* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 07.02.2019
Date of Decision: 28.03.2019

\+ O.M.P. (COMM) 271/2018
SH. CHANDER MOHAN LALL ..... Petitioner
Through: Mr.C.M. Lall, Sr. Adv. with Ms.Nancy Roy, Ms.Shreya Sethi, Mr.Sandeep Sharma & Mr.Lakshay Virmani, Advs.

versus

DLF HOME DEVELOPERS LTD. ..... Respondent
Through: Mr.B.B. Gupta, Sr. Adv. with Mr.Amit Agarwal & Mr.Saurabh Nirupam, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 31.03.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the "Retail/Commercial Office Space Buyer's Agreements" dated 31.05.2006 (hereinafter referred to as the "Space Buyers Agreement").

2. In short, the dispute between the parties is regarding the delay in handing over of the possession of the office spaces to the petitioner by the respondent. While the respondent claimed that the possession of the office space could not be handed over to the petitioner as the petitioner had defaulted in making the payment of the last installment, being the

12th installment, in accordance with Annexure-III (Schedule of Payments) and other charges like maintenance and holding charges, the petitioner claimed that the last installment was payable only on the receipt of notice from the respondent stating that it had received the Occupancy Certificate. As no such intimation was received by the petitioner, the final installment became due only in 2011 when the petitioner received such intimation. However, though the petitioner was ready and willing to make such payment, the respondent refused to hand over the possession of the office space to the petitioner until and unless the petitioner also pays the other charges demanded by the respondent. As these charges were not payable by the petitioner, disputes arose between the parties with respect to the entitlement of the respondent to demand such charges.

3. Eventually the possession of the office space was handed over by the respondent to the petitioner in November 2014 pursuant to orders being passed by this Court on an appeal under Section 37 of the Act filed by the petitioner.

4. The Arbitrator in the Impugned Award has held that for the final installment to become payable, the respondent was under an obligation to send an intimation of receipt of Occupancy Certificate to the petitioner. As the respondent failed to furnish proof of such intimation having been delivered to the petitioner, the petitioner was not liable to pay the final instalment till 12.01.2011, when for the first time the respondent sent an e-mail to the petitioner giving details of payment allegedly due from the petitioner and the paper work and other formalities to be completed. At the same time, the petitioner has been held entitled to damages for delay

in grant of possession till 12.01.2011 at the rate of Rs. 25/- per sq. ft. per month. For the period beyond 12.01.2011, the Arbitrator has held that as both the parties contributed to the delay in handing over of the possession of the office space, the petitioner was not entitled to any damages for the period beyond 12.01.2011, while the respondent was not entitled to claim interest on the last instalment for this period. There are other directions also passed by the Arbitrator with respect to each specific claim and counter claim of the parties.

5. The primary challenge of the petitioner is to the finding of the Arbitrator that the petitioner is not entitled to claim damages beyond 12.01.2011. The petitioner further challenges the finding of the Arbitrator that such damages would be confined to Rs. 25/- per sq. ft. per month as provided in Clause 11.4 of the Space Buyers Agreement.

6. The learned counsel for the petitioner submits that the Arbitrator has erred in holding that the petitioner had contributed to the delay in handing over / taking over of the possession of the office space. She submits that the petitioner became aware of the demand of 12th and last installment for the first time only on 12.01.2011. As the respondent demanded maintenance and holding charges alongwith interest, the petitioner protested against the same. The petitioner by his notice dated 18.05.2011 even offered to make payment of the 12th and the last installment and requested the respondent to hand over the vacant possession of the property. Therefore, the petitioner could not have been held guilty for contributing to the delay in taking over of the possession and thereby being denied damages beyond 12.01.2011.

7. On the other hand, the learned senior counsel for the respondent submits that the Arbitrator has rightly concluded that the petitioner was insisting on payment of damages instead of showing eagerness and making any serious offer to pay the balance amount and complete the formalities. He submits that barring offering to make payment of the 12th and the last installment, the petitioner never actually paid the same. The petitioner could have made the payment of the said installment and sought appropriation thereof in accordance with Section 59 of the Indian Contract Act, 1872. However, the petitioner even by his notice dated 18.05.2011 insisted on payment of damages thereby escalating the disputes. The petitioner also did not comply with the interim order dated 20.02.2013 passed by the Sole Arbitrator and instead challenged the same before this Court. Even after passing of the order dated 01.07.2013 by this Court in the appeal filed by the petitioner, there was further delay caused by the petitioner in taking over possession. The learned senior counsel for the respondent submits that therefore, the Arbitrator has rightly concluded that the petitioner also contributed to the delay in handing over / taking over of the possession of the shops in question and is not entitled to any damages beyond 12.01.2011.

