
(2013) 10 DEL CK 0269

In the Delhi High Court

Case No : Arbitration A. 18 of 2013 and IA No"s. 15911 and 15912 of 2013

Emaar MGF Land Limited

APPELLANT

Vs

Kakade British Realities Private Limited and Another

RESPONDENT

Date of Decision : 21-10-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, 37, 9

Citation : (2013) 9 AD 278 : (2013) 4 ARBLR 349 : (2013) 138 DRJ 507

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Neeraj Kishan Kaul, Ms. Manmeet Arora, Mr. Harsh, Mr. Kapil Rustagi and Ms. Nidhi, for the Appellant; Virender Goswami, Ms. Soni Singh and Mr. Abhinay, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—This is an appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996 (in short the Act) against the order dated 06.09.2013, passed by the learned sole arbitrator, on an application, preferred u/s 9 of the Act by the appellant herein.

1.1 The appellant had filed a petition u/s 9 of the Act, whereupon this court vide order dated 25.02.2013, passed an interim order of injunction qua the respondents herein, in respect of, land admeasuring 175.19 acres situate in Village Manjari, Pune, State of Maharashtra (hereinafter referred to as the land in issue). The said petition was disposed of vide order dated 23.07.2013, whereby, inter alia, directions were issued with the consent of the parties to the effect that a retired Judge of the Supreme Court be appointed as a sole arbitrator in the matter; who would be empowered to deal with the petition as an application u/s 17 of the Act. Pending disposal of the application, interim order dated 25.02.2013, was to remain operable. The arbitrator, was to be given the liberty to vacate or modify or affirm or even expand the scope of the order, if necessary, in accordance with law.

1.2 Accordingly, as agreed, Hon''ble Mr. Justice S.B. Sinha, a former Judge of the Supreme Court was appointed as a sole arbitrator in the matter. The petition, u/s 9 was treated by him, as an application u/s 17 of the Act, which resulted in the impugned order being passed. It may be noted that, at the stage at which, the impugned order was passed, the appellant, who is the claimant in the arbitration proceedings, had not filed its statement of claims. Similarly, the respondents had not preferred any counter claims.

1.3 It must be said, at the very outset, that the counsels appearing for the appellant have categorically submitted before me that even though its application before the learned arbitrator related to three (3) parcels of land (the details with respect to which are set out hereinafter), it is presently, concerned with only the first parcel of land, and that too, land admeasuring 175.19 acres. Thus, in relation to the land in issue, the appellant is, presently, aggrieved by the condition put by the learned arbitrator, while granting an injunction in its favour. The impugned condition requires the appellant to deposit a sum of Rs. 50 Crores in an escrow account and/or in a fixed deposit for a period of one year within four weeks of the date of the said order. The interest accrued is to enure to the benefit of the successful party. Therefore, while the respondents have been restrained from alienating or parting with possession or creating any third party rights or facilitating sale directly in favour of third parties, in respect of, the land in issue, the said direction has come with the aforesaid condition.

In order to appreciate the rival contentions advanced before me, by counsels for the parties, the following broad facts need to be noticed:

2.1 Respondent no. 1 is a company engaged in real estate business, apparently, in Western India. Respondent no. 2, who apparently is the Chairman-cum-Director of respondent no. 1 as also a sole proprietor of a concern by the name of Suryakant Kakade & Associates, purportedly approached the appellant, for jointly developing, on revenue sharing basis, a real estate project, in Pune. This is how the appellant portrays the case before this court.

2.2 It is, however, not in dispute that a Memorandum of Understanding dated 18.01.2007 (MOU) was executed between the parties herein, based on the aforesaid broad understanding. At this stage, the appellant, evidently paid a sum of Rs. 1.01 Crores to the respondents. According to the appellant, the MOU related to land admeasuring 520 acres, and that, the respondents had undertaken to give to it, the first option, to develop additional land, if any, acquired in the vicinity of the existing land. It is the appellant's understanding, that the total land area, over which, the proposed project was to be executed was a land admeasuring 705 acres and 66 guntas. The minimum reserved land area though, was fixed at 520 acres.

