(2008) 01 BOM CK 0156

In the Bombay High Court

Case No : Appeal No. 619 of 2007 in Arbitration Petition (Lodging) No. 233 of 2007

Oberoi Constructions Pvt. Ltd. APPELLANT

Vs

Worli Shivshahi Co-op. Hsg. Society Ltd. RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 11, 7, 7(3), 7(4), 9

Citation : (2008) 4 ARBLR 179 : (2008) 5 BomCR 855

Hon'ble Judges : R.S. Mohite, J;F.I. Rebello, J

Bench : Division Bench

Advocate : J.J. Bhat and Birendra Saraf, Amit Naik, Medha Godbole, Neha Choudhary, instructed by Naikm Naik Iyer and Co, for the Appellant; Jai Chinoy and Shailesh Shah and Prakash Ganwani, instructed by Shiralkar and Co., for the Respondent

Final Decision : Dismissed

Judgement

F.I. Rebello, J.—In Arbitration Petition No. 233 of 2007 the appellants herein had applied u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ''the Act'') for reliefs as set out in their application. The learned judge on considering the various contentions came to the conclusion that there is no binding agreement between the parties. Finding that there is no arbitration clause, petition has been dismissed. [Ed. : See A LR 2008 106 (Bom.) The learned judge further observed that it will be open to the parties considering the pendency of their application u/s 11 of the Act to submit further arguments of their case in that application. An appeal has been preferred by the appellants against the said order.

2. Appellants contend that MHADA had in principal granted approval for handing over to the respondent approximately 11,827.74 sq. mtrs. of land. The respondents invited bids from the various developers for redevelopment under Development Control Regulation No. 33(9) read with MHADA Act. The appellants

amongst others offered bids and deposited a sum of Rs. 2.00 crores. Meetings were held between the office bearers/representatives or the members of the respondents and the representatives of the appellants. According to the appellants their offer was accepted and they were granted rights in terms of their offer dated 30.06.2005 read with their letters dated 22.07.2005, 23.08.2005, 19.09.2005, 30.09.2005 and 25.10.2005. There was also exchange of documents and correspondence along with the meetings on various further dates. On 07.10.2006, a meeting was held in the office of the advocates of the respondents. Accordingly, the appellants by their letter dated 09.10.2006 forwarded to the respondents the agreed MoU initialled by Mr. Vikas Oberoi, Director of the appellants. In a special general meeting of the respondents held on 22.10.2006 all the terms and conditions, save and except some minor changes to be incorporated in the MoU, were approved by the respondents'' members and the managing committee was authorised to sign and execute the MoU. The respondents by their letter dated 25.10.2006 forwarded the final MoU to the appellants and requested the appellants to send back the same to the respondents after initialing the same. The appellants accepted the said minor changes suggested by the respondents, initialled two copies of the MoU and by their letter dated 01.11.2006 forwarded the same to the respondents. The respondents by their letter dated 03.11.2006 responded to the appellants'' letter dated 02.11.2006 but did not raise any objection of any kind.

The appellants contend that despite there being a valid, binding and concluded contract between the parties, the respondents did not execute MoU. As the respondents avoided to take further steps in pursuance of the agreement arrived at between the parties, the appellants by their letter dated 02.12.2006 recorded some of the facts and requested the respondents to do the needful. In the first week of January 2007, according to the appellants, one S. Purohit, Secretary of the respondents, contacted Mr. Vikas Oberoi of the appellants and sought to re-negotiate the terms and conditions of the agreement arrived at between the appellants and the respondents. The respondents on 05.01.2007 addressed letter to the appellants stating that MoU initialled and forwarded by the appellants was an offer which was considered by the respondents and that the amount of Rs. 2.00 crores paid by the appellants was not any advance but only earnest money deposit as an expression of bona fides so that negotiations can be proceeded with for finalizing the MoU. The appellants by their letter dated 09.01.2007 pointed out that there were no outstanding issues and that the MoU had been finalised. The respondents by their communication denied the appellants'' contention. Further correspondence shows the stand of the parties. The stand of the respondents was that the MoU had not been finalised while the stand of the appellants was that there was valid, binding and concluded contract between the parties. The appellants thereafter filed the petition u/s 9 of the Act and have sought the reliefs as set out therein.