8. I have considered the submissions made by the counsels for the parties. Before adverting to the same, the finding of the Arbitrator on this issue deserves to be noted and is reproduced hereinbelow:-

> *"67. In view of above discussion, issues no. 1 & 2 stand decided to the effect that though the Respondent was not obliged to send copy of Occupancy Certificate to the Claimant, but was certainly obliged to inform him about the receipt of*

Occupancy Certificate alongside calling upon him to pay the last installment, which could only be raised after receipt of such Certificate. The notice of demand of the last installment with offer of possession per se, without mention of receipt of Occupancy Certificate was not adequate intimation for the Claimant about receipt of Occupancy Certificate by the Respondent as also effective offer of possession by Respondent. The conclusion is also that the intimation about last installment vide the said letter dated 10/06/2009, was not actually sent to the Claimant. However, these findings on issues No. 1 and 2 are confined to the period upto 10th June 2009 when the Respondent allegedly intimated the claimant. Issues No. 1 and 2 stand decided accordingly. The effect of email sent to the Claimant on 12th January 2011 and other communication thereafter shall be discussed in the subsequent paras (under issues no. 3 & 6).

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107. In the facts of the case, the controversy between the parties has been divided into two time periods (i) from 10/06/2009 to 12/01/2011 (the date of email sent to the claimant) and (ii) from 12/01/2011 to 5th December 2014 when possession was actually taken over by the claimant. So far as the first period is concerned, it has been held under Issues No.1 & 2 above that intimation (dated 10/06/2009) regarding receipt of Occupancy Certificate was not actually sent to the Claimant by the Respondent, which was in breach of clause (10.3) of the AGREEMENT.

108. For reaching a conclusion with regard to the second period, it would be appropriate to first refer to the communication between the parties by way of emails, hard copies of which have been brought in evidence by the Claimant (Ex. CW1/9 to CW1/19). Vide the first email dated 12/01/2011 (Ex CW1/9), the Respondent sent details of payments allegedly due from the Claimant and paper work and other formalities. There was reference of conversation phone and it was also mentioned that delay in taking possession will result in the form of holding charges. (As mentioned above, the Claimant denied

the version of such a conversion over phone). The Claimant sent reply on the same day (Ex CW1/10) questioning as to why holding charges were being levied and that he has not been sent any notification as set out in clause (10.3) of the AGREEMENT till date and also sought explanation about the levy of monthly maintenance charges when he has not been given possession of the premises. Similarly, he raised query about delayed interest charges as well as conversion charges and asserted therein that he has already suffered on account of delayed delivery on the part of the Respondent in terms of lost rent and needed to know what their policy was in this regard. He further made clear that unless he received complete clarifications he will not be in a position to make any further payments. The Respondent then sent email dated 21/01/2011 (Ex CW 1/11) averring therein that letters of possession were sent to all customers way back in June 2009 where he was asked to remit/submit all payments and paperwork by 15th June 2009 or else the holding charges would be applicable thereafter and also that monthly maintenance charges are being levied for upkeep and maintenance of common areas, divided on pro-rata basis, as per the AGREEMENT, from the mall operational dated i.e. from October 2009 and delayed interest charges are applicable for payments made after the given time frame or which are still pending and whereas conversion charges are applicable for converting the lease hold land into freehold. In reply thereto on the same date (Ex CW1/12), the Claimant reiterated his version and made clear that he did not intend to pay holding or other charges and further intended to claim lost rent and user opportunity. The next email was sent by the Respondent on 24/03/2011 (Ex CW1/13) giving the details of payments and paper work which were pending. This communication is further to the effect that as a special case holding charges of Rs.38,06,376/- stood waived off and the delayed interest also being charged @ 12% instead of 15/18% as per break up given therein. As per this mail, the documents required to be provided for the purpose of registration were attached for reference. This communication was responded by the Claimant by email dated 25/03/2011 (Ex. CW 1/14) wherein