2.3 Apparently, on 04.04.2007, parties entered into a Joint Development Agreement (in short JDA). The JDA referred to three (3) parcels of land. The first parcel admeasured 225 acres and 39 guntas; the second parcel admeasured 82

acres and 2 guntas; and the third parcel admeasured 398 acres and 25 guntas.

2.4 The land in issue, which measures 175.19 acres, falls in the first parcel of the JDA.

2.5 The appellant, evidently paid in the first instance a sum of Rs. 20 Crores to the respondents. This was followed by a deposit of a sum of Rs. 20 Crores in an escrow account, which was jointly operated by the parties herein. This payment came about after the respondents had deposited the original title documents, which related to the first parcel of land and perhaps a portion of the second parcel in another escrow account maintained with Bank of India, Carve Road Branch, Pune, Maharashtra. The 20 Crores, however, was deposited in an escrow account maintained with HSBC bank, in its branch, located in, Pune.

2.6 It is not in dispute that out of the 20 Crores deposited in the escrow account with the HSBC Bank, a sum of Rs. 11,65,07,839/- was drawn for payment to persons from whom land had been acquired. The last payment, in this behalf, was apparently, made on, 11.08.2007.

2.7 It is also not in dispute that, the appellant, on 28.11.2008, withdrew an amount in the sum of Rs. 8,34,42,000/- from the escrow account maintained with the HSBC bank. The appellant, though, claims that this was done with the consent and knowledge of respondent no. 2; a fact which is disputed by the respondents. There is, therefore, no dispute that the appellant has invested, approximately, a sum of Rs. 32.65 Crores. The appellant also claims to be in physical possession of 175.19 acres of land, which is part of the first parcel of land, as indicated hereinabove. The latter is, however, disputed by the respondents, who claim that the appellant is in possession of the land admeasuring 2 acres or thereabouts.

2.8 The learned Arbitrator expressly rejected the appellant's prayer for grant of interim relief with respect to the second and third parcels. In the present appeal, there is no grievance made before me, with respect to, the said aspect of the matter.

2. It is in this context that one would have to examine the various contentions of parties.

Submissions of Counsels

3. On behalf of the appellant, arguments were advanced by Mr. Neeraj Kishan Kaul, the learned senior counsel assisted by Ms. Manmeet Arora, Advocate, while on behalf of the respondents, the arguments were advanced by Mr. Virender Goswami, Advocate assisted by Ms. Soni Singh, Advocate.

4. Mr. Kaul submitted that the impugned condition requiring the appellant to deposit a sum of Rs. 50 Crores was erroneous and perverse for the following reasons:-

5.1 The appellant was not required to pay any further amount in respect of the

first parcel of land in terms of its obligations under the JDA. The total amount that the appellant was required to pay was a sum of Rs. 104 Crores, which was a figure calculated at the rate of Rs. 20 Lakhs per acre for land admeasuring 520 acres. It was the obligation of the respondents to acquire the land and the same had to be transferred to the appellant or its nominee at its option. The appellant was, only responsible for development of the project, at its own cost. The revenue from which, was to be shared between the appellant and the respondents in defined percentages under the JDA. The appellant was to get 68%, while the respondents were entitled to 32%.

5.2 The observation of the learned arbitrator that the respondents had invested a sum of Rs. 70 Crores, was not correct. As pointed out to the learned arbitrator, the consideration paid by the respondents if, the documents deposited with the escrow agent are taken into account, would be only a sum of Rs. 48.57 Crores. This figure, at the highest, would increase to approximately Rs. 52.37 Crores.

5.3 The learned arbitrator having found a prima facie case in favour of the appellant could not have imposed the condition, which is sought to be imposed, by virtue of the impugned order, as in terms of clause 16 of the JDA, the appellant is not required to pay any further amount qua the first parcel of land.

5.4 If at all, the respondents were to succeed, it would be by way of a claim for damages, which would require adjudication by the learned arbitrator. No direction could have been issued qua the respondents for deposit of amounts in anticipation of a counter claim that the respondents may file.

5.5 The impugned direction, which adverts, to the fact that interest accrued on Rs. 50 Crores, shall enure to the benefit of the successful party, is a direction in the nature of award of cost, and that, such a direction could not have been issued at the interim stage.

