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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 10th May, 2024

\+ O.M.P. (COMM) 98/2024 & I.As. 4011-4012/2024

PROTO DEVELOPERS AND TECHNOLOGIES LTD ..... Petitioner

Through: Mr. Pawan Prakash Pathak, Ms. Richa Sandliya & Mr. Sunit Ranjain, Advocates.

versus

M/S ANTRIKSH REALTECH PVT LTD & ANR..... Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

I.A. 4010/2024 (*for exemption*)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

O.M.P. (COMM) 98/2024

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails an arbitral award dated 01.07.2023, rendered by a learned Sole Arbitrator adjudicating disputes between the parties under a Collaboration Agreement dated 09.02.2010 ["Collaboration Agreement"].

2. The agreement concerns a project for the construction of a multi-

storied building in Ghaziabad. The land was owned by respondent No. 2 herein. Respondent No. 2 originally entered into a Development Agreement with the petitioner on 23.06.2006, in which the petitioner was entrusted with the task of developing the project. It is the case of the petitioner that it was unable to complete the project due to shortage of funds, as a result of which respondent No. 1 was inducted as the developer in terms of a tripartite agreement dated 09.02.2010, entitled "Collaboration Agreement". In the said agreement, respondent No. 2 is referred to as the "*Owner*", the petitioner as the "*Confirming Party*" and respondent No. 1 as the "*Developer*". The Collaboration Agreement provided for a share of 62.5% in the completed project in favour of respondent No. 1, and a combined share of 37.5% in favour of the petitioner and respondent No. 2.

3. Construction activity pursuant to the Collaboration Agreement commenced in April, 2011 but had to be stopped in June, 2012 due to the revocation of a No Objection Certificate ["NOC"] granted by the Ghaziabad Development Authority ["GDA"]. GDA ultimately cancelled the sanction plan in October, 2012, but restored it after the parties paid development charges and city development fees to the Uttar Pradesh Irrigation and Water Resources Department. Respondent No. 2 applied for additional FAR on 02.09.2015, which was granted, subject to payment of charges. The project was again sealed on 12.05.2017, and ultimately on 21.03.2018, due to non-payment of various charges, including compounding charges and penal interest.

4. Thus, the project could not be completed, for which the petitioner and respondent No. 2 blame respondent No. 1, whereas respondent No. 1

attributes responsibility to the petitioner and respondent No. 2. The matter went to arbitration under Clause 38 of the Collaboration Agreement, in which the petitioner raised several claims, amounting to ₹710 crores in total, and respondent No. 1 raised counterclaims of approximately ₹100 crores.

5. The claims of the petitioner were as follows:-

"S.No.	***Claim***	***Amount (in Rs.)***
1.	*Compensation/ damages towards deprivation of 37.5% of the Flats and the land area of the said complex, which was supposed to be used by the Claimant*	*200 Crores*
2.	*Reimbursement of Penalty imposed by GDA*	*50 Crores*
3.	*Amount collected and retained as booking amount from the public*	*260 Crores*
4.	*Additional cost of construction required to be borne by the Claimant for completion of the Project*	*100 Crores*
5.	*Interest on money retained as booking amount from the public*	*100 Crores*
Total		***710 Crores***
6.	*Interest @18% as pendente lite and future interest*	
7.	*Cost of Arbitration*	
8.	*Render account of the amount collected from the public as booking amount"*	

6. Respondent No. 1 raised the following counterclaims: -

"S.No.	***Counter Claim***	***Amount (in Rs.)***
1.	*Claim towards amount given to the Respondents, in terms of loan/financial assistance from time to time, along with interest @ 18% per annum*	*16,33,66,889/- + Interest @ 18% per annum 23,23,70,188/-* ——————— *39,57,37,077/-*
2.	*Claim towards losses suffered by the Counter- Claimant due to the damage of the raw materials (such as iron/steel, concrete, rodi, shuttering plywood, etc.) on the site because of the sealing of the*	*2,28,44,371/- + Interest @ 18% per annum 26,51,493/-* ——————— *2,54,96,224/-*

	Project (May 2017 to January 20 19)	
3.	*Claim towards losses suffered by Counter Claimant due to fixed expenses on the Project site such as plant rent, security services, diesel, etc. incurred during the sealing period (from May 2017 to January 2019)*	*56,54,497/- + Interest @18% per annum 9,98,522/-* *66,53,019/-*
4.	*Claim towards financial losses alongwith interest suffered on account of cases filed by the home buyers and order(s) passed against the Counter-Claimant, by multiple legal forums till date, on account of delay in the completion of project.*	*7,30,20,857/-*
5.	*Claim towards future losses which the Counter- Claimant may suffer in future due to the case already pending and/or cases which may get filed against the Counter-Claimant by other home buyers, claiming refund, compensation and/or penalty for delay in completion of the Project.*	*A. Liability of pending cases: 35,00,00,000/-* *B. Estimated liability of future litigation/ cases: 15,00,00,000/-* *50,00,00,000/-*
6.	*Cost of litigation*	*50,00,00,000/-*
Total		***100,59,07,177/-"***

