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

Reserved on:30.01.2023
Date of decision: 24.02.2023

\+ **ARB.P. 744/2018**
\+ **ARB.P. 957/2022 & I.A. 13207/2022**

TEJPAL SINGH ..... Petitioner
Through: Mr.Bhagat Singh, Adv.

versus

SURINDER KUMAR DEWAN ..... Respondent
Through: Mr.Anil K. Kher, Sr. Adv. with Mr.S.S. Pandit & Mr.Kunal Kher, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Collaboration Agreement dated 03.05.2005 executed between the parties (hereinafter referred to as the 'Collaboration Agreement').

2. The Collaboration Agreement admittedly contains an Arbitration Agreement between the parties in the form of Clause 14 thereof.

3. As both the petitions arise out of the same Collaboration Agreement and are between the same parties, the same are being considered by way of this common order.

4. As noted hereinabove, the parties have entered into a Collaboration Agreement where under the petitioner was to construct the ground floor, first floor, second floor with its roof rights after demolishing the structure present on the land bearing No.A-2/5 admeasuring 450 sq. yards, Model Town, New Delhi belonging to the

respondent. The petitioner claims that he performed his part under the Agreement by constructing the building on 31.12.2005. He, however, further admits that thereafter the property was sealed by the Municipal Corporation of Delhi on 30.05.2006 due to unauthorized construction carried out therein. It is further admitted that the respondent terminated the Collaboration Agreement vide notice dated 11.05.2007. The respondent also invoked the Arbitration Agreement claiming damages from the petitioner.

5. The petitioner further claims to have sent a legal notice dated 08.06.2007 claiming ownership rights over the entire second floor and the entire third floor of the building constructed by him along with the roof/terrace rights thereon.

6. A Sole Arbitrator was thereafter appointed by this Court on a petition filed under Section 11 of the Act by the respondent. The learned Sole Arbitrator vide her Award dated 29.12.2017, held as under:

> *"18. In view of the foregoing, following award is passed:-*
> *a) Claimant sought permission to apply to the MCD/ concerned authority for de-sealing the premises in question and for the purpose of bringing the structure within the norms of the permissible limits. Record reveals that claimant had moved an application under Section 17 of the Act seeking permission to peruse the matter for de-sealing of the premises with MCD and after the property is de-sealed, he be permitted to reside in the property without any obstruction and hindrance from the respondent. The application was partly allowed vide order dated 16.12.2010 and claimant was allowed to approach the competent authority for de-sealing the property.*
> *However, second relief regarding occupation of the property was not granted being premature. During the course of arguments, it*

> *was admitted by the claimant that so far permission for de-sealing the property has not been granted. Even counsel for respondent did not oppose grant of this relief. However, it was submitted that claimant and respondent should jointly apply for de-sealing of the property. In view of the past conduct of respondent in raising unauthorized construction resulting in its sealing since 2006 and depriving the claimant of its use who is the absolute owner of the property and is a senior citizen now aged about 80 years old, this submission cannot be acceded to. Claimant is permitted to apply to the MCD/concerned authorities for de-sealing of the property for the purpose of bringing the structure within the norms of permissible limits.*
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> *b) In view of my discussion as above on different claims, the claimant is awarded a total sum of Rs.1,39,00,000/- (Rupees One Crore Thirty Nine Lakh Only).*
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> *c) Respondent or any other person claiming through him is restrained from entering/trespassing into the premises in question.*
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> *d) He is awarded interest on the principal amount of Rs.1,14,00,000/- (Rupees One Crore Fourteen Lakh Only as per claim A and B) @12% per annum w.e.f May 2006 till the date of award. The respondent shall pay the awarded amount and interest thereon within three months of the award failing which the claimant shall be entitled to recover interest @ 12% per annum on the principal amount till realisation.*
>
> *e) Claimant shall be entitled to cost of arbitration proceedings."*
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> *(Emphasis supplied)*

7. Aggrieved by the above Arbitral Award, the petitioner challenged the same by way of a petition under Section 34 of the Act, being OMP(COMM) 178/2018. The said petition was partially allowed by this Court vide its judgement dated 09.08.2018, setting aside the Award insofar as it granted Claim (A). The Court also restricted the Award of Claim (B) to Rs.35,000/- per month for the

period from May, 2006 to 11.5.2007 along with the interest awarded by the Arbitrator.

