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Millennium Plaza Ltd. and Anr. Vs. Ip Support Services (India) Pvt Ltd

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Court : Delhi

Decided On : Jul-15-2015

Judge : S. Muralidhar

Appellant : Millennium Plaza Ltd. and Anr.

Respondent : Ip Support Services (India) Pvt Ltd

Advocate for Pet/Ap. : Mr. Atul Sharma, Mr. Milanka Chaudhury, Mr. Sarojanand Jha, Mr. Sudhir Chandra Agarwal, Mr. Amol Dixit, Mr. Gaurav Mukerjee

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + O.M.P. 314/2013 Reserved on: June 29, 2015 Date of decision: July 15, 2015 MILLENNIUM PLAZA LTD. & ANR. ..... Petitioners Through: Mr. Atul Sharma with Mr. Milanka Chaudhury and Mr. Sarojanand Jha, Advocates. versus LECOANET HEMANT INDIA PVT. LTD. ..... Respondent Through: Mr. Sudhir Chandra Agarwal, Senior Advocate with Mr. Amol Dixit and Mr. Gaurav Mukerjee, Advocates. And + O.M.P. 315/2013 MILLENNIUM PLAZA LTD. & ANR. ..... Petitioners Through: Mr. Atul Sharma with Mr. Milanka Chaudhury and Mr. Sarojanand Jha, Advocates. versus IP SUPPORT SERVICES (INDIA) PVT LTD. OMP Nos. 314 & 315/2013 Through: Mr. Sudhir Chandra Agarwal, Senior Advocate with Mr. Amol Dixit and Mr. Gaurav Mukerjee, Advocates. CORAM: JUSTICE S. MURALIDHAR1 OMP Nos. 314 and 315 of 2013 have been filed by both Millennium Plaza Limited (MPL) and Unitech Limited (UL) challenging the impugned Awards dated 5th September, 2012

passed by the learned Sole Arbitrator in Arbitration Nos. 54 and 47 of 2006 being the claim petitions of Lecoanet Hemant India Private Limited (LHIPL) and IP Support Services (India) Pvt. Ltd. (IPSSIPL) respectively. Although two separate Awards have been passed, since the facts are common, both petitions are being disposed of by this common order. Background Facts 2. The background facts are that IPSSIPL entered into an agreement dated 2nd July 1997 with MPL and UL whereby the latter agreed to allot to IPSSIPL office space at floors Nos. 6, 7, 8 and 9 in Tower A of the Millennium Plaza Complex (MPC) in Sector 27, Gurgaon, Haryana for a total price of Rs. 12,36,42,900/-. On 2nd and 4th December, 1997 and 13th November 1999, further agreements were entered into between the aforesaid parties where under MPL and UL agreed to allot car parking spaces to IPSSPL. It is not disputed that the entire consideration for the aforementioned floors and car parking spaces stand paid by IPSSIPL to MPL and UL.

3. An agreement dated 12th November, 1999 was entered into between LHIPL, MPL and UL in terms of which MPL and UL agreed to allot office space at Floor No.10 in Tower A of the Millennium Plaza for a price of Rs. 3,54,36,000/-. On 13th November, 1999, an another agreement was entered whereunder MPL and UL agreed to allot car parking spaces to LHIPL. It is not disputed that LHIPL has paid the entire sale consideration.

4. Disputes arose between the parties with IPSSIPL and LHIPL contending that despite payment of the entire sale consideration, MPL and UL were not executing sale deeds in respect of the aforementioned properties their favour. The dispute essentially was with regard to payment of the maintenance charges and provision of two lifts in the MPC for the exclusive use of IPSSIPL and LHIPL. Arbitral proceedings and Award 5. IPSSIPL and LHIPL filed statements of claims before the learned Arbitrator as under: Claims 1.

2. Particulars Interest @ 18% compounded per annum on account of delayed payments. Directions to MPL and UL to execute and register the sale deed in respect of the premises 3.

4. 5.

6. 7.