7. The learned Arbitrator settled 15 points for determination, and heard the evidence of two witnesses on each side.

8. The learned Arbitrator, by the impugned award, has rejected the claims asserted by the petitioner and partly allowed two of the counterclaims asserted by respondent No. 1, for the sum of ₹12,01,01,524/-, inclusive of interest until the date of the award, alongwith future interest at the rate of 9% per annum.

9. I have heard Mr. Pawan Prakash Pathak, learned counsel for the petitioner.

10. The principal ground of dispute between the parties concerns the allocation of responsibility and expenses towards ensuring permission for the development work, NOCs, permits and licenses from the concerned

authorities, and approval of additional FAR/FSI. The learned Arbitrator, upon an analysis of the Collaboration Agreement, has come to the conclusion that this responsibility was that of the petitioner and respondent No. 2[1], whereas the responsibility for the costs of construction was placed upon respondent No. 1. The learned Arbitrator found that, after the date of execution of the Collaboration Agreement, responsibility for construction costs was to be borne by respondent No. 1, but Clause 31 provided an exception to the extent that allocation of financial liability with respect to applications for permissions, sanctions and NOCs, etc. was distributed between the parties in the same ratio as their shares in the multi-storied building, subject to a cap of ₹11 crores as the share of respondent No. 1. Any additional payment made by respondent No. 1 on this account was to be treated as having been made on behalf of the petitioner and respondent No. 2.[2] The learned Arbitrator has drawn a distinction between the government and statutory dues payable exclusively by the petitioner and respondent No. 2, to keep the sanctions, permits, NOCs, etc. alive and valid; as opposed to the joint liability provided in Clause 31 of the Collaboration Agreement.

11. In coming to this conclusion, the learned Arbitrator has placed reliance upon Clauses 1(d), 13, 15, 31 and 32 of the Collaboration Agreement, which read as follows:-

> *"**Clause 1(d)***
> *That the Owners and PDTLA on the one hand and Developer on the other hand shall share the entire constructed area (already*

[1] In paragraph 20 and 112 of the impugned Award, the learned Arbitrator has noticed that prior to the execution of the Collaboration Agreement, the internal arrangements between the petitioner and respondent No. 2 had been worked out so that their rights and obligations were common. This position is accepted by the petitioner.
[2] Paragraphs 113 to 118 of the impugned Award.

sanctioned and or to be sanctioned in future) as also unconstructed area/ common area/ common amenities etc. in the ratio of 37.5% to the Owner and 62.5% to the Developer, hereinafter called the Allocable Shares. It is clearly agreed that the share of the Owner/Confirming Party includes 129 flats to be given to the existing members of the Society at the cost of Rs. 1100/- per sq. ft. each comprising of_1163 sq. ft. each on cost to cost basis finished in every respect, which shall be out of the Owners Allocable Share of 37.5%.

xxxx xxxx xxxx

Clause 15

That the Developer shall be entitled to the refund of all fees, security deposits and other charges of whatsoever nature deposited by the Developer with various statutory authorities for seeking various approvals etc. for the said Complex/Township. *The Owner & PDTLA undertake that within 7 days of the receipt of any such refund referred to herein above, it shall pass on the same to the Developer, failing which it shall pay 18% p.a. on the aforesaid amount from the date of receipt of amount till it is actually paid.*

xxxx xxxx xxxx

Clause 27

If at any stage it is revealed that due to fault of Owner & PDTLA any part of the Agreement entered into between the parties is not enforceable for any reason(s) whatsoever, then the Developer shall be entitled to an amount equivalent to losses/ costs/ expenses as the compensation *(Limited to 18% per annum interest on investment), which the Owner/ PDTLA shall pay at the first instance.*

xxxx xxxx xxxx

Clause 31

It is agreed between the parties that ***all expenses incurred or to be incurred except additional purchasable FAR/FSI, and required to be paid to Government authorities/statutory authorities etc. shall be shared between the parties in the respective ratios of their shares, subject however, to the condition that the maximum amount to be incurred by the Developer on this account shall not exceed more than Rs. 11 Crores in total.*** *Any amount spent for additional purchasable FAR/FSI shall be to the account of Owner/PDTLA alone and not to the account of Developer and that amount shall not be taken into consideration as the Owners share, for the dues payable to the Government/statutory authorities. Out of the aforesaid amount of Rs. 11 Crores being envisaged as a maximum limit to be incurred by the Developer on this account, a sum of Rs. 5 Crores (Rs. 3.84 Crores being paid to GDA for release*

