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Angle Infrastructure Pvt. Ltd. Vs. M/S Capital Builders and Ors.

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Court : Delhi

Decided On : Dec-22-2014

Judge : Rajiv Shakdher

Appellant : Angle Infrastructure Pvt. Ltd.

Respondent : M/S Capital Builders and Ors.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment delivered on:

22. 12.2014 + OMP14932014 ANGLE INFRASTRUCTURE PVT. LTD. ..... Petitioner Versus M/S CAPITAL BUILDERS & ORS. ..... Respondents Advocates who appeared in this case: For the Petitioner : Mr Gopal Jain, Sr. Adv. with Ms Bina Gupta & Mr Abhay Anand, Advs. For the Respondent : Mr Atul Sharma & Mr Hilanka Chaudhury, Advs. For respondent no.1 CORAM: HON'BLE MR. JUSTICE RAJIV SHAKDHER RAJIV SHAKDHER, J1 This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the Act). By this petition interim directions are sought vis-a-vis respondent no.1. Briefly, the interim directions which the petitioner seeks, pertain to the Development Rights Agreement dated 05.06.2012 (hereafter referred to as the DRA), executed as between the parties herein and a Full and Final Settlement agreement dated 29.10.2013, executed between the petitioner and respondent no.1, which is a proprietorship concern of, one, Sh. Ashok Manchanda. PREFATORY FACTS2 Before proceeding further in the matter, I may only advert to following broad facts, which are relevant for

adjudication of the present petition. 2.1 It appears that the respondent nos. 1, 3 and 4 herein held joint interest, in an immovable property situate in Sector-70, Village Fazilpur, Jarsa Tehsil and District, Gurgaon in the State of Haryana. The said land, which admeasures 14.468 acres, forms part of various contiguous parcels of land. The parties herein executed the DRA in respect of this immovable property. The aforementioned land for the sake of brevity, hereafter will be referred to as the property in issue. Notably, respondent no.2, is a company, which is, apparently, controlled by respondent nos. 1, 3 and 4. 2.2 Broadly, under the DRA development rights were conferred on the petitioner. Clause 3.1 of the DRA stipulated that in consideration of grant/transfer/assignment of development rights in favour of the petitioner, the petitioner was required to pay Rupees 2000/- per sq. ft. for the entire FSI of the project land, admeasuring 8,97,000/- sq.ft. There was a caveat entered, which was, that the consideration, would vary in proportion to the area that may be approved by the relevant town planning authority, while granting zoning approvals. The aforesaid consideration was, in addition to, outflows on account of applicable EDC and IDC; in the event they were to become payable. 2.3 The timelines, by which the consideration had to be paid, was also detailed out in clause 3.1 and 3.2 of the DRA. Crucially, clause 3.2 also provided that if, the monthly payments, as prescribed in the said clause, were delayed, for a consecutive period of three (3) months, the petitioner would be entitled to retain the FSI of the project in proportion to amount/ payments made by it to the respondent till that date, with the caveat that the remaining FSI, would have to be returned to the respondent. Apart from this petitioner was also entitled to claim refund of any taxes, interest, government payment/ charges etc. paid in excess of the proportionate FSI, obtained by it. 2.4 The petitioner avers that under the DRA, it made certain payments to respondent nos. 1, 3 & 4 amounting, in all, to a sum of Rs. 94.76 crores. Notably, the said sum includes a sum of Rs. 12 crores which the petitioner claims, it paid to respondent no.1, pursuant to obligations undertaken under the DRA. In addition, the petitioner has also claimed that, it has incurred expenses amounting to a total of approximately Rs.66 crores towards various charges, which includes interest on EDC and IDC, payments in respect of EDC and IDC, and towards construction, development and advertisements. 2.5 Evidently, disputes arose between the parties, which led to institution of two

