IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO No. 5875 of 2015 (O&M)
Date of decision: December 11, 2015

M/s Bigjos Infraestate Ltd.

.. Appellant

v.

M/s Landmark SEZ City Planner Private Limited

.. Respondent

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Sumeet Mahajan, Senior Advocate with
Mr. Amit Kohar, Advocate for the appellant.

Mr. Anil Kshetarpal, Senior Advocate with
Mr. Maninder Singh Saini, Advocate for the respondent.

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Rajesh Bindal J.

1. The appellant has challenged the order dated 23.7.2015, passed by the learned court below, whereby in an application filed by the respondent under Section 9 of the Arbitration & Conciliation Act, 1996 (for short, 'the Act'), interim stay has been granted.

2. Learned counsel for the appellant submitted that the appellant-company was in possession of land measuring 57.82 acres. Besides this, it had possession of 15.08 acres of land on the strength of agreements to sell executed by the landowners, which had been purchased by it. The appellant had been granted a licence for development of the land on 20.8.2007. However, on account of certain unavoidable circumstances, the land could not be developed. The appellant entered into a Joint Venture Agreement

with the respondent on 23.4.2012, in terms of which the land was to be developed. All expenses were to be borne by the respondent. There was sharing of profits. The respondent-company was to pay initially a sum of ₹ 1.50 crores to the appellant. The project was to be launched within six months and completed within a period of two years. The cheques initially issued by the respondent-company for ₹ 1.50 crores were dishonoured, however, later on the amount was paid. The possession of the land was delivered by the appellant to the respondent, however, no development was made. In fact, the respondent-company did not take any step to initiate work on the project.

3. It was further submitted that more than two years after entering into the Joint Venture Agreement, suit for permanent injunction was filed by the respondent-company in Civil Court at Sonepat seeking restrain against the appellant from executing any document or general power of attorney in favour of any other developer except the respondent. In the aforesaid suit, the appellant filed application for stay of suit as there was valid arbitration agreement between the parties. The appellant-company sent notice dated 14.8.2014 to the respondent-company for appointment of the Arbitrator. The respondent-company did not appoint the Arbitrator. The court below, vide order dated 16.8.2014, allowed the application finding a valid arbitration agreement between the parties and proceedings in the suit were stayed. Thereafter, notice dated 18.8.2014 was sent by the appellant to the respondent terminating the agreement. When despite notice dated 14.8.2014, the respondent-company did not appoint the Arbitrator, the appellant filed Arbitration Case No. ARB-50 of 2015 in this court under Section 11(6) of the Act. Despite service of notice, none appeared for the respondent-company. This Court, vide order dated 17.7.2015, appointed Justice Mukul Mudgal, former Chief Justice of this Court, as the arbitrator. The appellant had already nominated its arbitrator and the two arbitrators had appointed a third arbitrator as per the terms of the arbitration agreement. The proceedings before the arbitrator are still pending.

4. It was further argued that the respondent-company was given possession of the property in dispute only as a licensee for development. It was subject to the condition that payments are made, however, the respondent-company having not made any payment or taken any steps for development of the land, it had reverted back to the appellant-company. It is the admitted case of the respondent-company that the appellant-company is going on with construction on the land. It establishes that possession is not with the respondent-company. On failure of the respondent-company to take steps to implement the project, the appellant got the zoning plan approved on 13.7.2015 and even got the licence renewed. Till date, the respondent-company besides belated payment of ₹ 1.50 crores, has not paid the appellant even a single penny. The entire amount invested by the appellant-company in purchasing the land is blocked with no return. The appellant-company had entered into a Joint Venture Agreement with the respondent-company mainly with a view to expedite implementation of the project, but the respondent-company failed to comply with the terms of Joint Venture Agreement.

5. It was further submitted that with the grant of interim stay by the court below, the entire project has come to stand still. The respondent-company had not taken any step. If the interim stay granted by the court below is allowed to continue, the appellant-company will suffer irreparable loss, whereas the respondent-company is not going to lose anything.

