
(2010) 04 BOM CK 0152

In the Bombay High Court

Case No : Appeal No. 192 of 2010 in Arbitration Petition No. 624 of 2010

Middle Income Group Co-operative Society Limited

APPELLANT

Vs

L and T Bombay Developers Private Limited, Bombay Dyeing
and Manufacturing Co. Limited and L and T Urban
Infrastructure Limited

RESPONDENT

Date of Decision : 27-04-2010

Acts Referred:

Companies Act, 1956 — Section 9

Citation : (2010) 5 BomCR 757 : (2010) 112 BOMLR 2097

Hon'ble Judges : Anil R. Dave, C.J; S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : Janak Dwarkadas, Chetan Kapadia, Sanjay Jain and Lalit Jain, instructed by L.J. Law, for the Appellant; S.U. Kamdar Pooja Mehta, P.K. Shroff, D.V. Deokar, Pinakin Modi, Jayalakshi, Vismay P. Shroff, Subodh Joshi and Sanjay B. Kotak, instructed by Parimal K Shroff and Co. for Respondent Nos. 1 and 2 and Farhan Dubash, instructed by Solomon and Co., for the Respondent

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.—This appeal is directed against the ad-interim order dated 29th March, 2010 of the learned Single Judge where under an ad-interim injunction in terms of prayer Clause (a) of the petition has been granted and the petition is posted for final hearing on 14th June, 2010.

2. Shri Dwarkadas, learned Senior Counsel appearing on behalf of the appellant submits that this order has serious repercussions and prevents the redevelopment of the property of the appellant, which is prevented by respondent No. 1, in the arbitration petition. He submits that grave loss, serious harm and injury will be caused if this order is not vacated. Despite all contractual obligations coming to an end, the appellant is prevented from redeveloping its own property. The buildings are in a dilapidated state and the appellant is a Middle Income Group Co-operative Housing Society. This is a colony of MHADA and the buildings are old. In such circumstances, he requests that the appeal be

taken up for admission and heard forthwith.

3. This request is opposed by Shri Kamdar, the learned Senior Counsel appearing for the original petitioner-respondent No. 1 to this appeal. He submits that the order is ad-interim in nature and does not prejudice the appellant in any manner. He submits that the arbitration petition is going to be decided finally and, therefore, this Court should not interfere at this stage.

4. We are of the opinion that considering the controversy and the nature of the relief granted so also the peculiar facts of this case warrant our intervention even at this ad- interim stage. Hence, we proceed to admit this appeal and take it up for hearing forthwith by consent of the parties. All the respondents waive service.

5. The arbitration petition in question has been filed by the first respondent in this Appeal. It is their case that a Special Purpose Vehicle Company was formed by original petitioner Nos. 1 and 2. The original respondent No. 2 L & T Urban Infrastructure (for short ` I infrastructure Limited") is stated to be a company of the L& T Group. Petitioner No. 1 to this petition and respondent No. 1 to the appeal is L& T Developers (for short ` Developers"). The original petitioner No. 2 is Bombay Dyeing. The arrangement between the original petitioners and respondent No. 2 was arrived at for the purpose of award of contract from the present Appellant-original Respondent No. 1. The contract was of redevelopment of the land admeasuring 20150 sq. mtrs situate at Bandra (East), Mumbai 400 051 or atleast 18400 sq. mtrs. from this total admeasurement. The FSI was to be permitted as per the available Rules.

6. The original petitioners and respondent No. 2 are Companies incorporated under the Companies Act, 1956. First respondent is a society of 19 buildings. As per the petition averments, a letter of award dated 2nd November 2006 read with bid documents and confirmation dated 3rd November 2006 came to be issued. The original petitioners have paid huge sums to the appellant-first respondent. They also secured lease in respect of the substantial area of the land comprising of 19 buildings and admeasuring 10373.54 sq. mts. All details are set out in paragraph 1.3 of the Arbitration Petition. Thereafter it is alleged that the subject matter of the arbitral proceedings needs to be preserved. The correspondence has been referred to and it has stated that there was a valid and enforceable contract between the parties pursuant to which payments have been made. It has been set out in the Petition that even conveyance was obtained in favour of the first respondent-appellant before us on 27th December 2008.