5.6 In support of his submissions, Mr. Kaul relied upon a judgment of a single Judge of this Court in the case of Intertoll Ics Cecons. O and M Co. Pvt. Ltd. Vs. National Highways Authority of India, .

5. Mr. Goswami, on the other hand, submitted that the impugned order need not be interfered with, on account of the following reasons:-

6.1 No demonstrable perversity has been shown by the appellant, which is, perhaps the only ground available to this court to interfere with the impugned order.

6.2 The submissions of the appellant recorded in the impugned order, would show that, they intended, even at that stage, to sue for specific performance, and had, therefore, referred to the clauses in the JDA which according to the appellant gave them, purportedly, that right. It is in this context, Mr. Goswami contended that the appellant had also relied upon the irrevocable power of attorney executed, apparently, in its favour, for the stated purpose.

6.3 Mr. Goswami said that, the value of Rs. 104 Crores put by the appellant on the land admeasuring Rs. 520 Crores, is not correct. The said amount was in the nature of an adjustable advance. The appellant, undoubtedly, according to Mr. Goswami, seeks to acquire the entire 520 acres.

6.4 Though, it was the stand of the respondents that, the appellant, was in possession of only 2 acres of land, the learned Arbitrator having regard to the facts and circumstances placed before him, has come to a prima facie view, that the, appellant needs to be protected qua 175.19 acres of land subject to the condition incorporated therein. The condition balances, though not fully, but to some extent, the rights of the respondents, and hence, ought not to be disturbed.

6.5 Admittedly, the respondents have invested a sum of Rs. 69,17,66,057/- in acquisition of the land in respect of that, which is, part of the first parcel. This investment was made, at least, as far back as, in 2007. The appellant has been, in breach of its obligations, and therefore the respondents were entitled to a return on its investment, apart from any other relief that may be available to it, in the ongoing arbitration proceedings. If seen, in this context, the impugned condition balances the rights of the parties, and thus, seeks to secure the interest of the respondents.

6.6 In support of his contention, Mr. Goswami has relied upon the following judgments:-

Wander Ltd. and Another Vs. Antox India P. Ltd., ; Sabh Infrastructures Ltd. Vs. Jay Shree Bagley and Anr., passed in FAO (OS) 583/2009 and CM No. 16992/2009 on 23.12.2009; and Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others, .

Reasons

6. Having heard the learned counsel for the parties, according to me, what requires to be examined is not how this court would have ruled had the matter been placed before it, in the first instance but, whether the conclusion reached by the learned arbitrator was reasonably possible based on the material placed before him. The scope of an appeal qua discretion employed by an authority of the first instance is restricted to an appeal on principle. Therefore, the appellate court is not to interdict the exercise of discretion employed by the original authority and substitute the same with its own view in the matter, except when, it is shown that the discretion exercised in the matter is imbued with arbitrariness, is capricious, or has resulted in perversity, or the impugned order is passed in ignorance of the settled principles of law for grant or refusal of interlocutory injunctions [see Wander Ltd. and Anr. (supra)].

7. What emerges from the record in this case is as follows:

8.1 That an application u/s 17 of the Act was argued at a stage, when claim and counter claims, had not been filed by the parties herein, before the learned arbitrator.

8.2 The appellant, which is the claimant before the learned arbitrator, had undoubtedly, in no uncertain terms, indicated that in its statement of claims, it shall pray for grant of an award of specific performance of the JDA. Therefore, while this court vide order dated 25.02.2013 had granted an interim injunction only in respect of 175.19 acres of land (i.e., the land in issue), the appellant pressed for grant of injunction qua other parcels of land, as well. (see paragraph 5(xii) of the impugned order).

8.3 The appellant had, in terms of the JDA, invested a sum of Rs. 32.66 Crores towards the first parcel of land, the respondents over a period of time between January and August, 2007, had invested a sum of Rs. 69.17 Crores (approximately) for acquisition of land qua the project in issue till March, 2007. In addition to the above, the respondents claimed that they were required to make payments after 05.03.2007 to the tune of Rs. 134.47 Crores (approximately). The learned arbitrator has, for the present, taken into account the former figure of Rs. 69.17 Crores (approximately).

