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

**Judgment reserved on: 03.04.2024**

**Judgment pronounced on: 01.07.2024**

+ **CS(OS) 416/2023**

DEEPA CHAWLA

..... Plaintiff

Through: Mr. Arun Vohra, Adv.  
Versus

RAHEJA DEVELOPERS LTD

..... Defendant

Through: Mr. Gaurav Mitra, Ms. Manmeet  
Kaur, Ms. Suditi Batra, Mr. Chandan  
Malav and Mr. Ishan Roy Choudhary,  
Adv.

**CORAM:**

**HON'BLE MR. JUSTICE JASMEET SINGH**

**J U D G M E N T**

: **JASMEET SINGH, J**

**I.A. 24812/2023**

1. This is an application under section 8 of the Arbitration and Conciliation Act, 1996 filed by the defendant seeking reference of parties in the captioned suit to arbitration in terms of Clause 14.2 of the Flat Buyer's Agreement dated 03.12.2015.

2. The facts in brief giving rise to filing of the present suit are as follows:

a. The plaintiff agreed to purchase Flat bearing H-122, admeasuring 4804.20 sq.ft. super area on 12<sup>th</sup> floor and a court/terrace



area admeasuring 970 sq.ft in H-Tower/Block, Sector 109, Gurgaon under the name and style of ‘Atharva’ for a sum of Rs. 2,00,00,000/- vide a Flat Buyer’s Agreement-Atharva dated 03.12.2015 (“*Flat Buyer’s Agreement*”).

b. The defendant company along with the abovesaid Flat Buyer’s Agreement also entered into Agreement dated 03.12.2015 (“*Second Agreement*”) wherein the defendant agreed to complete the re-fabrication and finishing of the flat in question, handover vacant, peaceful and physical possession of the flat and get the Sale/Conveyance Deed registered in favour of the plaintiff on or before 02.12.2016. It was agreed that if the defendant failed to do the needful and complete the transaction on or before the said date, the Defendant shall refund the entire amount of Rs. 2,00,00,000/- without any delay. The Plaintiff paid the entire agreed consideration amount for the execution and signing of the Agreement. The defendant for the same purpose vide communication dated 03.12.2015 handed over a post-dated payment cheque bearing no. 075108 dated 02.12.2016 for an amount of Rs. 2,00,00,000/-.

c. The defendant failed to complete the re-fabrication, finishing of the flat and failed to handover the possession within the agreed stipulated period. The defendant vide communication dated 01.12.2016 sought an extension of 12 months for delivering the possession of the suit property. The plaintiff granted the extension for 12 months, i.e. upto 02.12.2017, vide communication dated 02.12.2016. The defendant vide communication dated 03.12.2016 acknowledged the grant of extension and issued a post-dated cheque for the amount of Rs.



2,00,00,000/- bearing no. 739301 dated 03.12.2017 in lieu of the earlier cheque.

d. The defendant again failed to complete the refurbishing, finishing of flat and the handing over of the flat within the extended time of 02.12.2017. The defendant vide communication dated 01.12.2017 sought another extension of 12 months while offering to pay an assured return @24% per annum payable monthly on the total sale consideration amount till the delivery of the physical possession. However, the plaintiff granted an extension of only six months, i.e. till 03.06.2018 on the abovesaid condition vide communication dated 02.12.2017. The same was acknowledged by the defendant vide communication dated 02.12.2017 and a post-dated cheque bearing no. 725391 dated 03.06.2018 was issued in lieu of the earlier post-dated cheque.

e. Another extension of six months was sought by the defendant vide communication dated 31.05.2018 on account of failure to complete the requisite refurbishment and handing over, on the same condition of assured return @ 24%. The same was granted by the plaintiff vide communication dated 02.06.2018. Hence, another post-dated cheque bearing number 947964 dated 03.12.2018 for Rs. 2,00,00,000/- was issued by the defendant in lieu of the earlier post-dated cheque.

f. Thereafter, the defendant failed to perform its obligations and sought another extension of six months with the commitment to pay assured return @24% per annum on total sale consideration amount, which was accepted by the plaintiff and another post-dated cheque



bearing no. 932282 dated 30.06.2019 for the amount of Rs. 2,00,00,000/- was issued by the defendant in favour of the plaintiff.

g. The defendant issued and re-issued various cheques towards assured return from time to time. However, the defendant requested the plaintiff not to present these cheques for encashment. The details of the 16 cheques issued in continuation with extension of time are as under:-