8. in question. Recovery of any excess amount due and payable towards stamp duty and registration charges for the sale deed. Directions to IPSSIPL and LHIPL to undertake to establish an association of allottees within a time bound schedule and thereafter hand over the responsibility of providing maintenance of the building along with existing infrastructure/equipment to the said association. Directions to the MPL and UL to render audited accounts since July, 2001 and refund the amount paid in excess to the tune of Rs. 9,56,772/- being the difference between the amount charged towards maintenance @ Rs. 11 per sq. ft. and Rs. 8 per sq. ft. for a period of three years along with interest as may be deemed fit, with further directions to MPL and UL to recall the revised Maintenance Charges Debit Note. Directions to MPL and UL to re-programme two lifts for the exclusive use of both LHIPL and IPSSIPL to stop at 8th Floor only. Recovery of amount charged towards insurance premium and included in the maintenance charges, which would be ascertained on rendition of audited accounts. Such other and further reliefs as may be deemed fit including cost of arbitration.

6. By the two separate Awards dated 5th September, 2012, the learned Arbitrator allowed Claim No.2 directing MPL and UL to execute and register the sale deed in respect of aforementioned floors in favour of IPSSIPL and LHIPL and IPSSPL respectively. In respect of Claim No.6, learned Arbitrator directed MPL and UL to provide two dedicated elevators to the LHIPL and IPSSIPL for their exclusive use. In respect of Claim No.7, it was held that MPL and UL have no right to get the demised premises insured. As regards Claim No.8, the parties were left to bear their own costs. Claims No.1, 3, 4 and 5 were not pressed by the Claimants. Submissions of counsel for the Petitioners 7. Mr. Atul Sharma, learned counsel for the Petitioners at the outset submitted that the impugned Awards failed to deal with the counterclaims sought to be filed by the Petitioners. He submitted that the Petitioners' application under Section 23 (3) of the Act seeking to amend the statement of defence by incorporating the counter-claims was wrongly rejected by the learned Arbitrator by order dated 26th March 2011. According to him, since the latter order had merged with the final impugned Awards, it could be challenged in the present petitions under Section 34 of the Act.

8. Mr. Sharma submitted that the direction in the impugned Awards concerning the provision of two lifts for the exclusive use of the Respondents overlooked the fact that in a statutory declaration filed by MPL and UL under Section 11(2) of the Haryana Apartment Owners Act, 1983 (HAO Act) with the competent authority, three existing lifts in the MPC were shown as Common Area Facility. According to Mr. Sharma, after the HAO Act came into force, only those lifts declared as Common Area Facilities under Section 11(2) would be registered. Clause 16 of the agreement to sell also provided that upon HAO Act becoming applicable to the MPC its provisions and rules framed thereunder would supersede and govern the rights and obligations under the agreement to sell. The declaration filed by the Petitioners has not been challenged by LHIPL or IPSSIPL.

9. Mr. Sharma next submitted that the learned Arbitrator could not have directed MPL and UL to execute and register sale deeds in respect of the premises without including the clause acknowledging the Petitioners' right to claim maintenance charges from LHIPL and IPSSIPL. He submitted that under Clauses 16 and 22 of the agreement to sell the responsibility for the maintenance of the common area in the building in question was to remain with the Petitioners until the same was taken over by a legally constituted body or association of the allottees. Mr. Sharma submitted that barring LHIPL and IPSSIPL, the other apartment members in the MPC had entered into separate maintenance agreements with MPL and UL in acknowledgement of the fact that since association of the apartment owners has not been formed, the HAO Act was not operationalised. He submitted that on the one hand, LHIPL and IPSSIPL are availing of the services in the common areas and on the other hand are refusing to enter into a separate maintenance agreements with the MPL and UL in terms of Clause 20 of the agreements to sell. In overlooking the above legal position, the learned Arbitrator erred in holding that with the HAO Act having coming into force, the above clauses of the agreements to sell would no longer be operational.

10. Mr. Sharma further contended that the disputes raised by LHIPL and IPSSPL with regard to the quantum of maintenance charges were not justified. None of the other apartment owners in the MPC had raised any objection. What was sought to be collected by MPL and UL as maintenance charges was consistent with the

