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(2008) 06 BOM CK 0087

In the Bombay High Court

Case No : Arbitration Appeal No. 18 of 2008

Cogent Ventures (India) Ltd. (Formerly known as Bhupendra capital and Finance Ltd.) — APPELLANT

Vs

Shree Ram Infrastructure Ltd. (Formerly known as Shree Ram Mills Limited) and Utility Premises Pvt. Ltd. — RESPONDENT

Date of Decision : 20-06-2008

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 11(6), 17, 34, 37, 37(2)

Citation : (2008) 5 ALLMR 157 : (2008) 4 ARBLR 61 : (2008) 5 BomCR 278 : (2008) 5 MhLj 559

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : Harish Malhotra, Akshay Patil, Vikram Trivedi, Sachin Chandarana, Anshu Bhanot, Mayur Bhojwani, Priyanka Vegad, instructed by Manilal Kher Ambalal and Co, for the Appellant; Aspi Chinoy, P.A. Savant and S. Garud, instructed by Khaitan and Jaykar for respondent No. 1, Rajani Iyer alongwith Leena Mirasee and Dolly Katkaria, instructed by Shah and Sanghvi, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Kanade, J.—The appellant M/s Cogent Ventures (India) Ltd, formerly known as M/s. Bhupendra Capital and Finance Ltd., is challenging the order dated 02/04/2008 passed by the Arbitral Tribunal u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act").

2. Brief facts in a nutshell are as under:

3. The respondent No. 1 is M/s Shree Ram Infrastructure Ltd. which was formerly known as M/s. Shree Ram Mills Ltd. A reference was made against it by the Board of Industrial and Financial Reconstruction (hereinafter referred to as "BIFR"). Though a proposal was made and sanctioned by the BIFR for rehabilitation scheme for revival of respondent No. 1, the respondent No. 1 was

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unable to implement the rehabilitation scheme and, therefore, BIFR came to the conclusion that there was no alternative but to wind up the respondent No. 1.

4. Against the said order passed by the BIFR, respondent No. 1 preferred an appeal before the appellate authority i.e. AAIFR which sanctioned the rehabilitation scheme under which it was provided that by virtue of sale of 1,20,000 sq.ft. FSI, the Company could be revived.

5. It is the case of the appellant that the respondent No. 1 approached the appellant through Respondent No. 2 to provide financial assistance for discharging its obligations and liabilities to the Banks and Financial Institutions and that the respondent No. 1 would provide 1,20,000 sq.ft. FSI to the appellant and respondent No. 2. Two agreements were executed between respondent No. 1 and respondent No. 2; one on 27/04/1994 over an area of 4848.1 sq.mtrs (approx.) for development of 1,20,000 sq.ft. FSI and, thereafter another agreement was executed between respondent No. 1 and respondent No. 2 dated 18/07/1994 for an additional area

6. The appellant and respondent Nos. 1 and 2 entered into tripartite agreement dated 09/11/1994 whereby the respondent No. 1 agreed to sell its shares under the agreement dated 27/04/1994 and 18/07/1994 for Rs 21.60 crores.

7. The appellant paid a complete sum of Rs 21.60 crores on behalf of respondent No. 1 to the Banks and Financial Institutions. These payments were routed through respondent No. 2 and the respondent No. 1 acknowledged the receipt of the said amount in the agreement dated 09/11/1994.

8. Thereafter, the parties entered into agreement dated 22/06/1996 and it is the case of the appellant and respondent No. 2 that they were persuaded to cancel the agreement dated 18/07/1994. It is the case of the appellant that this agreement dated 18/07/1994 was cancelled on representation that an alternative land would be identified in the mill compound and would be placed at the disposal of the appellant and respondent No. 2. by respondent No. 1 for complete development of 1,20,000 sq.ft. FSI. It is the case of the appellant that the balance land was not given by respondent No. 1 and the appellant, respondent No. 2 and respondent No. 1 entered into a settlement by MOU dated 19/01/2005.