he questioned the reason for charge of interest and desired to be known when letter to take possession was sent and how did he commit the default. On the next day i.e. 26/03/2011 the Respondent sent a mail (Ex CW1/15) mentioning that complete payments were payable by 15/07/2009 and delayed interest was charged as per the AGREEMENT. In response thereto, the Claimant sent a mail dated 28/03/2011 (Ex CW1/16) taking the stand that the last instalment only becomes due on receiving intimation about receipt of Occupancy Certificate. He also required the Respondent to make a reasonable offer about the losses to him on account of delays on their part. In the next email dated 30/03/2011 (Ex CW/1/17) the Respondent made clear that last instalment is payable on receipt of Occupancy Certificate which was received in June 2009 and that complete holding charges cannot be waived and he was requested to complete the formalities within a week's time failing which the earlier offer of waiver shall stand withdrawn. The Claimant sent response on the same day (Ex CW1/18) again questioning as to when the intimation (about Occupancy Certificate) was sent to him and that they were attempting to pressurise him. He reiterated that till possession is handed over to him, he intends to charge DLD for delay in delivery and, in the minimum, the rent that he would have earned during the period and accordingly they continue to incur this liability for each day of delay. Ex CW1/19 is the copy of letter/notice dated 18/05/2011 sent by the Claimant to the effect that he was ready and willing to deposit the balance amount under the AGREEMENT and in return he expected immediate delivery of possession and also called upon the Respondent to pay to him @Rs.120 psf per month from 01/06/2009. The claim for damages of the Claimant was disputed by the Respondent vide their letter dated 01/10/2011, copy of which is Ex CW1/20.

109. It would also be relevant to refer to the order dated 20/02/2013 whereby the application of the Claimant under Section 17 of the Act was disposed of. It was remarked in the order that the Claimant did not offer to pay the last instalment even after having come to know on 12/01/2011 that possession was being offered by the Respondent who had obtained the

Occupancy Certificate. It was added that during the course of hearing, the Claimant offered to pay the last instalment in terms of schedule of payment and also offered to deposit a FDR equivalent to the amount demanded by the Respondent towards holding charges and maintenance charges etc. from June 2009 onwards before this Tribunal without prejudice to his rights and contentions during the pendency of the present proceedings till final adjudication of the disputes by this Tribunal and on the Claimant doing so, according to his offer, the Respondent should hand over possession of the premises and execute and register the sale deed in his favour. The order records that this offer was not acceptable to the Respondent.

110. It would be quite clear from the contents of the e-mails as well as the order dated 20/02/2013, referred above, that, in fact, both the parties are responsible for delay in execution of the conveyance/sale deed and delivery of possession of the premises as far as second time period is concerned. The Respondent, who had failed to send requisite intimation about Occupancy Certificate and delivery of possession in June 2009, went on to seek maintenance charges and delayed payment interest and other related charges and set these payments as a condition for accepting last instalment, and as the same time the Claimant, who had become aware of the receipt of Occupancy Certificate in January 2011 and was called upon to complete the formalities for delivery of possession, insisted for compensation towards loss of rent instead of showing eagerness and making any serious effort to pay balance amount and complete the formalities, and both the parties remained adamant on their stands resulting in so much delay in execution of sale deed and handing over of possession of the premises. It is also clearly made out that they came to some agreed terms of execution of deed and delivery of possession (as an interim measure) only after repeated orders were passed by the Court. In my considered view, both the parties contributed to the delays and are equally to blame."

9. A reading of the above finding of the Arbitrator would show that the Arbitrator has considered 12.01.2011 as a cutoff date, as on this date the respondent sent an e-mail giving details of payments due from the petitioner and other paper works and formalities to be completed for handing over of the possession of the Office Spaces to the petitioner. The Arbitrator has held that atleast till this date, the petitioner was not liable to make the payment of the 12th installment and therefore, was entitled to damages from 10.06.2009, which is the date on which the respondent alleged to have sent a letter demanding the last payment till 12.01.2011, which is the date when the respondent demanded the last installment from the petitioner in writing.