8. During the pendency of the petition under Section 34 of the Act, the petitioner invoked the Arbitration Agreement as contained in the Collaboration Agreement vide notice dated 26.02.2018, calling upon the respondent to do the following:

> *"4. That, now, our client, in terms of the Collaboration Agreement and otherwise, call upon you to:*
>
> *a. approach the MCD/concerned authority for de-sealing and regularization, if required, of the property bearing No. A-2/5, Model Town, Delhi or furnish a Power of Attorney in favour of our client for the same purpose;*
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> *b. execute the sale deed in favour of our client for the entire second floor, third floor with its roof rights upto sky of the above-mentioned property in favour of our client upon de-sealing of the property;*
>
> *c. pay damages @ 2 1akhs from December 29, 2017 till the date of execution of the sale deed in favour of our client towards loss of profit/revenue to our client; or*
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> *d. in the alternative (viz. alternate to the claims made in point a, b and c- as above), pay the construction cost of Rs. 1,00,00,000/- and refund of Rs.22,00,000/- to our client along with interest @ 18% per annum from April 25, 2007;*
>
> *e. in either case, you are also liable to pay damages of Rs.1,00,00,000/- towards mental harassment and loss of goodwill of our client in the market due to your actions."*

9. The respondent, however, vide its reply dated 18.03.2018 opposed the appointment of an Arbitrator, whereafter, the petitioner

filed the first petition under Section 11(6) of the Act, being ARB.P.744/2018.

10. The petitioner also challenged the order dated 09.08.2018 passed by this Court in OMP(COMM) 178/2018 by way of an appeal under Section 37 of the Act, being FAO(OS)(COMM) 8/2019. The said appeal has now been dismissed by the Division Bench of this Court vide its judgment dated 13.12.2022.

11. In the meantime, the respondent demolished the building constructed by the petitioner on the abovementioned plot of land.

12. The petitioner claiming that such demolition gave a fresh cause of action to the petitioner, again invoked the Arbitration Agreement vide notice dated 20.02.2022, and thereafter filed the second petition under Section 11 of the Act, being ARB.P.957/2022.

13. It is the case of the petitioner that the existence and validity of the Arbitration Agreement is not disputed by the respondent. The same having been properly invoked by the petitioner, this Court must proceed to appoint an Arbitrator.

14. The learned counsel for the petitioner further submits that the superstructure having been raised by the petitioner in terms of the Collaboration Agreement, the petitioner was entitled to the second floor along with the terrace in the same. Referring to the judgments of this Court in ***Ms.Sarla Mehra v. Mr.Praleen Chopra & Ors*** 2009 SCC OnLine Del 1025, and the order dated 18.01.2018 passed by this Court in ***Kunwar S Vishal v. Kohli Realtors Pvt. Ltd & Ors.,*** CS(OS) 19/2010, he submits that the petitioner became the owner of the second floor and the roof, and the respondent having demolished the same, the petitioner is entitled to the claim of damages. He submits that such dispute falls within the ambit and scope of the Arbitration

Agreement thereby entitling the petitioner to the appointment of an Arbitrator.

15. The learned counsel for the petitioner has further submitted that in the previous round of arbitration that resulted in the judgment dated 13.12.2022 passed in FAO(OS)(COMM) 8/2019, referred to hereinabove, the question of petitioner's entitlement over the superstructure was not an issue. He submits that, in fact, a fresh cause of action has arisen in favour of the petitioner on the demolition of the superstructure by the respondent. Placing reliance on the judgement dated 05.04.2022 of this Court in ***M/s Orissa Concrete and Allied Industries Ltd. v. Union of India & Ors.,*** Neutral Citation No: 2022/DHC/001231, he submits that an arbitration proceeding on a fresh cause of action is maintainable.