9. It is an admitted position that, in the meantime, the appellant and respondent No. 2 developed the sanctioned FSI to the tune of 86,725 sq.ft. in collaboration with M/s Ansal Housing & Construction Ltd. It is the case of the appellant that in respect of the balance FSI, the appellant had retained the same with itself and agreed to develop the same with respondent No. 2 as per terms and conditions of the agreement dated 09/11/1994. In the meantime, by order dated 15/10/2004, AAIFR ordered de-registration of respondent No. 1 from its being sick industry. The appellant filed a review application bearing No. 41/2006 before the AAIFR on the ground that the said order was passed without hearing the appellant, which review was, however, dismissed.

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10. The appellant, therefore, preferred a Writ Petition in the Delhi High Court bearing No. 9672 of 2006.

11. In the meantime, respondent No. 2 filed a Petition u/s 9 of the said Act in the Bombay High Court vide Arbitration Petition (Lodging) No. 846 of 2001. This Petition was dismissed by the learned Single Judge of this Court by order dated 04/05/2001. Against this order, respondent No. 2 preferred an appeal before the Division Bench vide Appeal No. 647 of 2001. This appeal was also dismissed by the Division Bench by order dated 03/06/2002. On 11/08/2006, respondent No. 2 besides other claims, was also seeking from respondent No. 1 to identify alternate land so that complete 1,20,000 sq. ft. could be developed and since respondent No. 1 was not agreeing for arbitration, filed a Petition u/s 11(6) of the said Act which was allowed by the Bombay High Court. This order was challenged by respondent No. 1 by filing SLP before the Hon''ble Supreme Court. This SLP, however, was dismissed by the Hon''ble Supreme Court by its order dated 21/03/2007.

12. Pursuant to the orders passed in the said proceedings, the Arbitral Tribunal was constituted. Respondent No. 2 filed its statement of claim.

13. Thereafter, Division Bench of the Delhi High Court, after it was informed that dispute between respondent Nos. 1 and 2 had been referred to the Arbitral Tribunal, came to the conclusion that the dispute between the appellant and respondent No. 1 could also be adjudicated by the same Tribunal and, accordingly, on the request made by the appellant and respondent No. 1, the dispute was referred to the Arbitral Tribunal.

14. The appellant in September, 2007 filed a separate statement of claim before the Arbitral Tribunal. While referring the matter to the Arbitral Tribunal by order dated 27/08/2007, the Hon''ble Delhi High Court was pleased to grant interim protection to the Petitioner for a period of four weeks with liberty to move an appropriate application before the Arbitral Tribunal for further reliefs. Since the interest of the appellant and respondent No. 2 was common, the Tribunal by order dated 18/12/2007, directed that in the statement of claim filed by the appellant, the respondent No. 2 should also be impleaded. Thereafter, an application was filed by the appellant u/s 17 of the said Act, praying for an order restraining the respondent No. 1 from disposing off certain properties set out in the said application. On 02/04/2008, the Arbitral Tribunal dismissed the application of the appellant u/s 17 of the said Act.

15. Against this order, the appellant preferred an appeal before the Hon''ble High Court of Delhi u/s 37(2)(b) of the said Act. On 11/04/2008, the Hon''ble Delhi High Court observed that it did not have jurisdiction to try and adjudicate the appeal and directed the appellant to approach the Hon''ble Bombay High Court and, accordingly, the said appeal was withdrawn. The interim protection was continued for a period of additional two weeks after 23/04/2008. Being aggrieved by the said order passed by the Arbitral Tribunal dated 02/04/2008, the appellant

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has preferred this appeal u/s 37 of the said Act.