of sanction plans and Rs. 1.16 Crores being paid to the Owner) is being paid/ incurred by the Developer at the time of execution of this Agreement. Any further demand by the authorities hereinafter on this account shall be shared between the parties in the respective ratios of their share, from time to time, subject however to the condition of the limit imposed on the Developers share. Any increase in fee/charges on pre existing sanction shall be shared in the ratio of respective parties.

Clause 32
The Developer shall pay a sum of Rs. 28 Lakhs to the Owner/Confirming Party towards the cost of construction material already procured-by the Confirming Party and lying at the site. However, the payment against the said material shall be made against the receipt of the Bills for the material."[3]

12. The learned Arbitrator has also noted that Clause 14 of the Collaboration Agreement provides for parties to bear tax and statutory liabilities corresponding to their respective shares in the built-up area or sales proceeds, supporting the distinction between payment of government/statutory dues and development costs.

13. It may be noticed at this stage that the learned Arbitrator's interpretation of the Collaboration Agreement is entitled to considerable deference. In the absence of a finding of perversity, irrationality or arbitrariness, it is binding upon the parties, and interference is not warranted.[4] Having regard to the clauses of the Collaboration Agreement noticed by the learned Arbitrator, I am unable to discern any such deficiency in the present case.

14. The learned Arbitrator's analysis of the essential terms of the Collaboration Agreement is, however, assailed by Mr. Pathak, with

[3] Emphasis supplied.
[4] This principle has been reiterated by the Supreme Court in a very recent decision in *National Highways Authority of India v. M/s Hindustan Construction Company Ltd.* [Civil Appeal Nos. 4702-4709/2023], decided on 07.05.2024.

reference to Clauses 1(d), 4, 9, 12 and 16 of the Collaboration Agreement. These clauses are set out below:

> *"**Clause 1(d)***
> *That the Owners and PDTLA on the one hand and Developer on the other hand shall share the entire constructed area (already sanctioned and or to be sanctioned in future) as also unconstructed area/ common area/ common amenities etc. in the ratio of 37.5% to the Owner and 62.5% to the Developer, hereinafter called the Allocable Shares. It is clearly agreed that the share of the Owner/Confirming Party includes 129 flats to be given to the existing members of the Society at the cost of Rs. 1100/- per sq. ft. each comprising of_1163 sq. ft. each on cost to cost basis finished in every respect, which shall be out of the Owners Allocable Share of 37.5%.*
>
> *xxxx xxxx xxxx*
>
> ***Clause 4***
> *For the purposes of raising the construction over the land being the subject matter of this Agreement, the Owner & PDTLA has delivered the peaceful possession of the land standing in the name of Owner and in respect whereof, the plans have already been sanctioned and which forms part of the present Development Agreement as mentioned in the recital hereinabove being 44219.65678 sq. meters (61500 sq. yards). The Owner & PDTLA assures and hereby covenant with the Developer that Owner & PDTLA shall not either itself or through its any servant/ members/ agent/ employee/ assignee/ representative disturb and obstruct in any manner whatsoever, the possession given to the Developer for the purpose of construction. However, the Owner & PDTLA may appoint site Supervisor to inspect the various works being carried out by the Developer for the Owner's portion/ allocation, to which the Developer shall have no objection.*
>
> *xxxx xxxx xxxx*
>
> ***Clause 9***
> *That the Developer undertake to start the construction work immediately upon approval of building plans as aforestated and shall endeavour to complete the construction of the Complex/ Township within 36 months from the date of receipt of all sanctions and approval of plans and that the time schedule of said 36 months is an essence of the contract except when non-completion of Complex/ Township is as a result of earthquake, lightening or an order or notification of the Government or the act of State or the act of Owner & PDTLA, which prevents the progress of the construction*

or by reason of war or enemy action or act of God for any reason beyond the control of the Developer and in any of the aforesaid events, the Developer shall be entitled to a reasonable extension of time for completing the said Complex/ Township.