7. In paragraphs 2.30 and 2.31 of the petition, it has been stated that in terms of the contract and letter of award, development and other agreements were to be in format as mutually agreed. Several meetings were held in that behalf. However, the terms were not finalized by the appellant-original respondent No. 1. Thereafter, reference is made to a Notification dated 6th December 2008 issued by the Government of Maharashtra which resulted into significant change in the mode of redevelopment of MHADA lands and petitioners discussed this with the

appellant on without prejudice basis. They were considering the impact of the same. After several steps were taken and on account of Government policies and pending litigation, the remaining measures could not be adopted, still, the first respondent proceeded to terminate the contract and the allegations in that behalf are to be found in paragraph Nos. 5 to 11 of the Arbitration Petition.

8. For all these reasons, according to the original petitioners, a dispute arose between the parties which in terms of Clause 7 of the bid document can be resolved by arbitration. Accordingly, steps were taken to appoint a Sole Arbitrator. The averments in that behalf are also incorporated in the Arbitration Petition. Apprehending that the first respondent may negotiate with third parties and enter into a contract for redevelopment of the buildings that the petition u/s 9 was filed in this Court on 19th March 2010. Ad-interim reliefs have been sought in terms of this Arbitration Petition.

9. On being served with the Arbitration Petition, the first respondent filed an affidavit in reply and pointed out that the petition is not maintainable on several grounds. The first respondent-appellant before us, inter alia, contended that there does not exist any concluded contract between the parties. It is stated that the obligations could not be fulfilled by the petitioners. It is stated that members of the first respondent society are allottees/owners of flats in building Nos. 1 to 19. The buildings are old and require urgent repairs and/or redevelopment. The society decided to redevelop the same by inviting tenders/offers from builders and developers. The documents dated 23rd August 2006 were issued and the process commenced. Thereafter reference is made to the proposal forwarded by the petitioners and in the detailed affidavit facts leading to the termination have been set out. The petition was also dealt with and it was stated that there was no substance in any of the allegations.

10. A compilation of documents was also handed in together with reply.

11. On this material, the matter was argued before the learned Single Judge who by the impugned order granted ad- interim relief in terms of prayer Clause (a) of the Petition. Aggrieved by this order, the instant Appeal is filed.

12. Shri Dwarkadas, learned Senior Counsel appearing on behalf of the appellant-original respondent No. 1/society, submits that no prima facie case was made out by the original petitioners. He submits that what the petitioners and second respondent had proposed was "in consortium" arrangement for redevelopment of the property. However, one of the partners of the consortium walked out. Inviting our attention to pages 359 to 363 of the Appeal paper-book, Shri Dwarkadas submits that the original petitioner No. 1 is not a party to the arbitration agreement. The bid document contained an arbitration clause and only petitioner No. 2 is a party thereto. He submits that there is no agreement with the Special Purpose Vehicle but there is only a bid document and one letter. In such circumstances and when the consortium inter se did not agree on several terms but suggested changes and modifications and one of them entered into detailed

correspondence on the subject of redevelopment, then, this was not a fit case for grant of any ad-interim relief. Until and unless the learned Judge had concluded that there was a contract between parties and that the termination thereof is per se illegal, he could not have prevented redevelopment of the old buildings and particularly when they are dilapidated, through some other agency. The ad-interim order causes serious prejudice and when the claim is monetary in nature, it is doubtful whether an injunction order in terms made could at all have been granted. For these reasons, the impugned order be set aside by allowing the Appeal.

13. On the other hand, Shri Kamdar, learned Senior Counsel appearing on behalf of the contesting respondent, submits that none of the documents and correspondence can be seen in isolation. Shri Kamdar submits that the argument that there is no arbitration agreement is baseless. He submits that all entities of the Special Purpose Vehicle are parties to it. The developers, Bombay Dyeing and Infrastructure Ltd. are part of the Special Purpose Vehicle and original respondent No. 2 is bound by the clauses therein. All documents would have to be seen in their entirety for the purpose of finding out whether there is any arbitration agreement. Similarly, the issue of readiness and willingness to perform the obligation under the contract in question is a matter which must be decided by the Arbitrator. On the basis of without prejudice correspondence, no final conclusion can be reached in this behalf. All arguments today on this aspect are premature and if the without prejudice correspondence is made a foundation for denying the relief, that would cause injustice to parties. For all these reasons and when the petition is pending, this Court should not interfere in his submission. Thus, the Appeal be dismissed.

14. With the assistance of the learned Senior Counsel appearing for parties, we have perused the impugned order and some of the documents brought to our notice including the pleadings in the Arbitration Petition.