petitions under Section 9 of the Act. The first petition, was filed by respondent nos. 3 and 4 herein, in which respondent nos. 1 and 2 herein, along with the petitioner, were arrayed as opposite parties. This petition was numbered as OMP No.378/2013. The second petition, was filed by Sh. Ashok Manchanda, the proprietor of respondent no.1 herein. In this petition, respondent nos.2, 3, 4 and the petitioner herein, were arrayed as opposite parties. This petition was numbered as OMP No.420/2013. 2.6 These petitions, i.e., OMP Nos. 378/2013 and 420/2013 came to be disposed of by an order dated 06.11.2013. On that date, what was placed before the court was a settlement agreement dated 30.10.2013, which was executed between the petitioner and respondent no.2 (the proprietorship concern of Sh. Ashok Manchanda). This settlement was arrived at with the intercession of the Delhi High Court Mediation & Conciliation Centre (in short the Centre). 2.7 It transpires that, the aforementioned settlement agreement dated 30.10.2013 was preceded by a Full and Final Settlement Agreement dated 29.10.2013. Though, this fact was not brought to the notice of the court, a perusal of the contents of the present petition, along with that of the earlier two petitions filed, has brought this fact, to light. 2.8 I only note that in substance, there is no material difference between the two settlement agreements. More particularly, there is no difference with respect to clause 2, obtaining in the two settlement agreements, on which, reliance has been placed by the petitioner. 2.9 In sum, by virtue of the settlement agreement, the disputes between the petitioner and respondent no.1, were permanently settled, in accordance with the terms setforth therein. I will be referring hereafter to the settlement agreement dated 29.10.2013, as that is the agreement relied upon by the petitioner, in so far as the present petition is concerned.

3. The terms of settlement envisaged payment of Rs. 45 crores to respondent no.1 in the manner and as per timelines prescribed in clause 1. Clause 2 of the settlement agreement, inter alia, provided that, in case the petitioner failed to comply with its obligations, as contained in sub-clause 1.1(a) and (b) of clause 1, then all rights and claims of parties shall revive; by which it could only mean qua the entities, which were parties to the settlement agreement. 3.1 It may be important to note that clause 4 and 5 of the settlement agreement, adverted to the fact that there was litigation pending with respect to approximately 1.0125 acres of

the property in issue, and therefore, approval had been obtained for transfer of development license by the petitioner, only qua 13.455 acres. Accordingly, a mechanism was incorporated for adjustment of an amount of Rs. 4 crores; which was made dependent on whether or not the land admeasuring 1.0125 acres, was made available to the petitioner. 3.2 Pertinently, under clause 6 of the settlement agreement, parties agreed to the disposal of the OMP No.420/2013 in terms of the compromise arrived at between them, and for withdrawal/ resolution of the other petition, i.e., OMP3782013. What is important is that under the very same clause, parties also agreed to seek a decree in terms of the settlement. 3.3. It is in this background, that on 06.11.2013, a decree was passed in terms of the settlement agreement, albeit the one which was dated 30.10.2013. As noted above, the settlement agreements are pari materia and that by itself would make no difference to the case of the petitioner. 3.4 Undisputedly, the petitioner after paying a sum of Rs. 1 Crore, out of Rs.45 crores payable to the respondent, with interest, as prescribed in the settlement agreement, failed to pay the balance sum. 3.5 As a matter of fact, post-dated cheques issued in that behalf were dishonoured. This led to institution of proceedings under Section 138 of the Negotiable Instruments Act, 1881. In one such proceeding, the concerned court has passed an order of conviction, which is dated 27.09.2014. The said order has been challenged by way of a Writ Petition (Crl.) bearing No.2060/2014. On 16.10.2014, a Single Judge of this court, pending adjudication of the writ petition, has restrained the trial court from passing an order on sentence. 3.6 In the interregnum though, correspondence was exchanged between the parties herein. The first letter on the issue, is a letter dated 16.08.2014, addressed by the advocates for respondent no.1 to the petitioner and respondent nos. 3 and 4 herein. By this letter, the advocates for respondent no.1, while bringing to the notice of the petitioner, what they thought were breaches committed, called upon it to transfer the entire FSI in the project, in view of its inability to pay its debt, and having regard to the fact it had sold, a number of, partially constructed flats and appropriated the booking amounts. 3.7 By a return communication dated 04.10.2014, the petitioner conveyed to the respondent, that it was agreeable to the proposal (presumably made by respondent no.1), for transferring FSI (in the form of constructed flats in the project) in lieu of the remaining payments owed, by it. 3.8 The petitioner