16. On the other hand, the learned senior counsel for the respondent, placing reliance on the earlier Arbitral Award; the order of this Court in OMP(COMM) 178/2018; and the order of the Division Bench of this Court in FAO(OS)(COMM) 8/2019, submits that the present petitions are gross abuse of the process of the Court. He submits that the present petitions have been filed merely to harass the respondent, who is a senior citizen, and such a frivolous petition should be nipped in the bud.

17. I have considered the submissions made by the learned counsels for the parties.

18. As noted hereinabove, the claim of the petitioner arises out of the Collaboration Agreement. The same was terminated by the respondent vide notice dated 11.05.2007. Thereafter a Sole Arbitrator was appointed by this Court for adjudicating the disputes that had arisen between the parties in relation to the Collaboration Agreement.

In the said arbitration proceedings, only the respondent raised his claims. The petitioner did not file any counter claim in spite of an opportunity granted by the learned Sole Arbitrator. This is so recorded by the learned Sole Arbitrator in the Award dated 29.12.2017, as under:

> *"15.7 .....In any case, if the claimant refused to execute sale deed, remedy available to the respondent was to file suit for specific performance of the agreement which remedy was never availed by him.*
>
> *15.8 Besides the testimony of claimant, there is admission on the part of respondent that building plan was sanctioned for construction of property upto second floor and approx 2000 square feet on each floor was to be constructed. However, in utter violation of sanctioned plan third floor was also constructed and construction of approx 2750 sqaure feet on each floor was raised with the result a show casue notice was issued by the MCD raising objection to the unauthorized construction. Since the respondent failed to remedy the breaches, officials of MCD demolished the third floor of the property during the period 23rd to 28th April, 2006. However, respondent again started construction of third floor, therefore, MCD sealed the entire property on 30.05.2006. Thereafter one FIR was registered against the claimant being no. 609/2006 u/s 188, 466(1) of the Delhi Municipal Corporation Act and S.188 and 457 of IPC. The claimant applied for anticipatory bail, however, in view of the information placed on record by the officials of MCD that unauthorized construction was still being raised, the application was rejected. Another application was moved before High Court on 3rd November 2006 and ultimately on 07.11.2006 High Court granted bail. For the purpose of getting property de-sealed, representation was made before MCD and property was de-sealed vide letter dated 22.01.2007 for a period of 7 days in order to remove unauthorized construction and submit*

relevant documents for regularization of property. However, instead of removing unauthorized construction, respondent again started raising construction on third floor. Therefore, property was again resealed by MCD. Respondent did not stop his nefarious designs and according to claimant, respondent trespassed into the property and took construction work at the said property. Therefore claimant was constrained to write to MCD not to entertain any request from the respondent with regard to sanctioning of plan etc. and claimant also terminated collaboration agreement vide legal notice dated 11.05.2007. There is no substance in the submission of the learned counsel for the respondent that claimant could not have unilaterally cancel the collaboration agreement and it was undeterminable in nature. Since the respondent was not remedying the breach by removing the unauthorized construction but was also bent upon raising construction upto third floor, there was no option left with the claimant but to cancel the collaboration agreement. Even otherwise, even if according to the respondent the collaboration agreement could not be terminated, a wrongful termination of contract could have been challenged by an independent claim which steps have not been taken by the respondent.

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15.10 According to the respondent, he invested approximately Rs. 1 Crore on raising construction. Despite granting sufficient number of opportunities he could not prove the same. Moreover, although, in reply to the claim petition, he stated that he will be filing a counter claim, no such counter claim was filed by him.

15.11 As regards the plea that collaboration agreement was in fact an agreement to sell and only a formal sale deed remained to be executed, the same is devoid of any force. Collaboration agreement prescribed certain terms and condition and on fulfilment of the same, the sale deed was to be executed. However, respondent failed to comply with those terms and conditions. In any case, if

> *there was any breach of contract on the part of claimant, remedies were available to the respondent, which he has failed to take recourse."*
>
> *(Emphasis supplied)*

19. Though the petitioner challenged the said Award by filing a petition under Section 34 of the Act, even at that stage, no other challenge was laid to the Arbitral Award to claim that the termination of the Collaboration Agreement by the respondent was illegal or ineffective.