6. Learned counsel for the appellant further submitted that he would be satisfied in case the matter regarding interim relief is left open to be decided by the Arbitral Tribunal.

7. On the other hand, learned counsel for the respondent-company submitted that besides Joint Venture Agreement, Memorandum of Understanding was also executed between the parties on the same date, i.e., 23.4.2012. The appellant-company was to execute a registered irrevocable power of attorney in favour of the nominee of the respondent-company for the land measuring 12 acres, 3 kanals and 14 marlas, which it had failed to. As per Joint Venture Agreement, a sum of ₹ 1.50 crores was paid. All the

steps were taken by the respondent-company, however, the appellant-company failed to discharge its obligations. As per Joint Venture Agreement, the profits were to be shared. Escrow account was to be opened, but no steps were taken by the appellant-company. However, he did not dispute the fact that no document has been placed on record by the respondent-company to show that any request or communication was ever sent, in case the appellant had failed to discharge any of the obligation in terms of Joint Venture Agreement or Memorandum of Understanding. Learned counsel further referred to a communication, annexed with the application as Annexure R-4, stating that possession of the land was delivered to the respondent-company. However, the letter does not contain any date. It was claimed that it was executed on the same date when Joint Venture Agreement and Memorandum of Understanding, were executed. He further submitted that in the aforesaid fact situation, the issue to be considered is as to who was at fault. That is pending before the arbitrator. It was merely during the pendency thereof that status quo regarding the property, subject-matter of dispute, has been granted.

8. As regards appointment of arbitrator, learned counsel for the respondent submitted that the respondent-company did not receive the letter sent by the appellant-company for termination of Joint Venture Agreement or for appointment of arbitrator, hence, it could not be responded to. Even notice in the application filed by the appellant-company in this court was also not received, hence, the respondent-company could not put in appearance. He further submitted that despite grant of status quo order by the court below, the appellant-company is still continuing with the construction.

9. Learned counsel for the respondent had objection to the offer made by learned counsel for the appellant regarding leaving the matter pertaining to interim relief to the Arbitral Tribunal.

10. In response, learned counsel for the appellant-company submitted that effort of the respondent-company is to delay the proceedings, as now it has filed an application seeking change of arbitrator. Regarding

payment of ₹ 1.50 crores, it was clarified that the cheques dated 23.4.2012 were bounced and thereafter the respondent-company paid a sum of ₹ one crore on 1.5.2012 and ₹ 50,00,000/- on 19.5.2012.

11. Heard learned counsel for the parties and perused the paper book.

12. In the case in hand, both the parties entered into a Joint Venture Agreement on 23.4.2012 for development of 72.90 acres of land, out of which 57.82 acres was in absolute ownership of the appellant-company, whereas for balance 15.08 acres, the appellant-company either had agreements to sell or collaboration agreements with the landowners. The appellant-company had been granted licence No. 208 of 2007 dated 20.8.2007 for development of the land in question as integrated residential and commercial complex. Salient features of the Joint Venture Agreement are that the respondent-company agreed to pay an amount of ₹ 1.50 crores to the appellant-company. It further agreed to pay another minimum guaranteed sum of ₹ 60 crores towards the investment of the appellant-company and further ₹ 15 crores towards minimum guaranteed profit. The respondent-company was to settle the claims of certain prospective buyers, who had given advance for purchase of plots in the project initially planned by the appellant-company. Possession of the land was given by the appellant to the respondent-company for the purpose of development of the project as licensee. Escrow account was to be opened to be operated jointly by the parties. It was agreed that the project was to be completed within 2 years from the date of agreement, which was to be launched by the respondent-company within a period of six months, however, the time was mutually extendable. The entire investment was to be made by the respondent-company. Clause 24 of the Joint Venture Agreement provided that the same could not be terminated by the appellant-company except on failure of the respondent-company to bring requisite funds for development. In such eventuality, the amount already invested was to be forfeited and the appellant-company to be absolute owner in possession of the property. Clause 34 provided for reference of any dispute between the parties to

arbitrator, one each to be appointed by both the parties, who in turn to appoint a third arbitrator. Similar clause was there in Memorandum of Understanding entered into on 23.4.2012.