3. The stand of the respondents is that MoU admittedly has not been signed and that the initials are only of the appellants and the correspondence does not

disclose the execution of any arbitration agreement. The respondents'' offer dated 30.06.2005 contains all the terms except arbitration clause. The respondents'' letter dated 28.10.2005 is only an acceptance of the appellants being appointed as developers and request for a meeting for finalizing the terms and conditions of MoU. Even in respect of Clause 41 of the MoU, i.e. the arbitration clause, the respondents in their meeting dated 22.10.2006 had suggested changes. It is also set out that the MoU is marked without prejudice. The appellants'' contention that once the appellants accepted the draft, it ceased to be "without prejudice", overlooks the fact that even the appellants'' acceptance on 02.11.2006 is conditional because they had suggested further changes. Even when sending corrected draft to respondent society the appellants have retained "without prejudice" endorsement and not cancelled it, which according to the respondents means even they want to continue to treat it as "without prejudice". At any rate, there is no concluded contract or arbitration clause in writing as even in letter dated 22.10.2006 it was mentioned that clause pertaining to arbitration should be redrafted. The appellants sent MoU with the changes in October 2006. The appellants sent further draft with further corrections and the same amounts to counter offer by the appellants which necessitated acceptance from society. Special general body meetings of the society were held on 05.11.2006 and 03.12.2006 for considering the MoU at which meetings members did not approve the MoU and in fact objected to letter dated 25.10.2006. The documents on record would indicate that there are three parties affected by the MoU, i.e. builder, society and the members and as such, the NOC of members is a condition precedent for concluding the agreement. The society had made this clear when they first sent MoU along with their letter dated 08.01.2006. The society in its special general body meeting dated 22.10.2006 reiterated that MoU will be signed only after it is circulated and NOC obtained from all the members. Even appellants by their letter dated 02.12.2006 requested the society to obtain NOC. The proceedings in the society''s general body meetings dated 05.11.2006 and 03.12.2006 show that only few NOCs were obtained. 123 members by their letter dated 26.04.2007 informed the society that they have not given consent and that they were not willing to give NOC. Though the property may be owned by the society, but for redevelopment it is necessary to obtain possession from the members and as such, every single member''s NOC is mandatory. 70% requirement is only for obtaining MHADA''s permission and the said provision does not mean that on the basis of consent of 70% of the members, balance 30% can be dispossessed without their consent. At any rate, it is submitted that the development agreement is not specifically enforceable and, therefore, at the highest the appellants can only claim monetary benefit and as such, are not entitled to any interim relief.

4. On behalf of the appellants, the learned Counsel submits that there was valid, concluded and binding agreement between the parties as the parties have agreed upon all material terms of the contract whereby the respondents granted right in the property as specifically set out in the petition. The learned judge

committed an error in not holding that there was no valid arbitral clause. The learned judge further committed an error in not appreciating that parties had agreed that any dispute arising out of the agreement MoU shall be resolved by arbitration. By their letter dated 25.10.2006 the respondents forwarded the final MoU containing the arbitration clause and as such there was an arbitration agreement which was recorded by exchange of letters. It is submitted that the learned judge failed to appreciate that the appellants have taken various steps in furtherance of the contract and with the active involvement of the respondent and that established that there was binding contract between the parties. The learned judge committed error in holding that there was no binding agreement between the parties, yet left the issue open to be considered u/s 11 of the Act. In these circumstances, the learned judge in the meantime ought to have protected the appellants till the decision in the application u/s 11 of the Act.

5. The question we have been called upon to answer is whether in this appeal is it open to us to say that the view taken by the learned Single Judge was a view incapable of being taken or one which could not have been arrived at considering the material on record and the appellants'' contention that there is a concluded contract containing an arbitration clause.

6. In our opinion, the issue to be decided is not merely whether there is concluded contract, the real issue is, whether it is open in an application u/s 9, if there be no arbitration agreement for the learned judge to assume jurisdiction and consider the reliefs as prayed for by the appellants. From the judgment it appears that the learned judge has held that there is no concluded contract yet in the matter of arbitration clause has left the issue to be concluded in the proceedings u/s 11.

7. For our discussion, we may consider some provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ''the Act''). Section 7(3) and 7(4) is relevant and reads as under:

7. xxx xxx xxx

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Thus, the first requirement is that the arbitral clause must be in the form of an arbitration clause in a contract or in a separate agreement, which shall be in writing as set out in Section 7(3). u/s 7(4) an agreement can be said to be in writing if it is in one of the modes as stipulated therein.

The question, therefore, that we have been called upon to answer, is there a subsisting agreement for redevelopment between the parties and whether the said agreement contains an arbitration clause in writing. There is no document evidencing an arbitral agreement signed by the parties. The appellants as argued can only make out a case that there is in existence a valid agreement in writing evidenced by the exchange of documents and letters. The MoU dated 02.11.2006 is styled as "without prejudice" and it does contain an arbitration clause, i.e. Clause 41. The name of the respondent is shown as the party of the one part. Insofar as the party of the other part is concerned, the name is not indicated though in the bracket it is set out as (An Oberoi Construction group company). In the schedule also the name is not shown though signed by Mr. Vikas Oberoi, Director. The company in whose name the agreement for development was to be entered into is not entered though the earlier correspondence and subsequent correspondence has been exchanged between the respondents and the appellants herein. The communication dated 02.12.2006 from the appellants to the respondents sets out as under:

You will appreciate that considerable amount of time has passed since the final MoU was sent for the approval of your general body. We are still awaiting the NOC of the society''s members as required by the MoU to proceed with the work of redevelopment.