<i>S. No.</i>	<i>Cheque No.</i>	<i>Date</i>	<i>Amount (Rs.)</i>
1	932289	30.06.2019	3,60,000/=
2	932290	30.06.2019	3,60,000/=
3	932291	30.06.2019	3,60,000/=
4	932292	30.06.2019	3,60,000/=
5	932293	30.06.2019	3,60,000/=
6	932294	30.06.2019	3,60,000/=
7	932471	22.07.2019	3,60,000/=
8	932472	22.07.2019	3,60,000/=
9	932473	22.07.2019	3,60,000/=
10	932474	22.07.2019	3,60,000/=
11	932475	22.07.2019	3,60,000/=
12	932476	22.07.2019	3,60,000/=
13	932477	22.07.2019	3,60,000/=
14	932478	22.07.2019	3,60,000/=
15	932479	22.07.2019	3,60,000/=
16	932480	22.07.2019	3,60,000/=

h. The above detailed cheques were deposited by the plaintiff with her bankers and the same were returned unpaid on account of “Payment Stopped by Drawer.” The plaintiff is pursuing complaint cases against the defendant under section 138 of the Negotiable Instrument Act, 1881



before the Saket Courts in this regard.

i. In March of 2019, the husband of the plaintiff was approached by the authorised representative of the defendant for selling the flat in question by mode of e-bidding and assured the plaintiff that in the said process the Plaintiff would certainly be able to get price over and above the purchase price of Rs.2,00,00,000/-, as the said amount would be the minimum bid reserve price. The same was agreed to by the plaintiff.

j. In furtherance thereof, the plaintiff was telephonically informed that her flat has been sold for the net reserve price of Rs. 2,00,00,000/- in April 2019, however no written communication was provided to the plaintiff in this regard.

k. Thereafter, the defendant transferred an amount of Rs. 28,00,000/- into the account of the plaintiff in two tranches dated 20.07.2019 and 08.08.2019 by NEFT/RTGS. However, the defendant failed to remit the balance consideration of Rs. 1,72,00,000/- received as the sale proceeds of the flat.

l. It is stated that defendants have duped many buyers/investors and various FIRs have been registered against the defendants in this regard.

m. The defendant on 27.05.2021 claimed that the flat in question was sold to the third party for an amount of Rs. 1.5 crores and it is the buyer who has denied to make balance payment.

3. Hence, the plaintiff filed the present suit of recovery of an amount of Rs. 4,55,45,182/- stating that the plaintiff never agreed to the selling of her flat for an amount of Rs. 1.5 crores. Even otherwise, the flat in question was sold in 2019 and till date, the plaintiff has not received any details of the sale



or the balance consideration of Rs. 1,72,00,000/- alongwith interest @24% per annum from July 2019 till date. The plaintiff also seeks recovery of Rs. 57,60,000/- on account of assured return agreed to be paid by the defendant and interest thereupon.

4. The plaintiff filed an application for pre-institution mediation, however the matter could not be resolved and closure report dated 24.03.2023 is on record.

5. After service of summons, the defendant filed the present application under section 8 of the Arbitration and Conciliation Act, 1996 stating that captioned suit for recovery of dues is not maintainable as there is a specific arbitration agreement between the plaintiff and the defendant for adjudication of disputes arising from the Flat Buyer's Agreement dated 03.12.2015. It is stated that the subject matter of this suit falls within the scope of the Flat Buyer's Agreement dated 03.12.2015.

6. The same is controverted by Mr. Vohra, learned counsel for the plaintiff, who states that the relief sought by the plaintiff in the present suit is not premised on the Flat Buyer's Agreement but on the Second Agreement whereby the defendant had confirmed the receipt of the complete consideration amount and assured that the flat in question will be refabricated, furnished and handed over on or before 02.12.2016.

