

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

% **Reserved on: 13.12.2021**

Pronounced on: 24.12.2021

+ **ARB.P. 637/2021**

M/S TARUN AGGARWAL PROJECTS LLP
& ANR.

.... Petitioners

Through: Mr. Kanhaiya Singhal,
Mr. Rishabh Jain, Mr. Udit
Bakshi, Mr. Prasanna, Mr. Chetan
Bhardwaj & Ms. Heena Tangri,
Advocates

Versus

M/S EMAAR MGF LAND LTD.

.....Respondent

Through: Mr. Dhanesh Relan, Mr. Arindam
Dey & Ms. Saubhagya Sundriyal,
Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Petitioner No.1- M/s Tarun Aggarwal Projects LLP and petitioner No.2- M/s Prajakta Colonilers Pvt. Ltd. entered into a Collaboration Agreement dated 07.05.2009 in the capacity of 'owner' of land admeasuring approx. 6.06875 acres, situated in revenue estates of Village- Nangli and Badshahpur, Tehsil & District Gurgaon, Haryana with respondent being the 'developer' for development of a residential

colony in Sector-62 and 65, Gurugram. According to petitioner, under the aforesaid Collaboration Agreement, for amalgamation of the aforesaid land a part of which was in joint ownership with the respondent and which is located adjacent to the colony being developed by the respondent, the respondent had agreed to apply for additional license of the land. As per the Collaboration Agreement in question, respondent was required to complete necessary development works on the licensed land of petitioners within 36 months from the date of obtaining possession of the licensed land, which was to be handed over by the petitioners after all necessary approvals, sanctions and licenses were obtained and facilitated by the respondent. Further as per the Collaboration Agreement, the cost for development of the work was to be borne by the respondent, whereas costs of obtaining sanction/approval and license were to be borne by the petitioners.

2. According to petitioners, in terms of the Collaboration Agreement, after completion of the development work, petitioners were to be allotted 2662 sq. yds., per acre of the developed plots in the land of petitioners or anywhere else in the residential colony being developed by the respondent by executing proper conveyance of title in favour of the

prospective buyers or in favour of each other or their nominee in respect of their respective share.

3. It is averred in the petition that in terms of aforesaid Collaboration Agreement, respondent did not take any step to obtain license on the land owned by the petitioner and in a deceitful manner, obtained an *ex-parte* order of partition in respect of a part of land which was subject matter of Collaboration Agreement and some other parcels of land which were jointly owned by petitioners and respondent. Further averred that respondent had applied for license to develop a town over the land which had fallen to its share and also for the lands which were jointly owned with petitioners and therefore, petitioners filed four appeals before the Collector, Gurgaon and as well as wrote to Director General, Town & Country Planning, Haryana objecting to issuance of license to respondent. However, respondent thereafter induced petitioners to enter into an Addendum dated 19.04.2011 to the Collaboration Agreement and offered to irrevocably allot 05 plots of total area measuring 2160 sq.yd. approximately as non-refundable security/consideration for due performance of all of their obligations. Thereby, in terms of Addendum Agreement dated 19.04.2011 the petitioners and respondent amicably

settled all their disputes with the understanding that the land in question was still capable of being licensed into a residential plotted colony, after being released from acquisition proceedings in terms of policy decisions of State Government. Thereby, in terms of Addendum dated 19.04.2011 parties agreed to apply for license within 15 days thereof and further agreed that the respondent shall carry the development work for providing for all kinds of amenities, facilities, utilities, basic infrastructure facilities including lighting, potable water, landscaping, sewerage, etc. at the cost & expenses of petitioners @ Rs.40 lac per acre and also agreed that the respondent shall irrevocably allot 5 plots measuring total area of 2160 sq. yds. to the satisfaction of petitioners, as a non-refundable security/consideration for due performance of obligations of developer under the agreement. Thereafter within 10 days, petitioner had to withdraw the pending litigations against the respondent. In addition, it is also claimed that under the Addendum Agreement dated 19.04.2011, petitioners were also entitled to allotment of 2662 sq. yds. of plotted area per acre of the licensed land after deduction of EWS Category of area from the developed land.