Earlier by letter dated 28th October, 2005 the respondents had informed the appellants that they have been appointed for redevelopment of the society''s property in terms of the redevelopment letter dated 30.06.2005 and the modification and alternations made thereafter as confirmed by subsequent letters and to contact them so that a meeting can be arranged at a very early date for finalizing the terms and conditions of the MoU. On 08.01.2006, the respondents had forwarded the appellants draft MoU prepared by the solicitors with inputs by the committee members for their approval and that they would be grateful if the appellants went through the MoU and sent it back with their comments. It was specifically set out there as under:

We would like to mention here that subsequently we will circulate this draft to all our members and our architect for their inputs and final approval.

In their communication dated 25.10.2006 the respondents informed the appellants that the special general body meeting had discussed and approved the draft MoU but the members had suggested minor changes in MoU and had suggested to go ahead with the NOC and signing MoU based on the points suggested. The minutes of the meeting which are on record show that one of the issue was redrafting Clause No. 41 as it was not correct. This is the clause contrary to the arbitral clause. The appellants were further called to initial the filial draft MoU so that they can proceed with the redevelopment process and to confirm that M/s. Oberoi Constructions Pvt. Ltd. will be carrying out redevelopment project. We have already referred to the letter dated 02.12.2006, after the MoU was forwarded, where the appellants have set out that they are awaiting the NOC of society members. The respondents by letter dated 05.01.2007 informed the appellants that the offer made and the draft MoU for the proposed redevelopment have been considered. The following contents are relevant:

You will appreciate that the matter can be proceeded with only if the draft MoU is approved by the members of our society, we may here state that several of our members have raised a number of substantive issues in regard to the MoU which require detailed consideration.

On 25.01.2007, the appellants were informed that the MoU is not finalised.

8. Before we answer the issues the judgments cited in respect of the first issue may be considered. Relying on the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, it is the submission of the learned Counsel that if the court entertains an application u/s 9 of the Arbitration and Conciliation Act, 1996 and if a dispute is raised as to the existence of the arbitration agreement or that the subject matter is covered by the arbitral clause, it must finally decide as to the existence of the arbitration agreement as also whether the subject matter is covered by the arbitration agreement. Reference for that purpose is placed on the following observations of the Supreme Court (para 18 of Arb. LR):

Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication.

Section 9 of the Act is the power of the court to grant interim relief. An order passed u/s 9 prima facie does not conclude any issue between the parties. What a court has to decide in such an application is only grant of interim reliefs, before or during the arbitral process and even on conclusion of arbitral proceedings before the award becomes a deemed decree of the court. A decision rendered u/s 9 is normally interim. The observations in the majority judgment is that when a party invokes the jurisdiction u/s 9, the court has necessarily to decide whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement, and that there is no indication in the Act that powers of the court are curtailed in this aspect. The important aspect of the observation is that the procedure of the court would govern the adjudication. The issue for consideration before the Apex Court was reconsideration of the judgment of a Constitution Bench, in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., . The issue for consideration was the nature of the power to be exercised u/s 11 of the Act. If the tests laid down in various judgments of the Supreme Court are considered as to what is a precedent and its binding character, it would be clear that the observation as to the decision on the issue of existence of an arbitration agreement and subject matter u/s 9, was not the subject matter for consideration before the larger bench. Therefore, as submitted at the highest it can be treated as an obiter dicta. We, therefore, proceed on the basis that it is open to a court exercising jurisdiction u/s 9 to finally decide as to the existence of the arbitration agreement and whether the subject matter of the dispute involved was covered by the arbitral clause. The issue whether the learned judge can keep the issue open to be considered in proceedings u/s 11 after holding that there is no contract will be discussed subsequently.

9. The next legal contention advanced is as to what will be the effect of the words "without prejudice". On behalf of the appellants, the learned Counsel has drawn our attention to the judgment of the Supreme Court in the case of Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, . The Apex Court noted that even correspondence marked as "without prejudice" may have to be interpreted differently in different situations. The interpretation would be based amongst others according to usage in the profession and that no issue of public policy is involved. The Supreme Court quoted with approval the judgment in Rush & Tompkins Ltd. v. Greater London Council (1988) 1 All ER 549 at pp. 551g-552b. It was held that the rule which gives the protection of privilege to "without prejudice" correspondence depends partly on public policy, namely the need to facilitate compromise and partly an implied agreement. In the same judgment the exposition of definition of "without prejudice" contained in the judgment of Lindley, LJ in Walker v. Wilsher (1889) 23 QBD 335 was set out, which reads as under:

What is the meaning of the words "without prejudice" ? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old stage of things and to establish a new one.