20. Even in the order dated 13.12.2022 dismissing the appeal of the appellant, the Division Bench of this Court has held that the petitioner was in breach of the Collaboration Agreement.

21. In view of the said findings, the petitioner cannot now be allowed to challenge the termination of the Collaboration Agreement. Such a challenge would be clearly barred by the law of limitation. The cause of action having arisen with the termination of the Collaboration Agreement by the respondent on 11.05.2007, while the arbitration agreement having been invoked for the first time by the petitioner on 26.02.2018, the claim of the petitioner would not only be barred by the law of limitation but would also be hit by the principles of *res-judicata.*

22. In ***M/s Orissa Concrete and Allied Industries Ltd.*** (supra), this Court held that the dispute that arises subsequent to the arbitration proceedings having been initiated, can be referred in a separate arbitration. The Court in that case *prima facie* found that the claim of the petitioner therein in the earlier arbitration was different and no cause of action had arisen to the petitioner at the stage of the earlier arbitration. The same cannot be said in the present case. As noted hereinabove, the cause of action, if any, of challenging the termination

of the Collaboration Agreement and/or claiming any relief thereunder was available to the petitioner at the stage of the earlier arbitration proceedings, and in any case, the cause of action, if any, arose in favour of the petitioner on 11.05.2007 when the Collaboration Agreement was terminated by the respondent. The invocation of the arbitration having been made on 26.02.2018 and 22.02.2022, the claim of the petitioner is *ex facie* barred by the law of limitation. It is also barred by the Principle of the *res-judicata*.

23. The submission of the learned counsel for the petitioner that the demolition of the structure would gave a fresh cause of action to the petitioner, is also ill-founded. Once the Collaboration Agreement had been terminated, the claim, if any, of the petitioner in the superstructure raised by the petitioner could only have been asserted by the petitioner before the earlier Arbitral Tribunal.

24. In ***Vidya Drolia & Ors. v. Durga Trading Corporation*** (2021) 2 SCC 1, the Supreme Court while laying down the restrictive scope and ambit of jurisdiction of the Court at the referral stage under Section 11 of the Act, has also held that the Court would have restricted and limited review to check and protect the parties from being forced to arbitrate when the matter is demonstrably deadwood. The Supreme Court observed as under:

> *"132. The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term "prima facie", in* ***Nirmala J. Jhala v. State of Gujarat*** *this Court had noted : (SCC p. 320, para 48)*

> *"48. '27. ... A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.'"*

133. Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary. [The European Convention on International Commercial Arbitration appears to recognise the prima facie test in Article VI(3):
"VI. (3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary."]

134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. <u>The prima facie review at</u>

the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd****., (2005) 7 SCC 234 are of importance and relevance. Similar views are expressed by this Court in* ***Vimal Kishor Shah v. Jayesh Dinesh Shah****, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303 wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.*

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139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie

case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable. [Ozlem Susler, "The English Approach to Competence-Competence" Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

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147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In ***Subrata Roy Sahara v. Union of India v. Union of India****, (2014) 8 SCC 470 : (2014) 4 SCC (Civ) 424 : (2014) 3 SCC (Cri) 712] , this Court has observed : (SCC p. 642, para 191)*

> *"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible*

> *and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"."*

25. In the present case, clearly the disputes sought to be referred to the Arbitral Tribunal by the petitioner is a "Deadwood". It is *ex facie* barred by the law of limitation and also *res-judicata*. In fact, in my opinion, these petitions are a gross abuse of the process of the Court. This is clearly evident from the following:

A. The learned Sole Arbitrator in her Arbitral Award dated 29.12.2017, observed as under:

> "*15.8 Besides the testimony of claimant, there is admission on the part of respondent that building plan was sanctioned for construction of property upto second floor and approx 2000 sqaure feet on each floor was to be constructed. However, in utter violation of sanctioned plan third floor was also constructed and construction of approx 2750 sqaure feet on each floor was raised with the result a show cause notice was issued by the MCD raising objection to the unauthorized*

construction. Since the respondent failed to remedy the breaches, officials of MCD demolished the third floor of the property during the period 23rd to 28th April,2006. However, respondent again started construction of third floor, therefore, MCD sealed the entire property on 30.05.2006. Thereafter one FIR was registered against the claimant being no. 609/2006 u/s 188, 466(1) of the Delhi Municipal Corporation Act and S.188 and 457 of IPC. The claimant applied for anticipatory bail, however, in view of the information placed on record by the officials of MCD that unauthorized construction was still being raised, the application was rejected. Another application was moved before High Court on 3rd November 2006 and ultimately on 07.11.2006 High Court granted bail. For the purpose of getting property de-sealed, representation was made before MCD and property was de-sealed vide letter dated 22.01.2007 for a period of 7 days in order to remove unauthorized construction and submit relevant documents for regularization of property. However, instead of removing unauthorized construction, respondent again started raising construction on third floor. Therefore, property was again resealed by MCD. Respondent did not stop his nefarious designs and according to claimant, respondent trespassed into the property and took construction work at the said property. Therefore claimant was constrained to write to MCD not to entertain any request from the respondent with regard to sanctioning of plan etc. and claimant also terminated collaboration agreement vide legal notice dated 11.05.2007, There is no substance in the submission of the learned counsel for the respondent that claimant could not have unilaterally cancel the collaboration agreement and it was undeterminable in nature. Since the respondent was not remedying the breach by removing the unauthorized construction but was also bent upon raising construction upto third floor, there was no option left with the claimant but to cancel the collaboration agreement. Even otherwise, even if according to the respondent

> *the collaboration agreement could not be terminated, a wrongful termination of contract could have been challenged by an independent claim which steps have not been taken by the respondent.*
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> *15.9 Much emphasis has been paid by the learned counsel for the respondent upon the contents of bail application filed by the claimant for submitting that the claimant himself admitted that construction was raised as per the sanctioned plan. Respondent does not get any benefit from this plea taken by the claimant in the face of voluminous evidence available on record that in violation of sanctioned plan, instead of 2000 square feet area, area of 2750 square feet was constructed. Third floor was also constructed with the result twice third floor was demolished and since unauthorized construction was not removed, property was sealed twice and now it is lying sealed. Not only that, FIR was also registered against the claimant. Over and above, there is admission in regard to all these facts by the respondent himself."*

B. In the order dated 09.08.2018 passed in OMP(COMM) 178/2018, this Court while rejecting the challenge of the petitioner to claim 'c', observed as under:

> *"25. I am unable to agree with the contention raised by the learned senior counsel for the petitioner. In the present case, the respondent, being the owner of the land, had entrusted the work of construction of a building on his land to the petitioner. The petitioner not only raised unauthorized construction but also made the respondent suffer the agony of facing criminal prosecution on FIR lodged against him. Inspite of the property being de-sealed for the purpose of demolishing the unauthorized construction, the petitioner, instead of rectifying the same, carried out fresh unauthorized construction thereby leading to the re-sealing of the property. Clearly the respondent has been able to make out a case for damages on account of mental agony and*

> *harassment suffered at the hands of the petitioner. In this view, the award of Rs.25 lakhs as damages, being a reasonable amount, cannot be faulted."*

C. Even the Hon'ble Division Bench of this Court in its order dated 13.12.2022 passed in FAO(OS)(COMM) 8/2019, has observed as under:

> *"25. As evident from the findings (supra) of the learned Arbitrator, it is not a case of breach of contract simpliciter. The respondent who was 72 yrs of age at the relevant time was not only deprived of his property but had to face the agony of sealing of his property by the MCD due to unauthorized and illegal construction raised by the appellant. The construction was once demolished by the MCD but the appellant instead of getting the unauthorized portion regularized started further unauthorized and illegal construction which led to the re-sealing of the building and registration of the FIR. Under the anticipation of impending arrest, the appellant had to move for his anticipatory bail which at the first instance was rejected by the Court of Sessions. It is only on the second bail petition being filed in this court that he was granted anticipatory bail.*
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> *26. Evidently, the respondent who is a senior citizen had to undergo harassment of facing a criminal case and the threat of arrest on account of illegal designs and acts of omission and commission on part of the appellant in raising construction in excess of the approved sanctioned plan and failure on his part to remedy the breach. Taking into all these factors, the learned arbitrator has awarded the damages for mental agony and harassment undergone by the respondent. The learned Single Judge has also affirmed the claim on the said count. We are in agreement with the findings of the learned arbitrator as well as the learned Single Judge. Clearly, the respondent had to face mental agony and harassment directly on account of the nefarious acts of the appellant. It could not have been reasonably foreseen by the*

> *respondent that due to the illegal and nefarious acts of the appellant, a criminal case would be registered against him. Possibly for this reason, a clause providing for damages for mental agony and harassment do not find place in the collaboration agreement. All that the respondent wished for, was a better roof over the head of his family. It was for this objective that the collaboration agreement was devised, but the appellant subjected the respondent to undue harassment on account of his illegal designs which led to the registration of the FIR, and the respondent had to run from pillar to post due to the direct acts of the appellant. Such circumstances do warrant awarding of damages on account of mental agony and harassment."*

D. During the pendency of the above appeal, a Division Bench of this Court passed the following order dated 15.03.2019:

> *"The appellant is present in Court along with his counsel.*
> *Mr. Kher, learned Senior Counsel appearing for the respondent submits that even post the award having been rendered, the appellant has not permitted the respondent to take possession of his property. He further submits that the respondent, who is over 82 years of age and he and his wife are senior citizens, are suffering from various ailments and are being harassed by the appellant. The appellant disputes the same.*
> *We have recorded the statement of the appellant in Court separately. The statement recorded in Court and the order passed today shall be brought to the notice of the SHO concerned, who shall provide protection to the respondent."*

E. The statement of the petitioner recorded by the Division Bench is as under:

> *"I am the appellant in this matter. The subject property bearing No.A-2/5, Model Town, Delhi, is lying sealed under the orders of the MCD. I or any of my servants, agents, employees or associates, are not in possession*

> *of the aforesaid property. I have no objection if the owner gets the property de-sealed.*
> *I undertake to the court that I or any of my servants, agents, employees or associates, will not obstruct the respondent in any manner in either entering the property or taking steps to get the property de-sealed or such other steps.*
> *I have been explained the consequences of breach of my undertaking given to the Court today."*

F. By an order dated 24.02.2020, the Division Bench of this Court, on a submission made by the petitioner that the petitioner is entitled to lay a claim on the second floor and terrace, directed the respondent to maintain *status quo* with respect to the existing construction in the suit premises. This order, however, was vacated by an order dated 29.09.2021. The petitioner thereafter filed an application seeking stay of the order dated 29.09.2021 before the Division Bench. On 25.10.2021, the Division Bench of this Court passed the following order:

> *"6. On merits, the submissions of the learned counsel of the appellant is that under the collaboration agreement with the Respondent land-holder, appellant builder was entitled to the second floor, third floor and all upper floors. The Respondent was only entitled to the ground and the first floor of the property as constructed by the Appellant. Learned counsel submits that the learned arbitrator permitted the Respondent to demolish only the third floor so as to bring the property in conformity with the by-laws. He submits that so far as the second floor is concerned, the same could not be demolished by the Respondent. He has also brought the attention of the Court to the order dated 21.06.2019 whereby the Respondent was permitted to demolish only such portions which are necessary to be demolished for getting the property de-sealed from the Municipal Corporation, subject to the condition of the appellant depositing, within ten days the entire awarded amount as*

modified by the impugned order passed by the learned Single Judge. The submission of Learned counsel of the appellant is that the appellant has deposited the said amount in this Court.