4. At the hearing learned counsel for petitioners submitted that the

Addendum Agreement dated 19.04.2011 shall supersede the previous Collaboration Agreement dated 07.05.2009, as detailed in Para-18 thereof. Learned counsel further submitted that the respondent issued allotment letters dated 19.04.2011 in respect of five plots stating that the Buyer's Agreement shall be executed later and based on this assurance, petitioners withdrew all the pending litigations, however, respondent failed to do so.

5. It was next contended by learned counsel for petitioners that petitioners complied all the obligations under the Addendum Agreement dated 19.04.2011 i.e. applied for additional license and deposited Rs.24,25,100/- as license fee and Rs.2,53,000/- as scrutiny fee, however, respondent completely failed to fulfill its obligations. Learned counsel submitted that the Director, Town & Country Planning, Haryana vide letter dated 17.07.2012 and 29.03.2013 informed the respondent that an amount of Rs.3627.83 lac was outstanding towards license already granted, however, respondent did not pay the said amount, which resulted into non-grant of additional license in terms of Addendum Agreement. Thereafter, petitioner vide its letter dated 26.04.2013 requested the respondent to make the aforesaid payment and showed

their readiness and willingness to perform their remaining part of obligations as detailed in addendum agreement, which was not replied to by the respondent. Thereby, petitioners' application dated 27.04.2011 for grant of additional license was rejected as withdrawn vide order dated 04.06.2014 issued by Director, Town & Country Planning, Haryana. Even the security amount of Rs.2,50,514/- paid by the petitioners towards scrutiny fee stood forfeited. Thereafter, petitioners claim to have sent a letter dated 30.04.2015 terminating the Addendum Agreement, which was not accepted by the respondent. Learned counsel further submitted that in complete violation of the Clause-17 of the original collaboration agreement dated 07.05.2009 and Clause-19 of the Addendum Agreement dated 19.04.2011, respondent transferred a part of land owned by petitioners to a third party i.e. M/s MGF Developments Ltd., as per the scheme of arrangement between the respondent and M/s MGF Developments Ltd. (in Company Petition No. 689/2016). Further, petitioners vide letter dated 17.05.2017 called upon the respondent to executed a cancellation deed but to no avail.

6. Learned counsel for petitioners empathically submitted that respondent was under the obligation to fulfill the terms and conditions of

the Addendum Agreement dated 19.04.2011 and on its failure to do so, petitioners have suffered huge loss, as had the petitioners received the license, they would have got 14550 sq. yd. developed area in the year 2014 i.e. after 03 years of the execution of the Addendum Agreement at the rate of Rs.37,400/- per sq.yd and if the said area would have been sold in the year 2014, petitioners would have approximately received amount of Rs.53,83,50,000/- and would have earned more than Rs.50 crores of interest. However, in the notice of demand dated 27.06.2019, petitioners have restricted their claim to Rs.10 crore only. Since the disputes between the parties were arbitrable, petitioners issued a legal notice dated 20.11.2019 raising demand for physical possession of 05 plots measuring 2160 sq. yds. and further, reimburse a sum of Rs.10 crores for the losses/damages suffered by petitioners. Petitioners also appointed Mr. Justice (Retd.) Kailash Gambhir as Arbitrator in the present case. In response to the aforesaid demand letter, respondent vide its letter dated 24.12.2019 denied appointment of Arbitrator by the petitioners.

7. Learned counsel for petitioners submitted that petitioners have already proposed the name of Arbitrator, however, in term of Clause-37

of the Addendum Agreement dated 19.04.2011, two more Arbitrators are required to be appointed for adjudication of disputes between the parties, and therefore, the present petition has been filed under the provisions of Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 seeking appoint of Arbitrators by this Court. Reliance was placed upon decisions in *M/S Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited* 2020 (2) SCC 455 and *Vidya Drolia & Ors. Vs. Durga Trading Corporation* (2021) 2 SCC 1.