13. Though as per the terms agreed between the parties, the plots were to be offered for sale within six months from the date of agreement and project was to be completed within a period of two years, however, the fact remains that the respondent-company has not referred to any communication between the parties in support of the argument that the appellant-company was at fault or that the work on the project started. For the first time, it filed a suit for permanent injunction seeking restrain against the appellant-company from entering into agreement with any third party except the respondent-company pertaining to the property in dispute or for dispossessing the respondent-company from the land. The suit was filed on 6.8.2014. This was despite the fact that there was a valid arbitration agreement between the parties. In the suit, a vague statement was made that the respondent-company had invested huge amount for developing the land besides payment of ₹ 1.50 crores to the appellant-company. No details were furnished. Nothing stated even before this court. It did not refer to any communication sent by the respondent-company to the appellant-company for execution of any document or fulfilment of any part of the duty assigned to it. Immediately after service, the appellant-company filed application under Section 9 of the Act for stay of proceedings in the suit as there was a valid arbitration agreement between the parties. In para No. 2 of the application, it was specifically stated that after entering into Joint Venture Agreement, the respondent-company had not taken any step to execute the project, hence, even ₹ 1.50 crores paid by it stood forfeited. In reply to the application, it was denied that there was any valid agreement executed between the parties. The conduct of the appellant-company was sought to be faulted stating that it had failed to execute power of attorney so as to enable the respondent-company to execute the project. The trial court, vide order dated 16.8.2014, allowed the application finding a valid arbitration agreement between the parties.

14. Thereafter, the appellant-company issued notices dated 14.8.2014 and 18.8.2014 for appointment of the Arbitrator and terminating the agreement, which were not responded to by the respondent-company. On failure of the respondent-company to act in response to the notice dated 14.8.2014 issued by the appellant-company, the appellant-company filed Arbitration Case No. ARB-50 of 2015 in this court seeking appointment of the arbitrator, in which notice was served upon the respondent-company, however, none appeared. This Court, vide order dated 17.7.2015, appointed Justice Mukul Mudgal, former Chief Justice of this Court, as arbitrator. The appellant-company had already appointed arbitrator on its behalf. Both the arbitrators even appointed third arbitrator. It had also been pointed out that the respondent-company had filed some application for change of arbitrator, which is stated to be pending.

15. In view of the aforesaid factual matrix, the respondent-company had not been able to prima facie establish that it had taken any step for execution of the project agreement, which was executed on 23.4.2012. Till such time it filed suit on 6.8.2014, it had paid merely a sum of ₹ 1.50 crores to the appellant-company, whereas the project was to be completed within a period of two years and during that period the appellant-company was entitled to receive a minimum amount of ₹ 75 crores. Further, the conduct of the respondent-company in not replying to the notice for termination of the agreement, for appointment of arbitrator by not responding to the notice and further by not appearing in this court despite service of notice in a petition filed for appointment of arbitrator and further seeking to change the arbitrator shows that effort of the respondent-company is to delay the entire process.

16. In view of my aforesaid discussions, in my opinion, the interim order passed by the court below granting interim stay in favour of the respondent-company is not just and fair, hence, the appeal is allowed and the impugned order passed by the learned court below is set aside.

17. It is made clear that nothing observed herein above will have bearing on the merits of the case pending before the Arbitral Tribunal. This

court has made certain observations considering the material placed on record before this court and in view of the stand of the respondent that he has objection to the consideration of the matter regarding interim relief by the Arbitral Tribunal, the Arbitral Tribunal will decide the issues raised before it in terms of the material placed before it.

(Rajesh Bindal)
Judge

December 11, 2015
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(Refer to Reporter)