16. Mr. Malhotra, the learned Senior Counsel appearing on behalf of the appellant has submitted that the Arbitral Tribunal erred in not granting an order of injunction restraining the respondent No. 1 from developing the remaining land to the extent of 2500.72 sq. mtrs. He submitted that a reference has been made by the High Court u/s 11(6) in respect of the composite claim viz claim for development of the balance land and, in the alternative, prayer for recovery of money was made. He submitted therefore that by refusing to grant the relief prayed for by the appellant, the appellant was deprived of its claim at the very threshold. Thirdly, he submitted that prima faice case has been made out by the appellant and in support of the said submission, he relied on three agreements viz. agreement dated 27/04/1994, 18/07/1994 and 09/11/1994 and also the MOU executed on 19/01/2005 and particularly on Clauses (vii) of the agreement dated 27/4/1994 which reads as under:

(vii) The said sanctioned rehabilitations Scheme, inter alia, envisages SRM to sell/ develop a portion of its property at Worli, to the extent of approximately 1,20,000 square feet of FSI and deploy the sale proceeds thereof in the manner stipulated in the sanctioned scheme. By the Sanctioned Scheme BIFR has directed the Bombay Municipal Corporation to grant to SRM permission for redevelopment/sale of SRM''s property at Worli. The Sanctioned scheme of 31st October, 1991 was under implementation by SRM;

18. He also relied upon the judgment of the learned Single Judge of this Court and the Apex Court which were delivered in favour of the appellant in its application for reference to arbitration u/s 11(6) of the said Act. He also relied on the statement made by the Counsel for respondent No. 1 before the Delhi High Court whereby it was stated that respondent No. 1 would not dispose of the remaining land till the disposal of the Petition. He submitted that the Arbitral Tribunal, therefore, had not taken into consideration other facts and circumstances of the case and it only relied on clause 5 of the 1996 agreement for the purpose of refusing interim relief in favour of the appellant. He relied upon number of judgments of the Apex Court.

1 Ms. Iyer, the learned Senior Counsel appearing on behalf of respondent No. 2 reiterated the stand taken by the Counsel for the appellant and supported the case of the appellant. She submitted that the subject matter of the agreement was land and not merely the sale proceeds of the FSI. She submitted that if the said argument was accepted then, in that event, if the land had not been developed, respondent No. 2 or the appellant herein would not have claimed any thing and surely that was not the intention of the agreement executed between the parties.

2 I have heard the learned Counsel appearing on behalf of the appellant, respondent No. 1 and respondent No. 2 at length and the appeal is being disposed of finally by consent of the parties at the admission stage itself.

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3 It is a well settled position in law that the party who makes reference u/s 11(6) of the said Act has to make out a prima facie case for the relief which it is seeking and merely because reference has been made pursuant to the order passed u/s 11(6) that, by itself, would not be a ground for grant of interim relief.

4 The facts, in the present case, disclose that three agreements were executed between the parties. In the first agreement dated 27/04/1994, respondent Nos. 1 and 2 had agreed to develop the land and out of the amount received from the said agreement, monies were to be deposited with AAIFR. For the purpose of arranging funds, the appellant agreed to pay Rs 21.60 crores and second agreement was executed wherein it was agreed that the sale proceeds of the FSI to the tune of 1,20,000 would be shared between the appellant and respondent No. 2 i.e. the share of respondent No. 1 would go to the appellant herein. As a result of the amount paid by the appellant herein, AAIFR de-registered respondent No. 1 and declared that it is no longer a sick unit. In spite of the said agreement development to the tune of 1,20,000 sq.ft. was not possible in respect of the land in question in the first agreement of 27/4/1994 on account of certain reservation of the land which was for some reason could not be lifted and, therefore, the third agreement was executed wherein it was agreed that the appellant would get the sale proceeds on development of 4848.1 sq. mtrs of land. Thereafter, another agreement was executed on 22/6/1996 and by virtue of clause 5 of the said agreement, according to respondent No. 1, right of the appellant was restricted to the sale proceeds of 4848.1 sq. mtrs. of land only whereas, according to the appellant, the said clause cannot be read to mean that the right of the appellant was restricted to development of 4848.1 sq. mtrs of land. Mr. Malhotra, the learned Senior Counsel appearing on behalf of the appellant laid much emphasis on the clauses of the agreement of 27/04/1994 and submitted that the subject matter of the agreement was development of 1,20,000 sq. ft. of land and it was only for the sake of convenience that in November, 1994 a bifurcation was made in respect of 1,20,000 sq. mtrs into two parts viz 4848.1 sq. mtrs and 2500.72 sq.mtrs. He also laid emphasis on the two judgments; one of the High Court and the other of the Apex Court. He submitted that both the Courts have categorically held that link between the three agreements had not snapped and, therefore, had made reference u/s 11(6) of the said Act. He submitted that the Arbitral Tribunal had clearly ignored the observations made by the Apex Court and the High Court in their orders which were passed in the Petition for reference u/s 11(6) of the said Act.