8. To the contrary, learned counsel appearing for respondent has opposed the present petition submitting that the claims raised by the petitioner are highly belated and barred by limitation, as it has been filed after a gap of more than eight years and it being in the nature of specific performance of the Agreement, is neither enforceable nor maintainable. Learned counsel submitted that on one hand petitioners have averred that the Collaboration Agreement dated 07.05.2009 and the Addendum Agreement dated 19.04.2011 stood terminated and on the other, they are seeking specific performance of the aforesaid Agreements. Learned counsel next submitted that there was failure on the part of petitioners to abide by the terms of the Addendum Agreement dated 19.04.2011 which

resulted into failure of contract agreement. Further submitted that the case of petitioners falls under Clause-36 of the Addendum Agreement and not under Clause-37, which incorporates Arbitration Clause. Learned counsel vehemently submitted that the claims raised by the petitioners in the present petition are disputed and that the claims of losses/ damages are untenable, baseless and unwarranted, however, an alternative prayer has been made to appoint Mr. Justice (Retd.) Manmohan Singh as the second Arbitrator to adjudicate the disputes between the parties.

9. Lastly, learned counsel for respondent submitted that in the demerger of the respondent-Company, development rights over part of the land (3.40 acres) subject matter of Collaboration Agreement dated 07.05.2009 now vests with M/s MGF Developments Ltd. and therefore, it is a necessary party to the present proceedings. In support of above submissions, learned counsel for respondent has relied upon decisions in *Oriental Insurance Company Limited Vs. Narbheram Power and Steel Private Limited* (20018) 6 SCC 534; *United India Insurance Company Limited & Anr. Vs. Hyundai Engineering and Construction Company Limited & Ors.* (2018) 17 SCC 607; *Vidya Drolia & Ors. Vs. Durga Trading Corporation* (2021) 2 SCC 1 and *DLF Home Developers Ltd.*

Vs. Rajapura Homes Pvt. Ltd. & Anr. 2021 SCC OnLine SC 781.

10. In rejoinder, the stand of petitioners is that it is the case of continuing cause of action as respondent has not admitted the termination of the Collaboration Agreement and it is still persisting. It was contended that respondent itself cannot take two stands by stating that the claims are belated and also that false disputes have been raised. Learned counsel also submitted that at the time of execution of Addendum Agreement dated 19.04.2011, petitioner M/s MGF Development Ltd. was not a party and therefore, is not required to be impleaded in this case. Learned counsel next urged that the claim of petitioner is not for specific performance of the Collaboration Agreement but for declaration to the effect that the Collaboration Agreement stood terminated and petitioners are entitled to damages and possession of the allotted plots as a consequential relief and thereby, the plea of respondent that case of petitioner falls under Clause-36 of the Addendum Agreement and not under Clause-37, which incorporates Arbitration Clause, cannot be accepted.

11. Leaned counsel appearing from both the sides were heard at length and record of this case has been perused.

12. The prayer made in the present petition is for appointment of an Arbitrator under the provisions of Sections 11(5) and (6) of the Arbitration and Conciliation Act, 1996. Pertinently, two Judge Bench of the Hon'ble Supreme Court in *DLF Home Developers Limited Vs. Rajapura Homes Private Limited and Another* 2021 SCC OnLine SC 781 has observed that the jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a *prima facie* arbitrable case. Further, expanding the scope of judicial inquiry, the Hon'ble Supreme Court has held as under:-

“17. There is no gainsaying that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, by which Section 11 (6-A) was introduced, the earlier position of law as to the scope of interference by this Court at the stage of referral has been substantially restricted. It is also no more res integra that despite the subsequent omission of Section 11(6-A) by the Arbitration and Conciliation (Amendment) Act, 2019, the legislative intent behind thereto continues to be a guiding force for the Courts while examining an application under Section 11 of the Act.

18. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of

disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-judge bench in Vidya Drolia (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct 'prima facie review' at the stage of reference to weed out any frivolous or vexatious claims.....

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20. To say it differently, this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.”

13. In the light of afore-noted guidelines of the Hon'ble Supreme Court, this Court has gone through the Addendum Agreement dated 19.04.2011 as well as other material placed on record to find out whether
ARB.P. 637/2021

this a fit case for grant of relief or not.