7. The operative portions of the Flat Buyer's Agreement reads as under:

***"14.2 Arbitration***

*All or any disputes arising out or touching upon or relating to the terms of this Agreement to Sell Application/Conveyance Deed including the interpretation, and validity of the terms thereof and their respective rights and obligations of the parties, which cannot be amicably settled, shall be settled through arbitration. The*



*arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments / modifications thereof for the time being in force. The arbitration proceedings shall be held at the Office of the Seller in New Delhi by a sole arbitrator who shall be appointed by the Managing Director of the Seller. The Purchaser hereby confirms that he/ she shall bave no objection in this appointment. In case of any proceeding, reference etc, touching upon the arbitration/subject including any award, the territorial jurisdiction of the courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh.”*

8. Some of the relevant clauses of the Second Agreement read as under:

*“6. In furtherance of its undertaking, THE DEVELOPER has given post-dated cheque no. 075108, dated 02.12.2016 drawn on Punjab National Bank for Re 2,00,00,000% (Rupees Two Crore only) towards refund of entire Sales Consideration which the Buyer is entitled to encash without any notice to THE DEVELOPER. Upon encashment of all the aforesaid post-dated cheques, this Agreement and the Flat Buyer's Agreements shall stand terminated, cancelled, revoked and ineffective with no binding obligation on either party and the Said Property shall revert to THE DEVELOPER along with all original documents.*

*7. In case it is clear to THE DEVELOPER that it is not in a position to hand over the vacant peaceful physical possession or get the Sale Deed registered for the Said Property by the Due Date, THE DEVELOPER shall be at liberty to repay the said entire Sales Consideration of Rs. 2,00,00,000/- (Rupees Two: Crore only) immediately on the Due Date and in such case shall not be liable to pay any amount after such refund and this Agreement and the Flat Buyer's Agreements shall stand terminated, cancelled, revoked, and be ineffective with no binding obligation on either party and the Said Property shall revert to THE DEVELOPER. If THE DEVELOPER is in default or in breach-of its obligations to repay/ refund the said entire Sales Consideration on*



*Due Date and/or any other cheques issued, that may have become due, the Buyer shall without prejudice to any other rights in this behalf be free to enter into and take possession of the Said Property on or after due date and shall be free to deal with the Said Property as absolute owner under the said Flat Buyer's Agreement without any restraint of transfer or sale etc from THE DEVELOPER in this regard and THE DEVELOPER shall stand discharged from its obligation to repay the said entire Sales Consideration to the Buyer;*

*9. This Agreement shall be read together with the said Flat Buyer's Agreement, and, to the extent any provision or term of this Agreement is in conflict with the provisions of the Flat Buyer's Agreement, the provisions of this Agreement shall prevail and supersede the Flat Buyer's Agreement. As an instance (without elaborating), especially the possession of the Scheduled Property, registration thereto and/ or transfer of Scheduled Property is to be made by THE DEVELOPER in 12 months as mentioned herein before. The Buyer shall not be liable for any taxes; charges, cess, or for that matter any amount of whatsoever nature before the due date of handing over the possession/ transferring the property to the buyer and/ or buyer having taken possession of the Said Scheduled Property. Declarations from the side of the Buyer as made in the said Flat Buyer's Agreement shall have no relevance in presence of the fact that the Buyer in the preset case has solely relied upon the declarations/ commitments of THE DEVELOPER with respect to their title/ ownership and other rights over the property and permissions/ clearances/ licenses etc; having been properly obtained by them and they have power to enter into this Agreement. This Agreement shall have an overall overriding effect over the Flat Buyer's Agreement including the settlement of any dispute.*

*..*

*16. The time shall be the essence of this Agreement.*

*17. The court of Delhi/ New Delhi shall have jurisdiction on subject matter of agreement.”*

9. Admittedly, the Second Agreement does not have an arbitration





clause.

10. It is stated by Mr. Mitra, learned counsel for the defendant/applicant that the two agreement are inextricably connected and dependent on each other. It is stated that the Second Agreement shall have an overriding effect on the Principal Agreement only in case where the terms of both agreements are in conflict with each other. In the present case, since the arbitration clause contained in the Principal Agreement remains the sole arbitration clause and therefore there is no dispute to the fact that the parties have to be referred to arbitration. Reliance is placed on the judgment of the Hon'ble Supreme Court in *Olympus Superstructures Pvt. Ltd. vs Meena Vijay Khetan & Ors.*, (1999) 5 SCC 651. The operative portion reads as under:-

*“28. Thus it will be noticed that there are several items in Schedule E of the main agreement which overlap the items in Schedule A of the Interior Design Agreement. In view of the overlapping, in our opinion it has to be said that several items in Schedule A of the Interior Design Agreement are in modification/substitution of the items in the main agreement. Therefore the coverage of the two agreements makes it clear that the execution of the Interior Design Agreement is “connected with” the execution of the main agreement. It may also be noted that the date of the main agreement and the Interior Design Agreement is the same in each of the three cases and clause 3 of the Interior Design Agreement states specifically that “the work of the said renovation, designing and installation shall commence from the execution thereof” which means that the execution of the Interior Design Agreement and the main agreement is to be simultaneous.*

...