10. The Arbitrator thereafter analyzed the correspondences exchanged between the parties and the orders that were passed by the Arbitrator on an application under Section 17 of the Act and by this Court on an appeal under Section 37 of the Act, to conclude that as the petitioner was insisting on compensation towards loss of rental instead of showing eagerness and seriousness to pay the balance amount and complete the formalities, he has contributed to the delay and is equally to blame for the delay in handing over / taking over the possession.

11. In view of the above finding, the correspondences that were exchanged between the parties beyond 12.01.2011 will have to be carefully scrutinized.

12. By the e-mail dated 12.01.2011 the respondent raised the demand on the petitioner of maintenance and holding charges apart from the 12th

installment. The petitioner by his e-mail dated 12.01.2011 responded to this demand as under:-

> *"Can you please also explain why there are holding charges being charged? According to the agreement the Retail Office Space were to be handed over in 2009. They were not handed over in that year and till date I have not been sent any notification as set out in paragraph 10.3 of the Agreement. In fact, till date I do not have any such communication sent to me.*
>
> *Please also explain why Monthly Maintenance Charges are being levied when I have not been given possession of the Spaces.*
>
> *Same is the position with regard to Delayed Interest Charges.*
>
> *Please also explain what the Conversion Charges are?*
>
> *I have already suffered on account of delayed delivery on the part of DLF in terms of lost rent. Also need to know what is the DLF policy in this respect.*
>
> *Unless I received complete clarifications from you I will not be in a position to make any further payments. Accordingly, your very early reply to these queries will be highly appreciated."*

13. The respondent in turn by its e-mail dated 21.01.2011, while referring to its demand in July 2009 (which the Arbitrator has held to having been not approved) insisted upon the payment of holding charges, maintenance charges and delayed interest charges.

14. The petitioner again protested against the said demand by his e-mail dated 21.01.2012 stating as under:-

> *"I am very surprised to read you email sent to me rather belatedly. How do you expect me to comply with any requirements which are not communicated to me. During our telephonic conversion you had admitted to me that the communication was sent to a wrong address and now you tell me that it is being scrutinized.*
> *I just wish to reiterate that since I received no communication from you, I do not intend to pay and holding or other charges. In fact, I intend to claim lost rent and user opportunity from the period when the property was to be handed over to me to the date possession is handed over to me. Accordingly, any delay in handling over possession will be at the risk and consequence of DLF.*
> *I will now await your further communication after you have scrutinized the issue relating to communication being sent at the wrong address."*

15. A reading of the above e-mail clearly shows that the petitioner was primarily protesting against the demand of holding charges, maintenance charges and interest for the alleged delay in payment of the last installment demanded by the respondent, though he has also stated that he intends to claim lost rent and user opportunity for the period of the delay.

16. The respondent, however, by the e-mail dated 24.03.2011, while agreeing not to charge holding charges, insisted on payment of maintenance charges and delayed interest at the rate of 12% per annum instead of 15/18% per annum as demanded earlier.

17. The petitioner, however, did not agree to this offer and by his e-mail dated 25.03.2011 protested as under:-

> *"I still don't understand why interest is being charged. Please explain. Let me know when we were sent the letter to take possession and how did we default."*

18. The respondent again by its e-mail dated 26.03.2011 stated that as the petitioner would have earned interest on the amount, it should pay such interest to the respondent at the rate of 12%.

19. The petitioner vide his e-mail dated 28.03.2011 refused to pay any interest and stated as under:-

> *"The last instalment only becomes due upon our receiving intimation from you that the occupation certificate has been received by DLF. We have not received that intimation till date. How can you charge interest under these circumstances. Please clarify.*
>
> *What amount the losses to me on account of delays on your part. Please make me a reasonable offer on that as well."*

20. The respondent, however, by its e-mail dated 30.03.2011 threatened that incase the petitioner does not complete the formalities within a week, the offer of waiver of holding charges and delayed interest charged at a lesser rate would stand withdrawn.

21. The petitioner did not bow down to such threats and instead, by his e-mail dated 30.03.2011 stated as under:-

> *"What still begs the answer is when was this communicated to me, in terms of the contract. How is a buyer supposed to know*

that the occupation certificate is received by you? You are deliberately evading this question.

