* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on April 10, 2015
Judgment delivered on April 21, 2015

\+ **O.M.P. 236/2015**

M/S. TODAY HOMES & INFRASTRUCTURE PVT. LTD. & ORS.

.....Petitioners

Through: Mr.Sandeep Sethi, Sr. Adv. with Mr.Vivek Sibal and Mr.Jitender Ratta, Advocates

versus

M/S. MAPLETREE PROPERTY PVT. LTD. AND ANR.

....Respondents

Through: Mr.Gaurav Pachnanda, Sr. Adv. with Mr.Ashok Rajagopalan and Ms.Shruti Gupta, Advocates for R-1

\+ **O.M.P. 240/2015**

LUDHIANA IMPROVEMENT TRUST

.....Petitioners

Through: Mr.Salil Sagar, Sr. Adv. with Mr.Ajay Pal, Mr.S.Sagar, Mr.Vishal, Mr.Sankalp Sagar, Advs.

versus

M/S. MAPLETREE PROPERTY PVT. LTD. AND ANR.

....Respondents

Through: Mr.Gaurav Pachnanda, Sr. Adv. with Mr.Ashok Rajagopalan and Ms.Shruti Gupta, Advocates for R-1

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in both these petitions is to the interim award dated

November 29, 2014 passed by Justice R.C.Lahoti, former Chief Justice of India as a Sole Arbitrator in the matter of disputes between the parties pending adjudication before him, whereby the learned Arbitrator has held that the respondent No. 1 in these petitions is entitled to the recovery of Rs. 15,55,20,000/- from the petitioners herein with simple interest calculated at 12.5% per annum from the date of payment till the date of realization. The 70% of the above amount with interest was directed to be paid by the petitioner No. 1 in OMP 236/2015 and 30% of the amount with interest was directed to be paid by the petitioner in OMP 240/2015.

2. For the purpose of convenience, the petitioner No. 1 in OMP No. 236/2015 shall be referred as "*M/s. Today Homes*" and all the petitioners in OMP No. 236/2015 (who are also respondent Nos. 2 to 5 in OMP No. 240/2015) as the "*Consortium*"; Petitioner in OMP No. 240/2015 (who is respondent No. 2 in OMP No. 236/2015) as "*LIT*" and the respondent No. 1 in both the petitions as the "*claimant*".

3. The facts as noted by the learned Arbitrator in the impugned interim award dated November 29, 2014 are as under:

4. The *claimant* and the *Consortium* are all companies registered under the Companies Act. The *LIT* is a Trust within the meaning of Section 3 of the Punjab Town Improvement Act, 1922. On June 28, 1999, the State Govt. published a Developmental and Housing

Accommodation Scheme under Section 41 of the Punjab Town Improvement Act, 1922. On September 13, 1999, the *LIT* decided to embark upon a project to build an international city centre market with modern facilities, called as Ludhiana City Centre (LCC) on land measuring 28.5 acres (approx.).

5. On January 14, 2005, the Govt. granted permission to *LIT* for calling expression of interest for the purpose of LCC. The *LIT* published advertisement vide which various parties were invited to present their bids. Pursuant thereto, on being found successful, on May 18, 2005, a Letter of Intent was issued to *M/s. Today Homes* by the Chairman, *LIT*. Accordingly, an agreement dated May 24, 2005 was signed by the then Chairman of *LIT* with *M/s. Today Homes*. An Escrow Account was opened with HDFC Bank on the basis of a tripartite agreement executed between *M/s. Today Homes* & *LIT* and HDFC bank on August 25, 2005, whereby, it was decided that the entire proceeds from the booking of saleable area had to be deposited in the Escrow Account opened with HDFC Bank and 30% of the amount was to be credited to the trust and 70% to the *M/s. Today Homes*.

6. That on August 29, 2005, the then Chairman of *LIT* executed a power of attorney in favour of the respondent No. 1 authorizing the respondent No. 1 to sell units on behalf of the *LIT*. It is noted that on

September 14, 2006, a notification was issued by the Department of Local Govt. dissolving the trust and appointing Mr.Kaler as Administrator of the Trust. On October 4, 2006, *LIT* vide resolution No. 204 resolved to cancel the GPA executed by the Chairman in favour of *M/s.Today Homes*. The said GPA was thereafter revoked on October 5, 2006. The fact of revocation of GPA was communicated to the *claimant*. It is necessary to state here that vide agreement dated January 10, 2006, the *claimant* purchased an area admeasuring 1,50,000/- sq. ft. super area on the lower ground floor of the building to be constructed in the said Centre for a total consideration of Rs. 51.84 Crores at Rs. 3456 per sq. ft. along with the undivided proportionate share in the land in the said Centre from the *Consortium*. The said agreement was executed by *M/s. Today Homes* as an attorney of *LIT*. The transaction between the *LIT* and *M/s. Today Homes* failed which has given rise to several disputes.

7. In an Arbitration Case No. 76/2007 between *M/s. Today Homes* and *LIT*, the Punjab and Haryana High Court vide its order dated October 25, 2013 appointed the Sole Arbitrator to adjudicate all the disputes arising between the parties relating to concession agreement dated May 24, 2005 along with jurisdiction/power to the Sole Arbitrator to decide the issue of validity of the concession agreement dated May 24, 2005 and jurisdiction of the Arbitrator.