8.4 The learned Arbitrator notes, in the impugned order, that the, appellant's right, if at all, for specific performance would flow from Article 40.5 of the JDA. In this regard, a reference is also made to the irrevocable power of attorney (which is coupled with interest), apparently, executed in favour of the appellant by the respondents.

8.5 The learned arbitrator thus, having regard to the letter of possession dated 04.04.2007, came to the conclusion that the appellant's possession had to be protected in view of the fact that it was in possession of some part of the land, if not the entire land admeasuring 175.19 acres. On the other hand, the learned arbitrator noticed the contention made on behalf of the respondents that the JDA could not be specifically enforced; an averment which he left for consideration at a latter point in point. The learned Arbitrator noted the fact that the JDA was a "complex document".

8.6 The fact that the second parcel of land belonged to third parties and not to the respondents, and given the situation that, land comprising of third parcel was only in the "process of negotiation", propelled him to confine the injunction to the land in issue i.e., 175.19 acres of land; which is, part of the first parcel of land.

8.7 Having regard to the fact that even according to the appellant, respondents had paid to various land owners, sums in the range of Rs. 48.57 Crores to Rs. 52.37 Crores, the injunction qua the land in issue was made conditional. The fact that there is a document on record which clearly shows that the respondents have paid between January and August, 2007, a sum of Rs. 69.17 Crores (approximately Rs. 70 Crores) to various land owners, propelled the arbitrator to incorporate the impugned condition. In my view, even on a conservative estimate, if nothing else is retrieved by the respondents, in the litigation pending before the learned Arbitrator, at the rate of return of 10% p.a., it would be

entitled to a sum of Rs. 7 Crores p.a., which, over a period of six years, would accumulate to, a figure, of approximately Rs. 42 Crores, if not more. The rate of return on funds blocked in immovable property, may be higher. This is, of course, is dependent on the nature of counter claims, if any, that the respondents may lodge and their successful prosecution. At the stage, at which, the impugned order was passed, the learned arbitrator could only guess estimate as to the kind of condition he needed to incorporate in the impugned order to balance the interest of the parties before him.

8. I find that there is nothing in the interim order which calls for interference. None of the factor for grant of interim order are ignored. The discretion, in the grant of interlocutory orders, is that of the authority, which passed the order in the first instance, in this case, the learned arbitrator-Which I do not propose to interdict even if I were to hold a view different from that of the learned arbitrator except in situations articulated hereinabove.

9. Mr. Kaul's submission that the order is perverse and/or arbitrary in view of the fact that the appellant had done all that it was required to do under the JDA is an aspect which has been adverted to and put in perspective by the learned arbitrator by recording the fact that there is a prima facie case made out for specific performance, which requires due examination.

10. The other argument of the appellant that the respondents, if at all could only sue for damages which cannot be secured at the interim stage prior to adjudication, is fallacious, for two reasons. Firstly, the nature of the counter claims that the respondents propose to lodge is not known, at least, at this stage. Secondly, this submission fails to recognize the fact that the appellant by virtue of the injunction is blocking the use by the respondents of 175.19 acres of land which, is a relief that may or may not finally be granted in its favour. The injunction could, therefore, only flow, according to the learned arbitrator's sense of the matter, in favour of the appellant upon the condition incorporated in the impugned order. Unlike the facts obtaining in the Intertoll ICS Cecons. O & M Co. Pvt. Ltd.; the case cited by the appellant, the expected counter claim of the respondents, is not, speculative.

11. For the foregoing reasons, I do not find any merit in the appeal. The same is accordingly dismissed. Before I conclude, I must, however, record the fact that Mr. Kaul had made an alternative plea, which was that, if this court was not inclined to interfere with the impugned condition contained in the learned arbitrator's order, the appellant should be allowed to provide an alternative security in the form of an unencumbered immovable property. In fitness of things, in my opinion, such a request should be made to the learned arbitrator who, I am sure, would give due consideration to such a request if made, by the appellant. In view of the appeal having been dismissed, the captioned applications have been rendered infructuous. The parties shall, in the facts and circumstances of the case, bear their own cost.