From your threat to withdraw the offer within a week, it is quite apparent that you attempting to pressurize me to pay this unjust amount to you. Accordingly, under the circumstance, please feel free to withdraw the offer. I wish to reiterate that till possession is handed over to me I intend to charge DLD for the delay in delivery and, in the minimum, the rent that I would have earned during the period. Accordingly, DLF continues to incur this liability for each day of delay.

Will once again await your response to my query raised above."

22. The petitioner thereafter by his e-mail dated 18.05.2011, while offering to pay the last installment, stated as under:-

"Accordingly, I hereby inform you that I am ready and willing to deposit a sum of Rs.71,22,150/- with you in satisfaction of the price under the Agreements to Sell. In return, I except you to immediately hand over the vacant possession of the property to me. I also call upon you to pay me damages calculated at Rs.120/- per sq. feet per month from 1st June 2009 (by which date you were liable to handover the vacant possession of the said properties) up to the date when you hand over vacant and peaceful possession to me.

If I do not hear from you within 2 weeks hereof that you are ready and willing to comply with these requisitions, I will be compelled to initiate legal proceedings against you without any further reference of notice to you entirely at your risks, costs and consequences. In such a scenario, I intend to additionally claim all costs of the litigation and damages and penal damages. This is without prejudice to any other right or remedy available to me."

23. I cannot agree with the learned senior counsel for the respondent that merely because the petitioner had demanded damages in the above notice, this cannot be considered as an offer by the petitioner to pay the last installment to seek possession of the office space in question. The petitioner had very clearly stated that he was willing to deposit the last installment and in return expected the vacant possession of the property. The demand for damages was not made a pre-condition to the handing over of the possession. A reading of the above e-mail would clearly show that the petitioner was merely protesting against the demand of holding charges, maintenance charges and interest on the alleged delay in payment. These demands have been held to be unjustified by the Arbitrator and therefore, the petitioner cannot be faulted for raising such protests. It is true that the petitioner in view of the above e-mails / letters also claimed damages, however, the same clearly were not made a pre-condition for handing over of the possession. On the other hand, it was the respondent who remained adamant in demanding interest and maintenance charges from the petitioner.

24. The petitioner thereafter filed a petition under Section 9 of the Act before this Court, however, as the respondent immediately thereafter appointed an Arbitrator, the petitioner filed an application under Section 17 of the Act before the Arbitrator praying for the respondent to be directed to handover the possession of the office spaces to the petitioner on payment of the last installment and completion of other formalities for execution of the Sale Deed. It was the respondent who opposed the said

application again claiming the damages as noted above. In his order dated 20.02.2013, the Sole Arbitrator observed as under:-

> *"It is also true that the Claimant did not offer to pay the last installment even after having come to know on 12/1/2011 that the possession was being offered by the Respondent and the occupancy certificate had been obtained by the Respondent.*
>
> *During the course of hearing, the Claimant offered to pay the last installment in terms of the schedule of payment and also offered to deposit a FDR equivalent of the amount demanded by the Respondent towards holding charges and maintenance charges etc. from June 2009 onwards before this Tribunal without prejudice to his rights and contentions during the pendency of the present proceedings till final adjudication of the disputes by this Tribunal. On the Claimant doing so, according to is offer, the Respondent should hand over possession of the premises and execute and register the sale deed in his favour. However, this offer was not acceptable to the Respondent."*

25. From the above it is evident that even before the Arbitrator the petitioner had offered to pay the last installment to the respondent, while also securing respondent's interest with respect to the balance amount demanded by the respondent towards holding charges, maintenance charges and delayed interest charges. It was the respondent who refused this offer as well.

26. The Arbitrator by his order dated 20.02.2013, therefore, directed as under:-

> *"In the circumstances and to balance the equities it would be in the interest of justice that as an interim measure and without prejudice to the rights and contentions of the parties it is directed that the Claimant shall deposit with the Respondent the*

last installment payable in terms of Annexure III to the agreements (schedule of payment) along with the holding and maintenance charges from 12/01/2011 till actual handing over possession of the said premises by the Respondent to the Claimant and to deposit a FDR drawn on a Nationalized Bank in the name of the Respondent with this Tribunal of an amount equivalent of the arrears of holding and maintenance charges demanded by the Respondent from 1/05/2009 during the pendency of the present proceedings. Subject to such payment being made and the FDR being deposited with this Tribunal, the Respondent shall hand over possession of the premises in question to the Claimant. The entitlement of the Respondent to claim the amount lying in the FDR shall depend on the final outcome of the present proceedings."