The court then noted that the term had come up for consideration in Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur and Others Vs. Pratap Rai, , wherein it was observed "without prejudice" would indicate that the order was not final and irrevocable. The definition in Black''s law Dictionary was then quoted which reads as under:

Where an offer or admission is made "without prejudice" or a motion is denied or a bill in equity dismissed "without prejudice", it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except insofar as may be expressly conceded or decided. See also ''Dismissal without prejudice''.

It would thus, be clear that the expression "without prejudice" is to be understood on the fact situation. When parties agree to a set of things then merely marking on the document "without prejudice" would be of no consequence. However, if the material indicates that the negotiations are still in progress and there is no finality on what was contained in the document marked "without prejudice", then the document marked "without prejudice" cannot be considered without the consent of both the parties.

10. Considering the above, is there an arbitration agreement in writing ? In M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd., , the Supreme Court noted that an agreement if not signed by the parties can be spelled out from the correspondence exchanged between the parties. The court noted that the question will have to be answered whether the correspondence spells out an agreement. The court further observed that there is a vast difference between negotiating a bargain and entering with a binding agreement. Let us consider the material on record. In the affidavit of S.B. Purohit dated 22.10.2006 filed on behalf of the respondents as Secretary of the society, in para 3(iii) it was set out that at the extraordinary general meeting when the MoU was placed before the meeting various objections and suggestions from members were discussed including the requirement of NOC from all the members of the respondents and the need to negotiate increase in hardship allowance and objections to the arbitration clause in the draft MoU. This apart the correspondence exchanged by the appellants themselves shows that the draft was to be approved by the general body. The letter dated 05.01.2007 by respondents to the appellants clearly sets out that the matter can be proceeded with if the MoU is approved by the members of the society. It was also set out that members have raised number of substantive issues in regard to the MoU. It is clear, therefore, from the exchange of correspondence between the parties that there was no written concluded contract or an arbitration agreement in writing as required u/s 7 of the Arbitration and Conciliation Act, 1996. Thus, parties were not at ad idem. In United Bank of India Vs. Ramdas Mahadeo Prashad and Others, , the court noted that where there was no consensus on the terms and conditions, there could be no concluded contract. Once there being no concluded contract, the learned judge was right in refusing the interim relief.

11. The contention that the learned judge had permitted the parties to proceed u/s 11 may now be dealt with. u/s 11 on an application made for constituting arbitral tribunal and further whether the subject matter is covered by the arbitral clause can be gone into by the court [See Patel Engineering]. It is submitted that

once the court u/s 9 decides the issue as to the existence of a contract containing an arbitral clause or an arbitration agreement in writing or subject matter being covered by the arbitral clause there is no question of the issue being once again considered u/s 11. If the argument advanced on behalf of the appellants is accepted namely that the decision as to the existence of arbitration agreement in a proceeding u/s 9 is final then that must conclude the issue. Once a issue is decided by a court in a competent proceeding, the finding on that issue cannot be gone into by another court or judicial forum unless its finding was set aside by a superior court. The principle of issue estoppel will arise and bar the party who was party to the earlier proceedings from once again raising the issue which was concluded. The learned judge however, has left it open to the appellants to submit more material and documents while submitting their case u/s 11. u/s 11 as noted earlier the issue will be open for consideration if the issue has not been decided by a competent court or judicial forum. Though Section 9 of the Act confers a power to grant only interim relief, the grant of relief is subject to the judicial forum or court having jurisdiction to grant interim relief. As noted in Patel Engineering the court while deciding an application u/s 9 can decide the issue as to the existence of an arbitral clause or the subject matter being covered by the arbitral clause. Such a decision, a finding as to jurisdiction, cannot be prima facie, if the obiter dicta in Patel Engineering is to be accepted. The issue would stand finally concluded. If the issue is sought to be raised before another court or judicial forum, considering the principles of issue of estoppel, that court or judicial forum would be estopped from deciding that issue. The finding of the learned judge in that case will have to be set aside. In our opinion, the decision rendered as to the existence of an arbitral agreement is final and not prima facie on the facts of the case.

For the reasons aforesaid, we find no merit in this appeal which is accordingly dismissed.

12. The learned Counsel for the appellant seeks continuation of the interim order granted by this Court for eight weeks. In our opinion, this is not a fit case. Hence, application is rejected.