followed its letter dated 04.10.2014, with the communication dated 10.10.2014. By this letter, it was suggested that an appropriate application be moved before this court, for modification of the settlement agreement. 3.9 The advocates of respondent no.1 vide letter dated 15.10.2014, put paid to any hope that the petitioner may have had of the settlement agreement, being modified. This communication, in no uncertain terms, rejected the suggestion made by the petitioner of transferring the FSI, in the form of constructed flats in the project, in lieu of balance payments owed by it, under the said settlement agreement. The communication, quite categorically stated, that the petitioner had twisted the offer made in their letter dated 16.08.2014.

4. The petitioner, however, did not give up and in consonance with the stand taken in letter dated 04.10.2014, followed the said communication with letters dated 28.10.2014 and 14.11.2014. In the last letter, petitioner took the stand that since it was offering FSI, equivalent to the balance payment, which according to it was only Rs. 40 crores (as it made an adjustment of Rs. 4 cores, in terms of clause 5 of the settlement agreement), its obligations under the said agreement, stood satisfied and fulfilled. This, of course, was refuted by respondent no.1 vide a return communication dated 19.11.2014. 4.1 In the interregnum though, the petitioner had filed an interlocutory application being: IA No.21340/2014, in one of the disposed of petitions, i.e., OMP No.420/2013. This application was, however, dismissed as withdrawn, giving liberty to the petitioner to take recourse to the remedies that may be available to it in law.

5. It is in this background the present petition has been filed. I may also notice, that in the meanwhile, Sh., Ashok Manchanda, proprietor of respondent no.1, had filed an execution petition, in this court, bearing No.Ex. P. 405/2014. By this petition, Sh. Ashok Manchanda had sought a direction, for being issued a transfer certificate, in favour of the District Judge, at Gurgaon, to enable attachment and sale of immovable property of the petitioner herein, which was located in the State of Haryana. 5.1 This execution petition was disposed of on 14.11.2014, with the observation that Sh. Ashok Manchanda, the decree holder, should file an execution petition in the appropriate court, that is, the court where the immovable property was located. The principal reason for this observation was that the decree

in issue was passed based on the settlement referred to above, which in turn had emanated from proceedings under the Act (i.e., the Arbitration & Conciliation Act, 1996), and the settlement having morphed into an award, no direction of the kind sought in the execution petition was required to be made. 5.2 Notice in the captioned petition was issued on 25.11.2014. The notice was made returnable on 04.12.2014, on that date, representation was made on behalf of respondent nos. 1, 3 & 4. As per the report of the registry, respondent no.2 was also served, though there was no representation on behalf of the said respondent. This was perhaps for the reason that the remaining respondents control respondent no.2. Parties were given time to complete pleadings. The matter was posted for hearing on 22.12.2014. SUBMISSIONS MADE BY COUNSELS6 In the aforesaid circumstances, arguments on behalf of the petitioner were advanced by Mr Jain, senior advocate, while on behalf of respondent no.1, submissions were made by Mr Sharma.