27. This order was challenged by the petitioner before this court by way of an appeal under Section 37 of the Act, being ARB.A. No. 8/2013. In the order dated 01.07.2013, the court, finally observed as under:-

"20. ***With regard to the direction issued to the appellant to deposit FDR in the name of respondent from the period 1st May, 2009 till 11th January, 2011***

In the impugned order the learned Arbitrator has directed the appellant to deposit with the respondent the last installment payable alongwith the holding and maintenance charges from 12th January, 2011 till actual handing over possession of the said premises by the respondent to the appellant. And to deposit FDR in the name of respondent from the period 1st March, 2009 during the pendency of the proceeding despite of coming to the conclusion on the material place on record that there is no document to show that the respondent had offered possession to the appellant in June, 2009 or intimation of receipt of occupancy certificate. Prima facie the said directions to deposit a FDR in the name of respondent is not in consonance with Clause 10.3 of the agreement i.e., procedure for taking possession which mandates the respondents to take the steps to inform the petitioner about

the receipt of the occupancy certificate and give the possession. Neither the respondent took such steps not the appellant was given possession at the relevant time. Thus, the question of seeking deposit in the interim stage of the said amount relating to maintenance charges in the form of FDR towards June 2009 payment does not arise. It is altogether different matter that on 12 January 2011, the petitioner was alerted about the receipt of the occupancy charges and for the same the petitioner is agreeable to deposit the amount as dealt with under the head of the maintenance charges below. The dispute in this regard is, subjudice before the arbitrator therefore in my view the said direction is liable to be recalled with the liberty to the parties to raise their respective claims which would be decided by the learned Arbitrator after recording of evidence. The impugned order is accordingly modified.

21. ***LAST INSTALLMENT***

There is no dispute in this regard on behalf of the appellant, who is ready to deposit with the respondent as indicated by him in his letter dated 18th May, 2011. Therefore, without any doubt before handing over the possession of the suit, the appellant is liable to deposit the said amount with the respondent."

28. The said order further records that as far as the holding charges are concerned, the counsel appearing for the respondent had agreed not to insist on the deposit of the same at that stage, whereas for maintenance charges, the Court accepted the submission of the petitioner that the petitioner should be permitted to deposit the same by way of an FDR before this Court. The Court, therefore passed the following direction:-

"24. At this interim stage, no final finding can be arrived at otherwise the right of either of the parties would be prejudiced. It is also not denied that the appellant had paid more than 90% payment on time. He was/is prepared to deposit the last

> *instalment as well. Thus, without deciding the rival contentions of the parties on merit, this Court is of the view that the appellant shall deposit the maintenance charges from 12th January, 2011 till actual handing over possession of the suit property, with the Registrar General of this Court, within one week by way of FDR in the name of Registrar General initially for a period of one year. The said amount would be disbursed immediately after passing the award in favour of either party as per the award. The appellant is also directed to deposit the last installment with the respondent within one week from today. The respondent shall hand over the possession to the appellant till 10th July, 2013 after the said deposit."*

29. Even thereafter possession could not be handed over to the petitioner and some further petitions were filed by the parties before this court, before the possession was eventually handed over to the petitioner in 2014 and the Sale Deeds were executed in December 2014 in favour of the petitioner.

30. A reading of the above two orders would also show that the petitioner was making an endeavor to obtain the possession of the office space in question and offered to make payment of the last installment. The petitioner also went to the extent of offering to secure the interest of the respondent by depositing the balance demanded amount in form of FDR which would be subject to the final Award being passed by the Arbitrator. This offer was also rejected by the respondent at every stage, including before this Court in the appeal filed by the petitioner. Eventually, as noted above, the Arbitrator found that the demands raised by the respondent were unjustified. The petitioner certainly cannot be penalized for protesting against an unjustified demand. The finding of the Arbitrator that the petitioner is also guilty in contributing to the delay in

handing over of the possession of the office space beyond the period of 12.01.2011, therefore, being contrary to the evidence on record, cannot be sustained.