actual costs incurred by MPL and UL with the reasonable 'mark up' percentage. Moreover, the entire audited accounts have been made available to the Respondents by MPL and UL for inspection. There was no question of MPL and UL trying to make unreasonable profits through the maintenance charges. Submissions of Senior counsel for the Respondents 11. In reply to the above submissions Mr. Sudhir Chandra, learned Senior counsel appearing for LHIPL and IPSSIPL raised a preliminary objection as regards the challenged by the Petitioners to the impugned Award in so far as it failed to consider their counter claims. He pointed out that by a separate order dated 26th March 2011, the learned Arbitrator had rejected the applications filed by UL and MPL under Section 23(3) of the Act seeking amendment to their statement of defence to raise counter claims. The Respondents objected to the maintainability of the said application by contending that the question of maintenance dues was outside the jurisdiction of the learned Arbitrator. In other words, the Respondents' objections were traceable to Section 16 (2) of the Act. By the order dated 26th March 2011 the learned Arbitrator upheld the said objection and rejected the Petitioners' application. That order, not having been challenged under Section 37 of the Act, had become final. There was, therefore, no question of learned Arbitrator entertaining the Petitioners' counter claim thereafter. In any event, this court would not in the present petitions under Section 34 entertain a challenge to the order dated 26th March 2011 of the learned Arbitrator.

12. Mr. Chandra next submitted that once the HAO Act came into force, the clauses of the agreement pertaining to the payment of maintenance charges ceased to have any effect. The question of payment of charges therefore fell outside of the agreement to sell. MPL and UL could not insist on incorporation of those clauses in the sale deeds. He pointed out that the entire sale consideration having been paid more than 12 years ago, there was no justification whatsoever for MPL and UL to refuse to execute the sale deed. He submitted that there was nothing perverse in the interpretation by the learned Arbitrator of Clause 16 of the agreement to sell. The fact that UL and MPL may have filed declaration under HAO Act without knowledge of either LHIPL and IPSSPL would make no difference to the fact that under both agreements to sell, two lifts were to be made available for their exclusive use. The declaration was, in any event, contrary to law

as well as the agreement between the parties. Consequently, learned Arbitrator was justified in rejecting the said plea of the Petitioners.

13. Mr. Chandra also disputed the correctness of the accounts submitted by the Petitioners. As far as LHIPL and IPSSIPL were concerned, they were paying the maintenance charges under protest. There were basic mistakes in the calculations in the office accounts and certain figures were wrong. The interest accumulated had not been considered for the purpose of accounting. He submitted the fact that other apartment owners may have paid the maintenance charges without insisting on adjustment of interest was irrelevant. He also pointed out that in breach of the agreement to sell, one of the lifts has been programmed to stop at all the floors while other has been programmed to stop also at floors 9 and 10 (to serve as a service lift, even though there is a designated service lift). Consequently, the learned Arbitrator was justified in allowing the claims of both Respondents as regards the exclusive use of the two lifts in terms of the agreement to sell.

14. As already noticed herein before the two central issues considered by the learned Arbitrator was regarding the execution of the sale deed and the obligation of the Petitioners to make available to the Respondents two lifts for their exclusive use. Discussion and conclusions 15. The two agreements to sell in question have more or less identical clauses as regards the payment of the maintenance charges. Clause 16 in both agreements to sell reads as under:

Save as otherwise herein provided Allottee shall have no claim, right, title or interest of any nature or kind whatsoever except the right of ingress/egress over or in respect of land, open spaces, common areas and the basement in the Millennium Plaza Complex, the possession whereof shall remain with the Developers and whose responsibility it will be to maintain and upkeep the same until the same are taken over by any legally constituted body or association of the allottees of the Millennium Plaza Complex or occupiers of the office in the said Complex, as the case may be, or until the Haryana Apartment Ownership Act becomes applicable to the Millennium Plaza Complex. In the last mentioned event, the provisions of the said Act and rules framed thereunder shall supersede and govern the rights and obligations covered by this Clause.

16. On the dates of the agreement to sell, the HAO Act had not been notified. However, it was notified in the year 2002. There is no dispute that the maintenance charges had already been paid till such time the HAO Act became operational, without any protest. The fact remains that for the HAO Act to become operational, an association has to be formed of the apartment owners of the Millennium Plaza Complex. However, admittedly no such association has yet been formed.

17. As regards the dispute regarding payment of the maintenance charges, under Clause 16, the responsibility of the developers i.e. MPL and UL to maintain and upkeep the complex was till it is taken over by the association of the allottees or occupies the office spaces in the Millennium Plaza Complex. Under Clause 17, an allottee was to sign a separate Maintenance Agreement which would contain the full scope of such maintenance. Under Clause 18 payment was to be made of the open area maintenance charges, common area maintenance and maintenance charges of basement and common services of the basement. 18.Under Clause 19, the obligation of the developers was to maintain Millennium Plaza Complex for a period of 3 years and at the time of handing over possession of the premises to the allottee to recover advance maintenance charges for one year. Under Clause 20 of the agreement, the indicative charges towards maintenance were determined to be Rs. 11 per sq.ft. per month. Firm charges was determined six months prior to the handing over of possession of the premises taking into consideration, inter alia, the prices of diesel, electricity, minimum wages prevailing in Gurgaon/Haryana.