7. It was the contention of Mr Jain that in view of disputes having arisen, amongst the parties herein, in respect of the settlement agreement, the rights of the parties as delineated in the DRA, stood resuscitated. In this behalf, Mr Jain, sought to place reliance on clause 2 of the settlement agreement. 7.1 It was thus contended that even the arbitration agreement obtaining between entities herein, which were also parties to the DRA, stood revived. 7.2 Having regard to the above, it was next contended by Mr Jain that, in lieu of outstanding payments (which the petitioner had to make under the aforementioned settlement agreement), it had accepted the offer of respondent no.1, of transferring FSI in the form of constructed flats. 7.3 The learned counsel submitted, in this behalf, that respondent no.1 having first made an offer on 16.08.2014, sought to retract from the same vide its communication dated 15.10.2014, sent via its advocates, after it had been accepted by the petitioner vide its letter dated 04.10.2014. 7.4 It was the submission of Mr Jain that the petitioners right to supplant payments under the settlement agreement with FSI in the form of constructed flats, flowed from the provisions of clause 3.2 of the DRA. 7.5 It was Mr Jains contention that, in any event, as to whether the respondent no.1 had conveyed its acceptance or not was itself a dispute, which would have to be adjudicated upon, by a duly constituted arbitral tribunal. 7.6 Learned counsel submitted that, pending the dispute, all that

the petitioner sought was that respondent no.1 should maintain status quo both with regard to its rights under the DRA as well as the settlement agreement.

8. Mr Sharma, on the other hand, submitted that the petitioner deliberately sought to twist the offer made by respondent no.1 vide its communication dated 16.08.2014. It was contended by the learned counsel, that if Mr Jains contention was to be accepted; which was, in effect, that clause 3.2 of the DRA stood revived, then, the petitioner, was required to transfer in favour of the respondents the entire FSI sans such FSI which, proportionate to the payments made by the petitioner under the DRA, would go to the petitioner. 8.1 In other words, according to Mr Sharma, the petitioner could not take advantage of its own wrong by offering to transfer FSI equivalent to only those amounts which remained unpaid under the settlement agreement. 8.2 Furthermore, it was Mr Sharmas contention that, the petitioner, had sold a large number of partially built flats, and in the process, mopped up a large sum, equivalent to nearly Rs. 150 crores. Learned counsel submitted that, in any event, the present petition was not maintainable, in view of the fact that the settlement had transmuted into an award, and objections, if any, could be filed only in the execution proceedings, as the period of limitation prescribed under the Act had expired long ago. REASONS9 Having heard the learned counsels for the parties, what has emerged from the record is as follows: (i) The parties herein had entered into a DRA, whereby development rights were given to the petitioner herein, in the property in issue, upon payment of consideration, as prescribed therein. (ii) The petitioner, admittedly, failed to pay the entire sum. (iii) Consequently, disputes arose which led to institution of two petitions, under Section 9 of the Act by Shri Ashok Manchanda, proprietor of respondent no.1, and respondent nos. 3 and 4. These petitions were numbered as: OMP No.378/2013 and 420/2013. (iv) The aforementioned petitions were disposed of on 06.11.2013, based upon the settlement arrived at between the parties. (v) Under the settlement agreement, the petitioner was to pay a total sum of Rs. 45 crores to respondent no.1, out of which Rs. 1 crore was paid at the stage of execution of the said agreement. (vi) Admittedly, the petitioner has failed to make payments under the settlement arrived at with respondent no.1.

10. In this context, what has to be seen is, firstly, what are the rights available to the petitioner in the event of an admitted breach of its obligations undertaken under the settlement agreement. For this purpose, Mr Jain has relied upon clause 2 of the settlement agreement. For the sake of convenience, the same is extracted hereinbelow:

....2. The payments at paragraph 1 above shall be in full and final settlement of all disputes between the parties and of any & all amounts payable by the Developer to CB towards transfer of all rights, titles and interests in the Project Land in favour of the Developer. The Parties acknowledge that, subject to compliance of paragraph 1 above by the Developer, they shall have no claims or demands, of any nature whatsoever, against each other with respect to any outstanding amounts, dues, etc. under the DRA. In case the developer fails to comply with paragraph 1.1 (a) and (b) above, all rights and claims of the parties shall revive...

