

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION APPEAL NO. 22 OF 2015

Manish Narendra Parekh

.Appellant

Vs.

Rishiram Galtiram Bhatt & anr.

.Respondents

Mr. Soni & Ms. Reena Salunkhe i/b Mr. Omkar Kulkarni, Advocate, for the Appellant

Mr. Dipan Merchant, Senior Counsel a/w Mr. Vaibhav Bajpai & Mr. Aamir Ali Shaikh i/b. M/s. I.V. Merchant & Co., for Respondent No.1
Mr. Pratik Shah, Advocate, for the Respondent No.2

CORAM : A.A. SAYED, J.

DATE : 17.07.2015

P.C.

. This Arbitration Appeal impugns the Award dated 2nd June, 2015 passed by the learned Sole Arbitrator in an Application filed by the Appellant/original Claimant under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'The 1996 Act'), inter alia seeking injunction and appointment of Receiver. By the impugned Award, the Application of the Appellant came to be dismissed.

2. The Appellant/original Claimant is the partner of Lala Builders and Developers. Respondent No.1 is the owner of the property situated at Final Plot No.24 (part) of TPS-I, Borivali and

bearing C.T.S. No.2413/21/1 to 19, at Village Eksar, Taluka Borivali (hereinafter referred as 'the said property'). The parties had entered into a Development Agreement on 8th December, 2011. Under the Development Agreement, 48% of the area was to be handed over to the Respondent No.1 after redevelopment. On the said plot of land, there were two buildings viz. one building owned by Society known as 'Prem Kutir Co-operative Society' and another building known as 'Rishiram Nagar' in which there were 60 tenants, out of which 22 rooms are stated to be occupied by Respondent No.1 along with his relatives. The learned Arbitrator in paragraphs 16 to 18 of the impugned award has assigned two reasons for rejecting the reliefs in the Application. Paragraphs 16, 17 and 18 of the impugned award read as follows :

“16. Per Arbitrator : The Claimant is not entitled to any interim reliefs for two reasons.

17. Firstly, the Claimant has not bothered to take any steps to protect his interest for a period of almost 21 months from the time the dispute started i. e. from 7th February 2013 till he filed Section 17 Application on 18th November 2014. There is absolutely no explanation as to why no such steps were taken if there was apprehension as alleged. This indicates complete lack of diligence on the part of the Claimant dis entitling him, the interim reliefs in the matter.

18. Secondly, the admitted position that the original Development Agreement meant for Claimant as also Respondent No.1 were both in the custody of a third party i. e. Respondent

No.2 indicates at least prima facie, that the parties intended the Agreement to be operative on the happening of certain events or that there were certain terms which had yet not been finalized. Otherwise, there was no necessity of keeping the Agreement with a third party. Claimant's explanation that this was so done because Respondent No.1 insisted on this, is unbelievable. Prima facie therefore the Claimant has failed to show existence of a concluded agreement between the parties. ”

3. From a bare reading of the impugned Award, it would be evident that the Applicant had failed to take any steps for a period of 21 months from the time the dispute started which indicates that the Appellant has slept over and was not diligent in asserting his rights in respect of the Development Agreement dated 8 December 2011 though he had approached this Court by filing Application under Section 11 of the 1996 Act. Section 9 of the 1996 Act provides that a party may apply to the Court for an interim measures, either 'before' or 'during' arbitral proceedings or at any time 'after' making of the arbitral award. Thus, the Appellant in the present case could have applied for interim measures even prior to the arbitral proceedings which he has failed to do and there is no reason satisfactory or otherwise assigned for the delay in applying to the Court for interim measures by the Appellant. Under the Development Agreement, the tenants/ members of the Society building were required to co-operate, else the redevelopment could not have been undertaken. It appears that no

concrete steps have been taken in that behalf. There was no consent of 70% of the tenants for redevelopment of the tenanted building. The Development Agreement was kept as a escrow with a 3rd party i.e. Respondent No.2. Prima facie, the observation of the learned Arbitrator that the parties intended the Development Agreement to be operative on the happening of certain events or that there were certain terms which had yet not been finalized and, therefore, there was no concluded Agreement between the parties, cannot be faulted. Moreover, it is seen that under the Development Agreement, there is no consideration paid by the Appellant to the Respondent No.1.

4. Apart from the above, it is required to be noted that Respondent No.1 has executed another Development Agreement dated 31 December 2012 with 3rd party, one M/s. Abhinandan Reality under which payments have been received by the Respondent No.1. Thus, 3rd party rights have already been created in the said property and the said 3rd party is obviously not a party Respondent before the Arbitral Tribunal as there is no Privity of Contract/arbitration agreement inter se between the Petitioner and the 3rd party. Though it is argued by the learned Counsel for the Appellant that the learned Arbitrator ought to have granted a relief by directing that no 'further' 3rd party rights be created, considering the facts and circumstances of the case, I am not inclined to accept this contention. It appears that this

contention was not even canvassed before the learned Arbitrator. In any case, it is required to be noted that the Statement of Claim contains an alternate prayer for damages which can be considered by the Arbitral Tribunal, if such case is made out by the Appellant.

5. The rights of 3rd party viz. M/s. Abhinandan Reality who is not a party to the Arbitration Proceedings would certainly be affected if any reliefs are granted in favour of the Appellant. In ***S.N. Prasad Hitek Industries (Bihar) Ltd. vs. Monnet Finance Ltd. (2011) 1 SCC 320*** and ***Deutsche Post Bank Home Finance Ltd. vs. Taduri Sridhar, (2011) 11 SCC 375***, it has been held that the Arbitrator can decide the dispute only between the parties to arbitration agreement.

6. In light of the above discussion, I am not inclined to interfere with the discretion exercised by the learned Arbitrator in rejecting the Application of the Appellant under Section 17 of the Arbitration and Conciliation Act, 1996. The impugned Award is unexceptionable. The Appeal is dismissed. No order as to costs.

(A.A. SAYED, J.)