19. I am afraid, it is not possible to accept the submissions made by the learned Counsel appearing on behalf of the appellant. It is an admitted position that, initially, respondent Nos. 1 and 2 had entered into agreement for development of 1,20,000 sq. ft of land. Thereafter, the appellant and respondent Nos. 1 and 2 entered into the tripartite agreement for the development of the said land and the consideration was paid and the amount of Rs 21.60 crores was paid in the AAIFR. However, thereafter in November, 1994 the parties chose to enter into agreement and the appellant agreed to develop 4848.1 sq. mtrs and appropriate

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the sale proceeds for the said development and, finally, in the agreement dated 22/06/1996 the appellant''s rights were restricted, in my view, by the clear reading of Clauses 3, 4 and 5 of the said agreement to 4848.1 sq. mtrs only. In the memo of appeal as also in the application for reference u/s 11(6) of the Act, a contention has been raised that the appellant and respondent No. 2 were persuaded to cancel the earlier agreement of 27/04/1994 and an assurance was given and representation was made that respondent No. 1 would given them a separate land for the balance FSI of 2500.72 sq. mtrs. Apart from the averments made in the appeal memo, there is no material to indicate that such an assurance or representation has been made by respondent No. 1. In my view, therefore, it is now not open for the appellant to make claim for the balance 2500.72 sq.mtrs in the face of Clauses 3, 4 and 5 of the agreement of 22/06/1996. The said clauses 3, 4 and 5 read as under:

3. UTILITY hereby confirms that it has not entered into any agreement or arrangement oral written or otherwise, or concluded any negotiations for sale, development transfer or otherwise in respect of the FSI exceeding 86725 sq.ft. relating to the said property or any part thereof on the basis of the said Agreement dated 18.7.94 and UTILITY agrees to indemnify and keep indemnify SRM forever against any right claim if made against SRM in respect of the said F.S.I. or the said property on the basis of the said Agreement dated 18.7.94.

4. It is agreed confirmed and declared that in view of the cancellation of the said Agreement dated 18.7.94, the said Agreement dated 9.11.94 executed amongst SRM, UTILITY and BHUPENDRA shall stand modified and the BHUPENDRA shall not claim any right title or interest whatsoever in the said additional property as more particularly described in the Second Schedule hereto or the sale proceeds thereof.

5. It is hereby expressly confirmed, agreed and declared that UTILITY and/or BHUPENDRA shall have no right or claim whatsoever in respect of the said property of SRM as more particularly described in First Schedule hereto save and except in respect of the F.S.I. of 86,725 sq.ft. only on the terms and conditions contained in the Agreement dated 27.4.1994 as also the Agreement dated 9.11.1994 as modified above.

20. Though Mr. Malhotra the learned Senior Counsel appearing on behalf of the appellant strenuously urged that perusal of the said Clause 5 and when it was read together with the First Schedule did not indicate that the claim of the appellant was restricted to 4848.1 sq. mtrs., yet, at this stage, in my view, no other interpretation can be given to the said clause except the one which has been given by the Arbitral Tribunal. That being the position, prima facie , no case has been made out by the appellant to establish its right over the balance 2500.72 sq. mtrs of land and, therefore, the Arbitral Tribunal has not granted the said interim relief as prayed by the appellant.

21. It is no doubt true that the Apex Court, while confirming the order of the

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High Court, has observed in para 29 as under:

29. ...It is for this reason that, in our opinion, the decision in Nathani''s case is not applicable to the present facts. We also reiterate at this juncture that the cloud on 2500 sq. mtrs of land which is inexplicably connected with the FSI of 1,20,000 sq.ft. created by the undertaking given before the Delhi High Court still remains looming large and remained so even on the date of the MoU. It is for this reason also that we are of the clear opinion that there was no final settlement of the issue regarding 1,20,000 sq.ft. of FSI even by the MoU dated 19.1.2005. If that was so, it is clear that there was live issue in between the parties and the parties were at loggerheads on that issue.