(emphasis is mine) 10.1 A bare perusal of clause 2 would show that in case the petitioner (i.e., the developer) were to fail in making the payments, as prescribed in subclause 1.1(a) and (b), all rights and claims of entities/ party to the settlement agreement would revive. 10.2 Prima facie, in my opinion, with the execution of the settlement agreement, only the rights and claims of parties under the DRA would revive, and not the mechanism set out in the DRA for adjudication of disputes or differences which arose qua the DRA. This would be evident from the discussion encapsulated hereafter. 10.3 It is Mr Jains contention that clause 2 of the settlement agreement would enable the petitioner to agitate or, in other words, press home its rights under clause 3.2 of the DRA. For the sake of convenience, the relevant extract of clause 3.2 of the DRA, on which reliance was placed by Mr Jain, is extracted hereinafter:

3.2.... In the event the Monthly Payments are delayed by more than a consecutive period of 3 (three) months, the Developer shall be entitled to retain the FSI of the Project in proportion to the amounts/ payments made by the Developer to the Owner till such date and the remaining FSI shall be returned in favour of the Owner. The amounts paid by the Developer including taxes, interest, government payments/ charges or other costs/ expenses including any bank guarantee

charges, development charges/ costs and/or EDC/ IDC payments, which are in excess of the Developers proportion of the FSI shall be refunded by the Owner within 3 (three) months from being notified by the Developer....

(emphasis is mine) 10.4 A bare reading of the extract would show that it is neither a right nor a claim, but an obligation cast on the petitioner. The obligation cast on the petitioner is thus : in the event the petitioner, delayed, the making of monthly payments, as prescribed under the earlier part of clause 3.2, by more than three (3) consecutive months, it could only retain that part of the FSI of the project, qua which it had made payments to the owners (i.e., the respondents herein) with an attendant obligation to return the remaining FSI. In other words, the petitioner was duty bound to return the remaining FSI, after redacting the FSI qua which it had made payments to the owners (i.e., the respondents herein). 10.5 Even if I were to assume for the moment that the arbitration clause stood revived by treating the same as a right under the DRA, the petitioner cannot secure any mileage as, a plain reading of clause 3.2, would show that, it would have to transfer the remaining FSI of the project to the owners, which includes respondent no.1 herein, after making an adjustment in the FSI, proportionate to the payments made under the DRA. 10.6 The submission of Mr Jain that the petitioner was willing to offer FSI in the form of constructed flats, in respect of outstanding payments under the settlement agreement, is clearly untenable. The supposed offer made by respondent no.1 vide its communication dated 16.08.2014, was clearly in line with what is plainly stated in clause 3.2 of the DRA. 10.7 Therefore, the submission of Mr Jain that, acceptance by the petitioner of the offer vide its return communication dated 04.10.2014 resulted, in a sense, in the settlement agreement being modified, is misconceived. In my view, quite correctly, the advocates of respondent no.1, vide their communication dated 15.10.2014, indicated to the petitioner that the contents of its communication dated 16.08.2014 had been twisted, or more appropriately put, misunderstood.

11. In view of the foregoing, quite clearly, the petitioner has failed to make out a prima facie case for grant of any of the reliefs prayed for in the instant petition. The balance of convenience, if at all, is clearly in favour of respondent no.1, in as much as even though a settlement agreement was executed nearly 14 months ago, it

has received a mere sum of Rs. 1 crore. On the other hand, the petitioner, continues to enjoy rights in the property in issue. It is not disputed that the cheques furnished by the petitioner have been dishonoured, and that, this situation has come to pass in view of the lack of financial wherewithal of the petitioner. Therefore, any interim direction, if ordered, as sought for by the petitioner, may result in further injury to respondent no.1.

12. For the foregoing reasons, the petition being without merit is dismissed. RAJIV SHAKDHER, J DECEMBER22 2014 kk

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