xxxx xxxx xxxx

Clause 12

That the Owner & PDTLA shall irrevocably constitute, by a separate General Power of Attorney in favour of the Developer by appointing its nominee for submitting application to the various authorities, requisitions, permissions, approvals, sanction and all other matters required statutorily to be done and performed in connection with the development, construction and completion of the Complex/ Township and for the purposes of booking, allotting and entering into agreements for the sale of area falling to the share of the Developers' allocation as may be required by Developer. The Developer undertakes to keep the Owner harmless and indemnified against all claims and demands resulting from any act, which may be contrary to terms of the Agreement. Owner & PDTLA shall also render all necessary assistance/ help to the Developer for completing the project in all respect without any demur/ obstruction in any manner whatsoever.

xxxx xxxx xxxx

Clause 16

That the further obligations and liabilities undertaken by the Developer are the follows:-

i) To carry out and complete the work of constructing the Complex/ Township in a proper and workmanship like manner and in accordance with all building rules and bye-laws and other regulations and statutory provisions and order, notifications, etc.

ii) To adhere to and to carry out the work of completing the project and constructing the said Complex/ Township strictly in accordance with the aforesaid building plans.

iii) To indemnify and keep the Owner & PDTLA fully and effectively indemnified against all claims, demands, actions, suits and/ or proceedings that may be made or taken against the Owner & PDTLA as a result or consequence of any default on the part of the Developer of any its obligations aforesaid and against all loss and damage that may be incurred by the Owner & PDTLA because of acts of Developer.

iv) To proceed with the work at a steady and even pace so as to complete the work within time schedule referred to herein

above.

v) To obtain necessary insurance under the Workman's Compensation Act and be responsible and liable to meet all claims, demands, actions, suits and/ or proceedings that may be taken by any person, body or authority (statutory or otherwise) in respect of the said project and to keep the Owner & PDTLA fully and effectively indemnified against the same in all respects, the intention being that the Owner being the owner of the said land are not responsible or liable to any person, body or authority in any way in respect of the said project for the duration of the work being in progress. The responsibility of the Owner &PDTLA being confined to payment of the outgoings, including proportionate share of the rates, cesses and taxes for the period commencing from the date of execution of this Indenture of Development Collaboration.

vi) To use good quality materials in the carrying out of the construction work and in the construction and competition of the said Complex/ Township.

vii) In case the share of Society and confirming party as stated in the agreement is not delivered in time i.e. 36 months (in 3 equal instalments of 1/3 No. of flats or 37.5% builtup space), the Developer shall be liable to pay the costs of making such flats at market price or interest thereupon @ 18% per annum on delayed period shall and also vacate the site forthwith. A grace period of 6 months will be allowed to the developer."

15. I am of the view that Mr. Pathak's reliance on these provisions does not serve to dislodge the construction placed on the Collaboration Agreement by the learned Arbitrator. Clause 1(d) has been considered by the learned Arbitrator, and only provides for the ratio in which the project is to be divided between the parties. Clause 4 is a covenant on the part of the owners with regard to handing over possession to respondent No. 1 and permitting respondent No. 1 to remain in peaceful possession. Mr. Pathak emphasized that Clause 9 of the Collaboration Agreement laid down a strict time schedule of 36 months, which was stated to be the essence of the Agreement. However, even the said clause carries an

exception *inter alia* when the progress of construction is inhibited by any act of the petitioner or respondent No. 2. As discussed more fully below, this is the essence of the findings recorded in the present case. Clause 12 provides for a power of attorney to be executed in favour of respondent No. 1 for the purposes of obtaining permissions, approvals, sanctions, etc. for development, construction and completion. Clause 16 similarly relates to the obligations of respondent No. 1, but I do not find anything to suggest that respondent No. 1 was responsible for incurring costs towards the development permissions, which ultimately led to the sealing of the project. In my view, the learned Arbitrator has rightly read these clauses in conjunction with other specific clauses of the Collaboration Agreement.

16. It is on the basis of this interpretation that the learned Arbitrator has ultimately disposed of the claims and counterclaims. The learned Arbitrator's analysis on each of the claims is dealt with below:

a. The petitioner's first claim of ₹200 crores arises out of deprivation of 37.5% of the project, which it would have been entitled to under the Collaboration Agreement. In this regard, the learned Arbitrator has noticed that the project remained incomplete because of the sealing of the project site time and again, which was attributable to the petitioner and respondent No. 2, and that respondent No. 1 was not to be blamed.[5] In coming to this conclusion, the learned Arbitrator has relied both upon documentary and oral evidence to examine the reasons for sealing of the project, and found that the statutory demands levied by authorities, including as a pre-

condition for sanction of additional FAR/FSI, were not deposited by the petitioner and respondent No. 2. In fact, the learned Arbitrator has found that respondent No. 1 had made payments which ought to have been made by respondent No. 2, to save the project. The learned Arbitrator has thus rejected the contention of the petitioner that respondent No. 1 was in breach of the Collaboration Agreement, and that the petitioner was therefore entitled to compensation for deprivation of the share of 37.5% allocated to it and respondent No. 2 in the completed project.