15. The learned Judge has proceeded on the basis that efforts were made to enter into a Development Agreement by parties. The correspondence shows that certain objections were raised by the original petitioner. The learned Judge has termed these objections as not tenable. Further, he has held that certain new terms and conditions were sought to be introduced, to record a finding that the development agreement could not be executed. He also records that the appellant-original respondent No. 1 terminated the arrangement mentioned in the letter of intent dated 2nd November 2006. He also makes a reference to the further letter on the same subject dated 18th November 2009.

16. In paragraphs 4 and 5 of the impugned order he records the rival contentions including on the point of readiness and willingness.

17. From the observations in paragraphs 6 and 7 of the impugned order, it is apparent that whether there was any concluded contract between parties or not is a vital issue in the matter. Further, whether there was arbitration agreement

between parties or between some of the entities to the contract is equally the core issue. On the basis of the contents of the letter dated 18th November 2009 it cannot be concluded that there were transactions and they are admitted in of the letters of termination. To our mind, "Negotiations" and "Transactions" and concluded contracts are words which have their own significance and must be seen in the backdrop of peculiar facts of each case. By picking and choosing a single letter and considering the contents thereof, the learned Judge could not have recorded a finding on the existence of the contract. To our mind, the learned Judge has completely omitted from consideration the pleadings of parties and the other documents on record. Suffice it to state that before us reference was made to a letter dated 15th November 2009 addressed by the original petitioner No. 2 M/s. Bombay Dyeing. They have written a letter to the first respondent-appellant before us. From the tenor of this letter, it is clear that an opportunity will have to be given to parties to further explain the stand of one of the partners of the Special Purpose Vehicle Company/Consortium. The argument that M/s. Bombay Dyeing was having second thoughts cannot be brushed aside. Further, our attention was also invited to the letter dated 8th September 2009 wherein one of the consortium partners (L & T Bombay Developers Private Limited) requested for a dialogue so as to revise some of the terms of the contract between parties. The reference to the letter dated 4th November 2009 addressed by original respondent No. 2 to the appellant also outlines the fact that any unilateral communication by M/s. Bombay Dyeing and payment made to M/s. Bombay Dyeing would amount to breach for which the other two partners reserve their right for proceeding to recover against the appellant and M/s. Bombay Dyeing. The letter outlines the fact that the other two entities have not given their consent to M/s. Bombay Dyeing to issue any no objection certificate to the society so as to bind all of them.

18. There is some substance in the complaint of Shri Dwarkadas that these documents and their contents would be vital before a prima facie conclusion is arrived at about the existence of a contract and its nature. If there are only negotiations and discussions and no dealings as urged or these are binding commitments is something which must be probed further.

19. Equally, Shri Kamdar's contention that some of the documents/letters are marked without prejudice and, therefore, would be tentative and should not be construed as expressing any binding opinion, needs to be considered further.

20. Both sides have invited our attention to several decisions of the Supreme Court of India and other Courts on the interpretation and meaning of the term "without prejudice". Shri Dwarkadas has invited our attention to the judgment of the Hon'ble Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., to support his submission that the principles which are relevant for granting the relief of specific performance of a contract are applicable while considering the prayers in the present arbitration petition. We are of the opinion that nothing of this has been adverted to by the learned

Judge. He has not even dealt with and considered the bid documents. Therefore, a finding which is cryptic and virtually concludes the issues should not have been rendered by the learned Single Judge unless he gave complete opportunity to both sides to make good their case.

21. Even on the question of irreparable loss and injury, what we find from the record is that the buildings are fairly old and would require immediate attention and the proposal of the first respondent society for redevelopment was under consideration for a fairly long duration. The structures may have dilapidated further after the letter of award issued way back in November 2006. Even for this reason and unless a strong prima facie case was made out, the ad-interim injunction so as to stall process of redevelopment could not have been granted.

22. For all these reasons, although the order is ad- interim, the same being vitiated and erroneous in the manner afore-stated, we have no alternative but to interfere with it in our appellate jurisdiction.

23. In the result, the Appeal is allowed. The ad-interim order dated 29th March 2010 is set aside. The Arbitration Petition should appear on the returnable date and after the parties are given opportunity to file affidavits/ documents, the learned Judge should consider the same afresh and without being influenced by any earlier observations. We clarify that our observations are only for the purpose of highlighting the various aspects of the controversy. We have not expressed any final opinion on the merits and all contentions in that behalf are kept open.

24. The Appeal is allowed in the above terms. No order as to costs.