31. The learned counsel for the petitioner relying upon Clause 11.4 of the Space Buyers Agreement has further challenged the quantification of damages at the rate of Rs. 25/- per sq. ft. per month by the Arbitrator. She submits that Clause 11.4 of the Space Buyers Agreement had no application to the facts of the present case inasmuch as the said Clause is applicable only where the respondent either abandoned the scheme or was unable to give possession within 36 months from the date of the execution of the Agreement or such extended period as permitted under the Agreement. In the present case, the respondent either abandoned the scheme or was unable to give possession to the petitioner but, instead, had failed to give possession till 12.01.2011 as it failed to communicate the demand to the petitioner, and thereafter, actually refused to give possession by raising unlawful demands against the petitioner.

32. On the other hand, the learned senior counsel for the respondent submits that the Arbitrator having interpreted the terms of the Agreement and having held that the damages have to be in accordance with Clause 11.4, it would not be open for this Court to interfere with such finding. He further submits that the petitioner having failed to duly prove the damages by leading any cogent evidence in that regard before the Arbitrator, in any case, could not have claimed damages for loss of rental, which would be in the nature of special damages and would require a notice to the respondent at the time of the entering into an Agreement

itself. He submits that therefore, the Arbitrator has rightly awarded damages at the rate of Rs. 25/- per sq. ft. per month to the petitioner.

33. I have considered the submissions made by the learned counsels for the parties. Clause 11.4 of the Agreement is reproduced hereinunder:-

> ***"11.4 Failure to deliver Possession: Remedy to the Intending Seller***
>
> *The Intending Allottee agrees that in consequence of the Intending Seller abandoning the Scheme or becoming unable to give possession within thirty six months from the date of execution of this Agreement or such extended periods as permitted under this Agreement, the Intending Seller shall be entitled to terminate this Agreement whereupon the Intending Seller's liability shall be limited to the refund of the amounts paid by the Intending Allottee with simple interest @ 9% per annum for the period such amounts were lying with the Intending Seller and to pay no other compensation whatsoever.*
>
> *However, Intending Seller may, at its sole option and discretion, decide not to terminate the Agreement in which event the Intending Seller agrees to pay only to the Intending Allottee xxxxxxx in this Agreement and not to anyone else and only in cases other than those provided in Clauses (11.1), (11.2), (11.3), and Clause (39) and subject to the Intending Allottee not being in default under any term of this Agreement, compensation @Rs.25/- per sq. ft. of the super area of the said Premises per month for the period of such delay beyond thirty six months or such extended periods as permitted under this Agreement. The adjustment of such compensation shall be done only at the time of conveyancing the said Premises to the intending allottee first named in this Agreement and not earlier."*

34. A reading of the above Clause would show that where the respondent is unable to give possession of the office space to the allottee within 36 months from the date of the execution of the Agreement or such other extended period, it may terminate the Agreement and refund the amounts paid by the allottee alongwith interest at the rate of 9% per annum but would not be liable to pay any other compensation. However, incase the respondent decides not to terminate the Agreement, it shall pay to the allottee a compensation at the rate of Rs. 25/- per sq. ft. per month for the period of delay beyond 36 months or such extended period as permitted under this Agreement. The Arbitrator has interpreted this Clause and has held as under:-

> *"113.As regards the quantum of compensation to the Claimant, the same would be what the parties contemplated at the time of the Agreement, and which is what is provided in clause (11.4). As per this clause (11.4) if the seller abandons the scheme or becomes unable to give possession within 36 months or within extended period, it shall be entitled to terminate the AGREEMENT, but at its sole option and discretion. If it does not decide to terminate the AGREEMENT in that event it shall pay to the allottee compensation @ Rs.25/- psf of super area per month for the period of delay. The contention of the Claimant that this clause does not get triggered and this limit of compensation cannot be applied in his case, is not tenable. Though Occupancy Certificate had been received by the Respondent in June 2009, it became unable to deliver possession to him because of non-communication in that respect and in a way it was inability on the part of the Respondent to deliver possession within prescribed time. The said clause, in my view, shall become applicable, being within the contemplation of the parties, and would entitle the Claimant the compensation at the rate mentioned therein i.e. Rs.25 psf per month from 10th June 2009 till 12/01/2011."*

35. The above being a matter of interpretation of the Agreement, which I do not find to be unreasonable or perverse, does not warrant any interference by this Court in exercise of its limited jurisdiction under Section 34 of the Act.