7. Learned counsel submits that if the Respondent is permitted to demolish the second floor, it will vitally affect the appellant's rights in the said property. He further submits that the second floor of the property deserves to be preserved during the pendency of the appeal.

8. On the other hand Mr. Anil Kher, learned senior counsel for the Respondent submits that on account of raising of the illegal construction by the appellant builder, the respondent had to face a lot of harassment. He had to obtain bail in the case registered against him. The Sessions Court rejected his bail application, and he was granted bail only by this Court. Consequently, the Respondent terminated the collaboration agreement. In the impugned award, the termination has been upheld by the learned Arbitrator and even the learned Single Judge has not reversed the same. Mr. Kher points out that the learned Single Judge modified the impugned award by reducing the damages awarded in favour of the Respondent, and a perusal of the prayer clause in the appeal would show that the appellant – whenever preferred the appeal in January 2019, was aggrieved only by that part of the impugned order passed by learned Single Judge, whereby the Respondent was granted an amount of Rs. 35,000 per month for a period May 2006 to May 2007, and Rs. 25 lakhs towards damages.

9. The prayer made in the appeal dated 09.01.2019 reads as follows.

> *" (a) Set aside the impugned order dt. 9/8/18 in OMP (COM) 178/18 in so far as it grants Respondent an amount of Rs. 35,000/- per month for the period from May, 2006 to May 11, 2007 and Rs. 25 Lakhs towards damages;*

> *(b) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts of the case."*

10. Mr. Kher submits that there can be no justification for the appellant to seek any right in the property in question or any interim orders in respect of the construction/ structure of the property in question.

11. Mr. Kher further submits that there was excess area coverage on each floor and, therefore, each floor had to be demolished. He submits that in fact all the floors have been demolished and the property as existing, is not habitable.

12. In response, learned counsel for the appellant submits that the appellant has moved an application, namely CM APPL. 6878/2020, for amendment of the prayer clause in the memorandum of appeal, so as to incorporate the prayer that the impugned award be set aside.

13. Mr. Kher, learned counsel for the Respondent points out that no notice has been issued on this application yet by the Court.

14. We have heard learned counsels and we do not find any merit in the present application. The appellant - when he preferred the present appeal in January 2019, was aggrieved only by the damages awarded against him. It is for this reason that the prayer was worded as stated herein above. The amendment in the prayer made was sought to be incorporated by the CM APPL. 6878/2020, was filed a year after filing of the appeal. This application has not been allowed. In our view, the moving of this application, it is neither here, nor there. Whether or not, the said amendment should be granted would be an aspect to be considered as and when this application is taken up for hearing along with the appeal itself. The application was moved after the filing of the appeal. It was, therefore, an afterthought, and no emergency is made out by the appellant to

> *pass any orders of injunction against the Respondent.*
>
> *15. It is clear to us that the appellant builder has taken the Respondent, who is an old person, for a ride and he had to face the harassment of facing criminal charges on account of the acts and omissions of the appellant in raising the illegal construction on the Respondent's property. On account of this conduct, he has been restrained from going near the property in question. We are therefore not inclined to recall the order dated 29.09.2019.*
>
> *16. Application is dismissed."*

26. Therefore, there have been consistent findings of not only of the learned Arbitral Tribunal, but also of this Court, that the respondent is being harassed by the petitioner and for such harassment, the respondent was even awarded damages for mental harassment. The present set of petitions is a continuation of such harassment and the Court cannot give its seal of approval to the same. The Court cannot be a mute spectator to such gross abuse of the process of the Court. In fact, such gross abuse of the process of the Court should be severely dealt with.

27. Accordingly, the present petitions are dismissed with costs quantified at Rs.1 lakh for each of the petitions, to be paid by the petitioner to the respondent within a period four weeks of this order.

NAVIN CHAWLA, J.

FEBRUARY 24, 2023/Arya