*30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to “other matters” “connected” with the subject-matter of the main*



*agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, — (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) — it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with*



*arbitration clauses arose before this Court in Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co. [(1977) 4 SCC 367 : AIR 1977 SC 2122] There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the “sole repository” of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and “later purchases”, other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.*

11. Reliance is further placed on the judgement passed by the Hon’ble High Court of Delhi in *Amit Guglani & Anr. vs L&T Housing Finance Ltd. & Anr.*, 2023:DHC:5979

*“30. From a reading of the aforementioned judgments of the Supreme Court, it clearly emerges that where there are two agreements which are connected and interlinked and both contain Arbitration Clauses, which are not similar to one another, in order to determine the nature of the arbitral proceedings, the two documents have to be read in harmony or reconciled and parties should get the disputes resolved under the main or umbrella agreement. Applying these principles, this Court finds merit in the contention of the Petitioners that reference to arbitration has to be made by invoking the Arbitration Clause in the Tripartite*



*Agreement which reads as follows:-*

*“27. If any dispute, difference, claim or controversy (the “Dispute”) arises between the Parties about the validity, interpretation, implementation, or alleged breach of any provision of this Agreement, then the Parties shall negotiate in good faith to endeavor to resolve the matter. However, if the Dispute has not been resolved by the Parties within thirty (30) days after the date of receipt of written notice of the Dispute by either Party from the Party raising the Dispute, then Dispute shall be referred to a sole arbitrator appointed by the Lender. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 as updated. The venue of arbitration shall be at New Delhi. The award of arbitrator shall be final and binding on the Parties.”*

12. Reliance is also placed on the judgments of the Hon’ble Supreme Court in *Ameet Lalchand Shah & Ors vs Rishabh Enterprises & Anr.* (2018)15 SCC 678 and *Giriraj Garg v. Coal India Ltd.*, (2019) 5 SCC 192 by the defendant/applicant.

13. It is stated by the learned counsel for the defendant/applicant that the transaction between the parties was with regard to the purchase of flat for which the plaintiff made a payment of Rs. 2 crores. It is stated that the arbitration clause in the Flat Buyer’s Agreement is wide enough to cover all disputes and since the defendant has not been able to execute a conveyance deed or return the amount of Rs. 2 crores, the same falls within the ambit of clause 14.2 of the Flat Buyer’s Agreement and the parties must be referred to arbitration.

14. The same is refuted by the learned counsel for the plaintiff and it is stated that the Second Agreement in clause 9 specifically states that the Second Agreement shall be read together with the said Flat Buyer's



Agreement, and, if any provision or term of the Second Agreement is in conflict with the provisions of the Flat Buyer's Agreement, the provisions of the Second Agreement shall prevail and supersede the Flat Buyer's Agreement. The said Clause further envisaged that the Second Agreement shall have an overall overriding effect over the Flat Buyer's Agreement including the settlement of any dispute.

15. The plaintiff places reliance on the judgment of the Hon'ble Supreme Court in *NBCC (India) Limited vs Zillion Infraprojects Pvt. Ltd*, 2024 SCC OnLine SC 323 wherein it was held that the general reference of one contract in another contract would not automatically incorporate the arbitration clause in the subsequent contract without any specific reference to the arbitration clause. The operative portion reads as under:-

*“9. The issue is no more res integra. The provisions of subsection (5) of Section 7 of the Arbitration Act have been considered by this Court in the case of M.R. Engineers and Contractors Private Limited (supra). After considering the relevant passages from Russell on Arbitration and various English judgments, this Court held thus:*

*“24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:*

*(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:*

*(1) the contract should contain a clear reference to the documents containing arbitration clause,*

*(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,*

*(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the*



*contract and should not be repugnant to any term of the contract.*

*(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.*

*(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.*

*(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.*

*(v.) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where*



*the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”*

*10. It could thus be seen that this Court has held that when the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. It has been held that the arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause. It has further been held that where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.*

*11. This Court further held that where the contract provides that the standard form of terms and conditions of an independent trade or professional institution will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. It has been held that sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions. It has also been held that where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract, the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.*



12. A perusal of sub-section (5) of Section 7 of the Arbitration Act itself would reveal that it provides for a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties.