36. In ***Associate Builders v. DDA***, (2015) 3 SCC 49, the Supreme Court cautioned the Court exercising its power under Section 34 of the Act in the following words:-

> *"42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> *"28. Rules applicable to substance of dispute. (1)-(2)*
>
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."*

37. In ***National Highways Authority of India v. ITD Cementation India Ltd.*** (2015) 14 SCC 21, the Supreme Court reiterated the above principle in the following words:-

> *"25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to*

take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do."

38. I may only note that the Arbitrator has also held that the petitioner has failed to lead any evidence in support of its claim for damages inasmuch as the copies of the two Lease Deeds and the printouts from MagicBricks.com have not been proved in accordance with law. I again do not find the said finding of the learned Arbitrator to be warranting any interference by this Court in exercise of its limited jurisdiction under Section 34 of the Act.

39. The learned counsel for the petitioner has further challenged the direction of the Arbitrator to the petitioner to pay interest on the ground rent with effect from 12.02.2011, that is 30 days from 12.01.2011 till the date of payment. The learned counsel for the petitioner submits that the petitioner was always ready to pay the said ground rent, however, it was the respondent who refused to accept the same.

40. The Arbitrator on this claim has observed as under:-

"ii. Interest on Ground Rent and House Tax:

Terms of clause (2) of the AGREEMENT are to the effect that the allottee shall be liable to pay from the date of his application ground rent, house/property tax etc. or any other cess or fee as and when levied by local body or DDA or Municipal Corporation or such other concerned authorities.

And that as long as the said premises of the allottee is not separately assessed to such taxes etc. the same shall be paid by him in proportion to super area as determined by the seller. In view of this clause, there is force in the contention raised on behalf of the respondent that payment of such charges has nothing to do within Occupancy Certificate and offer or delivery of possession and as such there was no justification for the Claimant to have delayed the payment thereof. Under clause (35) of the AGREEMENT, there is entitlement of the Respondent to charge interest @15% p.a. for the first 90 days of delay and thereafter @ of 18% p.a. It has been disclosed that the Claimant, in pursuance to the order of Hon'ble High Court, made payment of principal amount of ground rent and house tax in October 2014, but without interest and it is also contended on behalf of the Respondent that if this Tribunal comes to the conclusion that the offer of possession/demand was communicated only on 12/01/2011 then interest on the same would be payable after 30 days at the agreed rates. It has been pointed out by the Ld. Counsel for the Claimant, and rightly so, that the Respondent has not stated or quantified the amount as regards interest on the House Tax. That being so, the Respondent in my view, would be entitled to interest on the Ground Rent paid, as noted above, but not on the House Tax. In view of the conclusion that the receipt of Occupancy Certificate and offer of possession was not communicated to the Claimant before 12th January 2011, it is hereby held that interest on ground rent shall be payable by the Claimant at such agreed rate(s) as per clause (35) from 12/02/2011 (i.e. after 30 days of 12/01/2011) till the date of payment made by the Claimant."

41. I have noted the correspondences exchanged between the parties as also the orders of the Arbitrator and of this Court hereinabove and do not find any justification for the Arbitrator to direct the petitioner to pay interest on the amount of ground rent from 12.02.2011 till date of

payment. The Arbitrator seems to have given this direction only on the basis that from 12.01.2011 the petitioner had refused to make the demanded payment to the respondent. This does not appear to be correct and therefore, the said direction cannot be sustained.

42. In view of the above, the Award insofar as it restricts the damages awarded in favour of the petitioner till 12.01.2011 and directs the petitioner to pay interest on the ground rent with effect from 12.02.2011 is set aside.

43. The respondent shall pay damages to the petitioner at the rate of Rs. 25/- per sq. ft. per month till the actual possession was handed over to the petitioner.

44. The petition is disposed of in the above terms, with no order as to cost.

NAVIN CHAWLA, J

MARCH 28, 2019/*rv*