19. Clause 20 further provided that the developer shall make available or have the maintenance agency employed by it making available to the allottee, audited accounts related to maintenance of the complex to enable the allottee to assess the accuracy and/or justifiability thereof. With HAO Act coming into force on 19th April 2002, in terms of Clause 68 of the Agreement, the responsibility no longer remained with all the developers to maintain the complex.

20. The conclusion of the Arbitrator was that all the rights and obligations of the parties in respect of the maintenance of the building in question are now governed

by the provisions of the aforesaid Act and the Rules framed thereunder which supersede the Agreement between the parties in respect of the maintenance of the building.

The said conclusion is consistent with the aforementioned Clause 18 of the agreement.

21. It was urged by Mr. Sharma that since IPSSPL and LHIPL continued to avail of the maintenance facilities including the common areas and lifts, there was no justification in their refusing to incorporate the clause of the sale deed.

22. Under Clause 16 of the Agreement, once it is clear that with the coming into force of the HAO Act, UL and MPL do not have any responsibility to maintain the premises in question, they cannot insist by the incorporation of a clause in the sale deed mandating that the purchasers, i.e., ISSIPL and LHIPL, must enter into separate maintenance agreements with UL and MPL. While it is true that the agreements to sell envisage insertion of clauses to that effect in the sale deed, the said clauses are inconsistent with the legal position and other clauses of the agreement itself. As pointed out by the learned Arbitrator, the parties are now bound by the terms of the HAO Act and the Rules and that fact may be recorded in the sale deed. However, this does not preclude the parties entering into separate agreements for maintenance but for the Petitioners to insist that clause should be incorporated in the sale deed does not appear to be legally permissible. The said claim of the Petitioners was, therefore, rightly rejected by the learned Arbitrator. Maintainability of counter claims 23. Next the Court proceeds to deal with the objections raised by the Respondents to the present petitions to the extent that they seek to challenge the learned Arbitrator's rejection of their counter claims.

24. The Court finds no merit in the plea of Mr. Sharma, learned counsel for the Petitioners, is that although the application under Section 23 (3) of the Act seeking to amend the statement of defence in order to incorporate the counter claim was rejected by the learned Arbitrator by an order dated 26th March 2011, the said order was merged with the final Award and that, therefore, notwithstanding the fact that the said order was not challenged separately by the Petitioners by filing an appeal under Section 37 of the Act, the Petitioners could raise such a plea in the

present petitions under Section 34 of the Act.

25. The Petitioners were aware on 26th March 2011 itself that the learned Arbitrator had upheld the Respondents' objections to his jurisdiction to entertain the Petitioners' counter-claim for maintenance charges. That order of the learned Arbitrator, under Section 23 (3) read with Section 16 (2) of the Act, was not challenged under Section 37 of the Act and thus became final. Therefore, in the final Award, apart from noting in para 8 of the Final Award that by the order dated 26th March 2011 the attempts by the Petitioners to amend their Statement of Defence to include their counter-claims had been negatived, the learned Arbitrator had no occasion to deal with the counter-claims on merits. Consequently, this Court declines to permit the Petitioners to raise such a plea at this stage.

26. The other issues that requires to be considered is whether the Petitioners were obliged to provide two lifts to the executive use of the Respondents and whether the learned Arbitrator was justified in allowing that claim. Mr. Sharma could not point anything in the impugned Award which is contrary to the clauses of the agreements to sell with each of the Respondents. Both the agreements make it abundantly clear that the Petitioners have to provide two exclusive lifts for the use of the Respondents.

27. Consequently, this Court finds no error whatsoever in the learned Arbitrator allowing the said claim.

28. No grounds have been made out by the Petitioners for interference with the impugned Award on any of the grounds in Section 34 of the Act.

29. The petitions are dismissed with costs of Rs. 20,000 which will be paid by the Petitioners to the Respondents within four weeks from today. S. MURALIDHAR, J th 15 JULY, 2015/rs/Rk

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