b. Claim No. 2 was for reimbursement of the penalty of ₹50 crores imposed by GDA. The learned Arbitrator has found no evidence in support of this claim in the communication relied upon by the petitioner,[6] or any evidence that the claim had, in fact, been paid. Mr. Pathak has not referred to any evidence to dislodge this finding.

c. The petitioner's third claim of ₹260 crores was for the amount allegedly collected by Respondent No. 1 as booking amount from the public. In this regard, the learned Arbitrator found that the petitioner had no right to any amount recovered by respondent No. 1 towards its share of 62.5% in the project, and that there was no evidence to support a finding that the amount had been received on account of the share of the petitioner/respondent No. 2.

d. Claim No. 4 was on account of recovery of the amount of ₹100 crores towards the additional cost of construction for completion of

[5] Paragraphs 135 to 147 of the Award.
[6] Letter dated 23.09.2015, referred to in paragraph 156 of the Award.

the project. The learned Arbitrator has found against the petitioner, both on the question of liability of respondent No. 1 and on the question of evidence, that such a claim was not payable.

e. The only other substantive claim asserted by the petitioner was for rendering of accounts by respondent No. 1. The learned Arbitrator has noticed that this is a vague and unexplained claim, but has analysed the contractual clauses to find that respondent No. 1 was not liable to render accounts to the petitioner on any ground, including for amounts collected for bookings and for construction costs, as identified in the statement of claim. As far as construction costs are concerned, the payments were, in any event, to be made by respondent No. 1. The claim for rendering accounts on account of the booking amount is already covered by the learned Arbitrator's analysis on claim No. 3.

17. The learned Arbitrator's analysis of the two counterclaims of respondent No.1, which were partly allowed, are dealt with below:

a. Counterclaim No. 1 of ₹39,57,37,077/- was made on the grounds of loan/financial assistance given by respondent No. 1 to the other parties. This claim has been partially allowed, to the extent of ₹11,35,23,288/-, inclusive of simple interest at the rate of 9% per annum until the date of the award. The learned Arbitrator has found that respondent No. 1 was required to deposit various amounts towards dues of GDA and government/ statutory dues, which were contractually the liability of the petitioner and respondent No. 2. Of the amount claimed, the learned Arbitrator found that a payment of ₹9 crores was asserted in the counterclaim, and not specifically

denied by the petitioner. It was also supported by the evidence of the witnesses led by respondent No. 1, who were not cross-examined upon this point. The learned Arbitrator has found against respondent No. 1 on the balance of the claim, and therefore awarded the sum of ₹9 crores, alongwith interest thereupon, which has also been reduced from the claimed rate of 18% per annum to 9% per annum.

b. In counterclaim No. 3, respondent No. 1 sought recovery of ₹66,53,019/- towards fixed expenses at the project site from May, 2017 to January, 2019. The learned Arbitrator has found that respondent No. 1 was entitled to this claim for the period the site was sealed and construction could not be carried out, based upon Clause 27 of the Collaboration Agreement, which provided for respondent No. 1 to be indemnified for losses, costs and expenses during the period the contract could not be enforced. The claim on this account was supported by invoices, bills for hiring of man-power, shuttering, scaffolding, generator, security, and payment of diesel and professional services. The learned Arbitrator noticed that the petitioner had only pleaded a vague and general denial and, therefore, accepted the claim, albeit for a reduced period of May, 2017 to October, 2017 and from 21.03.2018 to 10.01.2019. The claim has therefore been allowed to the extent of ₹65,78,236/-**,** inclusive of interest until 30.06.2023

c. All other counterclaims have been rejected.

18. On the aforesaid analysis, the learned Arbitrator has rejected all the claims made by the petitioner and allowed two counterclaims of

Respondent No.1. I find that this position really flows from an interpretation of the contractual clauses, which have been discussed above. The evidence has been analysed by the learned Arbitrator in light of that interpretation, and the conclusions arrived at are, in my view, plausible and justifiable. Mr. Pathak has not taken me to any evidence that, according to him, has been missed, or to any finding that is entirely unsupported by evidence, so as to justify setting aside of an arbitral award.

19. For the aforesaid reasons, I am of the view the petitioner has failed to make out a case for interference with the impugned award within the limited parameters available under Section 34 of the Act. The petition, alongwith any pending applications is, therefore, dismissed.

PRATEEK JALAN, J

MAY 10, 2024
'pv'/ SM/