14. The first and foremost objection raised by respondent is that the present petition is barred by limitation having been filed after a long delay of 08 years and therefore, deserves rejection. Further, respondent has emphasized that the present case has to be considered within the parameters of Clause-36 and so, petitioners shall take recourse to provisions of Specific Relief Act if at all they have to seek enforcement of contractual obligations and thereby, the case of petitioners does not fall under Clause-37 and so, disputes are not arbitrable.

15. What is required to be adjudicated first is as to whether the claims raised by the petitioner are time barred or not?

16. It is the claim of petitioners that in terms of Addendum Agreement dated 19.04.2011, respondent had issued allotment letters in respect of 05 plots assuring that the Buyer's Agreement shall follow and based on these assurances, petitioners claim to have withdrawn all the pending litigations against the respondent. Petitioners further claim to have applied for the additional license by paying fee of Rs.24,25,100/- in respect of their land in the year 2011, however, Town and Country Planning, Haryana vide letter dated 29.03.2013 called upon the

respondent to make the balance payment, which respondent failed to do. Thereafter, on 04.06.2014 petitioner's application dated 27.04.2011 was rejected by the Town and Country Planning, Haryana and the security amount of Rs.2,50,514/- was forfeited. On 30.04.2015, the Addendum Agreement dated 19.04.2011 was terminated and vide letter dated 30.04.2015, respondent was duly informed about termination thereof and was also called upon to execute a Cancellation Deed, which was not replied by the respondent. On 27.06.2019, the petitioners claim to have sent a demand notice dated 27.06.2019 to respondent, however, it was not replied to. Again, a legal notice dated 20.11.2019 was sent to respondent to handover the physical possession of 05 plots in terms of Addendum Agreement dated 19.04.2011 which further contemplated that in the event of failure of respondent to comply the said legal notice within 30 days, dispute resolution process shall be contemplated. The petitioners also proposed name of Mr. Justice (Retd.) Kailash Gambhir as Arbitrator to settle the disputes in terms of Clause-37 of the Addendum Agreement dated 19.04.2011.

17. Further, it is the stand of petitioners that after respondent failed to comply with the terms of Collaboration Agreement dated 07.05.2009,

that the parties had entered into the Addendum Agreement dated 19.04.2011 settling all the disputes. Meaning thereby, the terms stipulated in Collaboration Agreement dated 07.05.2009 stood superceded by the Addendum Agreement dated 19.04.2011, which is subject matter of dispute in the present petition. The aforesaid Addendum Agreement dated 19.04.2011 notes the disputes resolution clause as under:-

“Dispute Resolution & Jurisdiction

36. In case of any conflict or difference arising between the parties or in case the either party refused or neglects to perform its part of the obligations under this Addendum Collaboration Agreement, inter-alia as mentioned in Clauses 3, 6 & 9 hereinabove, then the other party shall have every right to get this agreement specifically enforced through the appropriate court of law.

37. Save & except clause 36 hereinabove mentioned, all or any dispute arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity thereof, and the respective rights and obligations of the parties, shall be settled through under the provisions of Arbitration & Conciliation Act, 1996 wherein both the

parties shall be entitled to appoint one Arbitrator each and the Arbitrators so appoint shall appoint a third Arbitrator or rank of Retired Judge of any High Court. The arbitration proceedings shall be governed by the provisions of Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being in force. The arbitration proceedings shall be held at Delhi. ”

18. Relevantly, Clause-36 of the Addendum Agreement dated 19.04.2011 clearly stipulates that in the event of any dispute with regard to Clauses 3, 6 and 9, other party shall have a right to get the agreement specifically enforced through appropriate court of law. These Clauses read as under:-

“3. That simultaneously with the execution of this Addendum to Collaboration Agreement dated 07.05.2009, the DEVELOPER shall irrevocably allot 5 plots (i.e. of total area measuring of 2160 sq. yards approx.) to the OWNER, to the satisfaction of the OWNER as a non-refundable security/consideration for due performance of all its obligations contained herein or imposed by DCTP/other Competent Authorities in development of Township upon the “said land”.