13. It is thus clear that a reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document into the contract.

14. The law laid down in the case of *M.R. Engineers and Contractors Private Limited (supra)* has been followed by this Court in the cases of *Duro Felguera, S.A. v. Gangavaram Port Limited and Elite Engineering and Construction (Hyderabad) Private Limited represented by its Managing Director v. Techtrans Construction India Private Limited represented by its Managing Director*.

....

22. As already discussed herein above, when there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not ipso facto be applicable to the second contract unless there is a specific mention/reference thereto.”

16. It is further submitted by the learned counsel for the plaintiff that the application has been filed to subvert the issue of filing of written statement by the defendant within the statutory period.

17. I have heard learned counsel for the parties.

18. The Flat Buyer's Agreement dated 03.12.2015 incorporates the terms and conditions with regard to the sale of the flat in question. The Second Agreement is regarding the obligations of the defendant to re-fabricate, furnish the flat in question and handover vacant and peaceful possession of the flat to the plaintiff on or before 02.12.2016. The Second Agreement also provides that in case the defendant is unable to handover the vacant and





peaceful physical possession of the flat or get the sale deed executed, the defendant shall repay the entire sale consideration amount of Rs. 2 crores. It is important to note here that these obligations are not contained in the Flat Buyer's Agreement.

19. The Flat Buyer's Agreement in clause 4.2 only states that the defendant/applicant will hand over the possession of the flat within 24 months from the date of Agreement to Sell, extendable by another period of 6 months. It is the Second Agreement which fixes a date of 02.12.2016 for handing over of vacant and peaceful possession of the flat in question.

20. Even though the Second Agreement contemplates that both the agreements are to be read together, I am of the view that it is the Second Agreement which contemplates the plaintiff to be entitled to refund of the amount of Rs. 2 crores, in case the flat is not ready to be delivered to the plaintiff on or before 02.12.2016. To my mind, the two agreements operate in their own distinct and separate fields and the Flat Buyer's Agreement cannot be interpreted to include the claims made by the plaintiff in the present suit.

21. In addition, Clause 9 of the Second Agreement clearly contemplates the Second Agreement to have overall overriding effect over the Flat Buyer's Agreement.

22. The judgment of the Hon'ble Supreme Court in *NBCC (supra)* and more particularly paragraph 10 makes it clear that the arbitration clause contained in the Flat Buyer's Agreement can be read into the Second Agreement only by a specific reference to the arbitration clause. In the present case, the recovery of the amounts due and payable to the plaintiff on account of failure to handover vacant and peaceful possession is only



stipulated in the Second Agreement and is therefore beyond the purview of clause 14.2 of the Flat Buyer's Agreement.

23. Further, the judgment of *NBCC (supra)* in para 12 clearly stipulates that under sub-section (5) of section 7 of the Arbitration and Conciliation Act, 1996 a conscious acceptance by way of a specific reference of the arbitration clause is required. In the present case, clause 9 of the Second Agreement categorically contains that this *agreement shall have an overall overriding effect over the Flat Buyer's Agreement, including the settlement of any dispute*, meaning thereby that there is a specific exclusion of the arbitration clause for settlement of any dispute. Both the parties have agreed to the said clause and therefore cannot at this stage seek a remedy that they have waived of by way of this express condition in the Second Agreement.

24. In addition, the judgments of *Olympus (supra)* and *Amit Guglani (supra)* relied upon by the defendant/applicant are not applicable in the present case since in those cases there existed arbitration clauses in the both the agreement between the parties, though the arbitration clauses were different from one another. The judgments are premised on harmonising of the two distinct arbitration clauses contained in the agreements between the parties. The same is not true in the present instance.

25. Further, the judgments of *Ameet Lalchand Shah & Ors vs Rishabh Enterprises & Anr. (supra)* and *Giriraj Garg v. Coal India Ltd., (supra)* relied upon the defendant/applicant are distinguishable since in none of those cases was there an existence of an overriding clause as is existing in the facts of the present case. The express exclusion of the arbitration clause is evident from the terms agreed to by the parties in the Second Agreement and therefore the parties cannot be referred to arbitration in these



circumstances.

26. For the said reasons, the application is devoid of merits and therefore dismissed.

**CS(OS) 416/2023**

27. The defendant shall file written statement within the statutory time period.

28. List before the Joint Registrar on 20.08.2024.

**JASMEET SINGH, J**

**JULY 1, 2024**

*[Click here to check corrigendum, if any](#)*