22. However, it has to be borne in mind that the said order has been passed for the purpose of making reference u/s 11(6) of the said Act. These observations have to be read in the context in which they were made i.e. while considering the question whether a case had been made out for making reference u/s 11(6). After the reference is made, interim relief u/s 17 is in respect of the subject matter of the dispute. The Arbitral Tribunal, therefore, in view of Clause 5 of the agreement of 22/06/1996 has come come to the conclusion that no case is made out by the appellant for grant of interim relief prayed by the appellant. I do not see any reason to interfere with the said order passed by the Arbitral Tribunal.

23. Apart from interpretation of the said agreement entered into between the parties, it has to be noted that respondent No. 2 had filed the Petition u/s 9 of the said Act, seeking similar relief. This Petition was dismissed by the learned Single Judge of this Court in 2001. Against this order, respondent No. 2 had preferred an appeal before the Division Bench of this Court and the appeal was also dismissed. Respondent No. 2, after filing its statement of claim before the Arbitral Tribunal, did not prefer an application u/s 17 of the said Act and, thereafter, the present appellant filed an application u/s 17 of the said Act. It has to be noted here that the rights of the appellant and respondent No. 2 are, in turn, have been interlinked and are very much dependent on each other for the purpose of their claim. That being the position, it is apparent that after respondent No. 2 had failed in its attempt to secure the said relief, the appellant herein has made a second attempt to seek similar relief.

24. Mr. Malhotra, the learned Senior Counsel appearing on behalf of the appellant has also placed much emphasis on the statement made by the Counsel appearing for respondent No. 1 in Delhi High Court. The said order of the Delhi High Court reads as under:

Notice. Mr. Dhir accepts notice on behalf of respondent No. 2. This application can be disposed of at this stage in view of the statement of Mr. Chandhiok, counsel for the respondent No. 2 that the respondents are not selling property which forms part of the agreement dated 27.4.2004 enclosed with the petition. Mr. Chandhiok further says that along with the said agreement a site plan of the property was also enclosed and the property which has been sold to the

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applicant/petitioner, shown in red strips is not being sold.

In view of the statement of Mr. Chandhiok, application stands disposed of.

25. The Third Schedule to the Agreement dated 27.04.2004 reads as under:

ALL THOSE PIECES or parcels of land or ground bearing Cadestral Survey No. 1547 (Part), 1548 and 1549 (Part), admeasuring 5796.17 square yards equivalent to 4848.1 square mtrs or thereabouts (notwithstanding the area stated herein, the Municipal F.S.I. will be 120,000 square feet only) of Worli Estate of Lower Parel Division, situated at G.M. Bhosle Marg, Bombay 400018, in the Registration District of Bombay City and bounded as follows:...

It is submitted that, in the Delhi High Court, a categorical statement was made in respect of the entire land belonging to respondent No. 1.

26. Mr. Chinoy, the learned Senior Counsel appearing on behalf of respondent No. 1, on the other hand, submitted by referring to the Schedule of the agreement in question that this statement was made only in respect of 4848.1 sq. mtrs of land. Be that as it may, since, in my view, this would not in any way confer any right on the appellant to seek interim relief u/s 17 of the said Act. Lastly, it was submitted by Mr. Malhotra, the learned Senior Counsel appearing on behalf of the appellant that if the parties had intended that the appellant was to only develop 4848.1 sq. mtrs of land, there was no further necessity of entering into MOU in 2005 and that there was no necessity for the parties to continue the dispute any further. The said submission also cannot be accepted since the appellant has made a composite claim and, ultimately, if the appellant succeeds, the appellant can be compensated in terms of money in the monetary claim which has been made by the appellant.

27. In the result, there is no merit in the submissions made by the learned Senior Counsel appearing on behalf of the appellant. Appeal is, therefore, dismissed. Under the circumstances, there shall be no order as to costs.

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