6. That the Plot Buyers Agreements for the 2160 sq. yards of the plots to which the owner have become irrevocably and absolutely entitled to by virtue of this

agreement and in the manner as more specifically mentioned in Clause 3 above, shall be executed between the parties in the standard format of the Developer within a period of 15 days from the date of the receipt of the licence for the said land and the possession thereof shall be handed over by the Developer to the Owner within a period of 18 months from the date of grant of licence with a grace period of 6 months. Save and as otherwise provided in clauses 33 & 34 of this Addendum Agreement, no further consideration shall be required to be paid by the Owner to the developer for the transfer of the said 2160 sq. yards of the plots. Subject to due performance of its obligations as contained in this agreement, the Developer shall be left with no right, title or interest of whatsoever kind or nature on 2160 sq. yards of the plots and their ownership shall vest with the owner absolutely and forever. In case of any substantial defect in the title of the owner w.r.t. 2160 sq. yards of the plots then the Developer shall immediately allot and the owner shall become entitled to alternative similarly situated plots of same sizes, free from any defect to the owner or its successors-in-interests incur.

9. The OWNER have agreed that simultaneous to the execution of this Addendum to Collaboration Agreement dated 07.05.2009, the DEVELOPER shall allot/transfer title of 5 plots measuring 2160 sq. yards approx. in favour of the OWNER or its nominees, to the satisfaction of the OWNER, the OWNER shall within a period of 10 days from the date of the execution of this Addendum Collaboration Agreement withdraw, at the litigation of the land as detailed in Schedule-II to this agreement, relating to the land owned and possessed by the DEVELOPER for which either license had been granted by DTCP or in process to grant of license. The Parties agree that on the

withdrawal of litigation by the OWNER and subject to the terms of clauses 33 & 34 below, the above said allotment of plots measuring 2160 sq. yards shall become absolute right and interest in the above said plots measuring 2160 sq. yards. Further, subject to OWNER getting allotment of 5 plots total measuring 2160 sq. yards app, as mentioned above OWNER have specifically agreed not to litigate again on the same issue, raised in the pending litigations before the various Forum/Authority/Court even when the land is not licenced by the competent authority. The consideration of this agreement is also resolving of pending litigation amicably between the parties, amicably on their own free will voluntarily, without undue influence, fraud, coercion and misrepresentation.”

19. In the considered opinion of this Court, conjoint reading of Clauses-36 & 37 makes it clear that a party does have a right to seek enforcement of agreement before the Court of law but it does not bar settlement of disputes through Arbitration and Conciliation Act, 1996. Moreover, Clause-37 also suggests how arbitration proceedings shall be conducted and in the light thereof. Petitioners have already proposed name of **Mr. Justice (Retd.) Kailash Gambhir** and respondent in its reply has proposed name of **Mr. Justice (Retd.) Manmohan Singh** as the second Arbitrator. Even otherwise, once respondent has proposed the name of second Arbitrator, it cannot be permitted to take objection of

delay and latches as well as application of Clause-36 to the Addendum Agreement dated 19.04.2011 to the present case.

20. In the aforesaid view of the matter, this Court finds that the disputes *inter se* parties are arbitrable and can be adjudicated by the arbitral tribunal. Accordingly, as proposed by both the sides, Mr. Justice (Retd.) Kailash Gambhir and Mr. Justice (Retd.) Manmohan Singh are appointed as the first and second Arbitrators in this case, who shall appoint the third Arbitrator in terms of Clause-37.

21. Whether or not M/s MGF Developments Ltd. is a necessary party to the present proceedings, learned counsel for petitioners has relied upon Hon'ble Supreme Court's decision in *Vidya Drolia (Supra)* to submit that the scope of judicial review and jurisdiction of the Court under Sections 8 & 11 of the Arbitration Act is identical but extremely limited and restricted and it is only the arbitral tribunal, who is the preferred first authority to determine and decide all questions of non-arbitrability.

22. In the backdrop of the claim that a part of petitioner's land has been transferred by the respondent to a third party i.e. M/s MGF Developments Ltd. (in Company Petition No. 689/2016), this question is left open to be agitated, considered and decided by the arbitral tribunal.

23. With aforesaid observations, the present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

DECEMBER 24, 2021

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