three years as stipulated under Article 54 and 55 of The Limitation Act. Consequently, the arbitration was also barred by limitation. It was further urged that no cause of action had also arisen in favour of the respondent to seek arbitration as there was no financial dispute.

14. Per contra, it was contended by learned counsel for respondent that the Statement of Claim was within limitation and squarely covered by the period of limitation provided under Article 113 of The Limitation Act. In the present case, right to sue lastly arose on 25.06.2018, hence, the Statement of Claim of respondent was not time barred. Qua the accrual of cause of action in favour of the respondent, it was asserted by learned counsel for respondent that since clause 30 of The Agreement provided that in case of any financial dispute between the parties , the dispute shall be referred to Arbitration, the cause of action accrued in favour of the respondent when the petitioner refused to refund the amount paid to the petitioner.

15. On these aspects, it will be relevant to reproduce the findings of the Learned Arbitral Tribunal given in paragraphs (95, 96 and 97) of the impugned award, which are reproduced hereasunder:-

> "95. The contention that there is no cause of action is rejected since there is a dispute existing between the parties in relation to whether refund and / or compensation is to be paid to claimant or whether respondent is entitled to balance sale consideration in terms of the agreement. This dispute between the parties will be covered under 'Financial Dispute' as per Clause 30 of the Agreement.

> 96. An application for reference of disputes to arbitration is required to be filed within a period of three years when the right to apply accrues. The Supreme Court in Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors has held that -
> *"the right to apply accrues when difference or dispute arises between the parties to the arbitration agreement. A dispute arises where there is a claim and a denial and repudiation of the claim. There should be a dispute and there can only be a dispute when a claim is asserted by one party and denied to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or request. Whether in a particular case dispute has arisen or not has to be found out from the facts and circumstances of the case." In the facts of the case, it is therefore necessary to find out as to when the right to apply accrued.*
>
> 97. On 08.02.2015, the Respondents ought to have handed over the possession of the Unit to the Claimant, which they failed. However, vide Declaration dated 26.05.2015 the Respondents started paying Rs. 35,000/- as delay compensation and the last payment was made 20.12.2016. Till 20.12.2016 there was no dispute between the parties where a right to apply for arbitration accrued in favour of the Claimant. Claimant vide letter dated 05.04.2017 and 10.08.2017 sought refund from the Respondents only to receive a letter dated 28.03.2018 from the Respondent offering possession on payment of balance sale consideration. The Claimant rejected the offer of possession vide letter dated 02.04.2018 and again sought for refund. However, the Respondents vide letter dated 19.04.2018 again offered possession, which received no response from the Claimant. Thereafter, on 25.06.2018, when the Respondent informed the Claimant that Clause 22 of the agreement will be invoked in case the Claimant is seeking refund and refund as demanded by the Claimant will not be granted. Thus, a cause of action arose in favour of the Claimant, since the Respondent refused the demand of refund made by the Claimant. Hence, the instant case is well within the period of limitation of 3 years. Furthermore, this Tribunal has held that the Claimants were entitled to refund, and no refund was made knowing fully well that the project was delayed, the cause of action in the instant case would be a continuous one."

16. The Learned Arbitral Tribunal dealt with the issue of limitation as well as accrual of cause of action in favour of the respondent in minute

detail, which finding, to my mind, is neither perverse nor contrary to the term of The Agreement. It is also worthwhile to mention here that on institution of civil suit by the respondent before the Learned ADJ to recover Rs.70,16,105/-, the petitioner herein had preferred an application under Section 8 of The Act whereby the petitioner had brought the Arbitration Agreement to the notice of the Learned ADJ. It was averred by the petitioner before the Court of Learned ADJ that since all the financial disputes between the parties were to be referred to arbitration, the suit of respondent before the Court of Learned ADJ was not maintainable. Accordingly, the learned ADJ vide order dated 31.08.2019 held that :

> "8. Now as per the above clause, all the financial disputes among the parties are to be referred to arbitration of the arbitrator chosen by mutual agreement as per the law of arbitration and the arbitration proceedings are to be conducted at Delhi and the award thereof has to be binding upon both the parties.
> 9. To my mind, the dispute raised by the plaintiff in the present suit is essentially a dispute which falls within the four corners of the above said clause no.30. As such, to my mind, the present suit is barred by Section 8 of the Arbitration and Conciliation Act. The application filed by the defendants is, thus, allowed. The parties shall be at liberty to chose their arbitrator by mutual consent and refer the dispute to arbitrator."

17. Since, the petitioner itself in its application under Section 8 of the Act had submitted to the court of Learned ADJ that the dispute before the court was a financial dispute which could only be arbitrated, it does not now lie in the mouth of the petitioner that the dispute between the parties was not a financial dispute. Therefore, this finding too does not merit any interference.

18. Learned counsel for petitioner further urged that the Learned Arbitral

Tribunal had applied principles of equity and consumer laws to the dispute in question and had accordingly decided the same. The Learned Arbitral Tribunal had thus gone beyond the scope of reference to arbitration. Furthermore, that the principles of equity as per Section 28(2) of The Act can only be applied to arbitration in the event of consent given by the parties. In so far as application of consumer laws was concerned, the same could not have been applied by the Learned Arbitral Tribunal as the subject matter of dispute did not fall within the ambit of Consumer Protection Act and the property in question was a shop to be used for commercial purpose.

19. The contention of learned counsel for petitioner does not hold any water. Clause 14 of the terms and conditions of The Agreement specifically states that the respondent cannot claim any damages or compensation if the delay in delivery of possession of subject shop occurs due to reasons beyond the control of the petitioner. Arbitral record shows that the testimonies of witnesses before the Learned Arbitral Tribunal demonstrated that the primary reason for delay in offering the possession to respondent was due to non-receipt of NOC from IFCI. It is an undisputed fact that the NOC was not issued by IFCI as the respondent had mortgaged the subject shop to IFCI and had not taken any steps to foreclose the mortgage. The Learned Arbitral Tribunal in detail examined the testimonies of the witnesses before him and held that the delay in offering possession was *not* caused due to reasons beyond the control of the petitioner. After discussing numerous judgments on the Consumer Protection Act which dealt with builder-buyer disputes, it was thus consequently, held by Learned Arbitral Tribunal that

> *"79. This Tribunal is conscious of the fact that majority of these decisions have come in cases under the Consumer Protection Act, 1986. However, the Tribunal is of the opinion that the legal principles which form the basis for these decisions can also be made applicable in an arbitration proceeding. All these decisions have come while addressing builder-buyer disputes. The legal framework has to be the same in discussing the concepts of builder-buyer agreement. There is therefore no reason why the underlying intent or philosophy of the said judgments should not be applied to the facts of this case, as also to an arbitration proceeding."* ; and

compensation in the form of refund of the amounts paid by the respondent was granted. The impugned award further indicates that the Learned Arbitral Tribunal also bore in mind the principle of restitution unjust enrichment and equity while awarding the compensation to the respondent, which to my mind is correct and neither perverse nor against the public policy.

20. In the light of the aforesaid discussion, I find not reason to interfere with the impugned award dated 05.12.2022 of the Learned Arbitral Tribunal. Accordingly the application is dismissed with no order as to cost. File be consigned to record room.

HEMANI MALHOTRA
Digitally signed by HEMANI MALHOTRA
Date: 2024.10.21 14:29:51 +0530

ANNOUNCED IN THE OPEN COURT
ON 21st OCTOBER'2024

(HEMANI MALHOTRA)
DISTRICT JUDGE (COMMERCIAL COURT)-02
WEST/EXTN. BLOC/TIS HAZARI COURTS, DELHI@