8. The *claimant* sent a notice dated October 19, 2007 to the *Consortium*, calling upon them to settle the disputes by referring the matter to arbitration. The *Consortium* did not reply to the legal notice. The *claimant* filed an Arbitration Application No. 113/2008 in this Court. The matter was taken to the Supreme Court of India. As noted by the learned Arbitrator, the *LIT* had submitted an affidavit stating that the entire money was lying in an Escrow Account. The Supreme Court directed that, the money be kept in Fixed Deposit. Before the Supreme Court, the *LIT* had admitted of having received 30% of the amount paid by the *claimant*, it disputed its liability under the said agreement. Thereafter, the *claimant* issued a statutory notice dated January 18, 2010 under Section 98 of the Punjab Town Improvement Act, 1922, wherein, it was stated that *LIT* having admittedly received 30% of the amount paid by the *claimant* to the *Consortium*/*LIT*, the *LIT* cannot now dispute the existence of the agreement or its liability to pay the amount received by the *Consortium*/*LIT*. The adjudication of the disputes between the parties before the learned Arbitrator was in view of an order passed by this Court on March 14, 2014, whereby Justice R.C.Lahoti was appointed as a Sole Arbitrator to adjudicate all claims and counter claims of the parties arising out of the agreement to sell dated January 10, 2006. In fact, as noted by the learned Arbitrator in para 19.1 of the impugned interim

award, the Punjab and Haryana High Court vide its order dated October 25, 2013 in Arb. Case No. 76/2007 had also appointed Justice R.C.Lahoti to carry out the task of settlement of disputes inter se between the parties through the mode of arbitration. Suffice to state, the learned Arbitrator is considering the disputes between the *claimant* and the *Consortium/LIT* in terms of agreement dated January 10, 2006 and also disputes inter se between the *Consortium* and *LIT* in terms of concession agreement dated May 24, 2005 between the *M/s.Today Homes* and *LIT*.

9. In the statement of claim filed by the *claimant*, the principal relief sought is recovery of Rs. 15,55,20,000/- with interest @ 12.5 % p.a. compounded quarterly. The *claimant* has also claimed damages including loss of interest and rental income. The said amount is being claimed from the *Consortium* and *LIT* jointly and severally. The learned Arbitrator on the basis of the pleadings has framed the following issues on July 25, 2014:

> *1. Whether in view the plea taken by respondent No. 5, the present claim petition is maintainable under the law?*
>
> *2(a) Whether the agreement dated 10.01.2006 is valid in law*
>
> *(b) Whether the said agreement is legally enforceable against respondent No. 5?*

3. Whether the sale and transfer of the site/space in the city LCC Project by the respondent No. 1 i.e. M/s. Today Homes and Infrastructure Pvt. Ltd. to the claimant, M/s. Mapletree Property Pvt. Ltd. is legal and binding on the respondents or any of them?

4(a). Whether the Concession Agreement dated 24.05.2005 between respondent No. 1 i.e. M/s. Today Homes and Infrastructure Pvt. Ltd. and respondent No. 5 i.e. Improvement Trust, Ludhiana is valid in law?

(b) Whether the power of attorney dated 19.08.2005 issued by respondent No. 1 to respondent No. 2 is valid and legal?

5(a) Whether the claimants are entitled to refund of the principal amount of Rs.15,55,20,000/-?

(b) If yes, from which of the respondents?

6. Whether the claimants are entitled for interest @12% p.a. compounded quarterly, as per Cl. 4(h) of the Agreement dated 10.01.2006?

7. Whether claimants are entitled to differential interest as claimed in para 21(c) of the SoC?

8. Whether the claimants are entitled to loss of rental income?

9. Whether respondent No. 1 has failed to fulfil its obligations under the Agreement dated 10.01.2006?

10. Relief and Costs?

10. That in the meantime, the *claimant* had filed an application under Section 31(6) of the Arbitration and Conciliation Act, 1996 (Act) and

had sought for an interim award for refund of 70% of Rs.15,55,20,000/- with interest @ 12.5 % p.a. from the *Consortium* and for refund of balance from *LIT*. The learned Arbitrator was of the view that the factum of agreement dated January 10, 2006 in favour of the *claimant*, the payment of Rs. 15,55,20,000/- by the *claimant* to the *M/s. Today Homes* and a deposit of the amount in Escrow Account have not been denied. The learned Arbitrator noted the principal defence of *Consortium* that the *M/s. Today Homes* was acting as a power of Attorney holder of *LIT* a disclosed principal and thereafter, whatever would be the liability, it would be of the *LIT*. The learned Arbitrator also noted that *LIT* on the other hand sought to shift the entire responsibility on the *M/s. Today Homes* by submitting that the entire series of transactions entered into by the *Consortium* with *LIT* through its the then Chairman was vitiated by fraud and illegality. The learned Arbitrator noted the stand of the *claimant* and the reliance placed by the *claimant* on the agreement dated January 10, 2006 and the judgment of the Supreme Court dated October 14, 2008 in Civil Appeal No. 6104/2008, Ludhiana Improvement Trust and Anr. Vs. Today Homes and Infrastructure Pvt Ltd. The learned Arbitrator has also noted that the facts as noted, have not been disputed. He has also noted the stand of the *M/s. Today Homes* that the money withdrawn from the Escrow Account has been invested in the project and there is no balance money available in the hands of the *M/s. Today Homes*. Further, the *M/s. Today Homes* was acting only in the capacity of agent of *LIT* whose name having been disclosed to the *claimant*, it is only the *LIT* which can be held liable to the *claimant* and the *claimant* can enforce its right only against *LIT*. The learned Arbitrator was of the opinion that as far as the *claimant* is concerned, its claim is rightful and cannot be denied. The dispute is only between the *Consortium* and *LIT* inter se and that is the dispute which would really call for adjudication and that adjudication would determine the apportionment of liability between them along with the liability of payment of interest. The payment of compound interest would call for consideration of certain legal and equitable issues but payment of simple interest cannot be denied, and he was of the view that the liability of the *Consortium* and *LIT* towards the *claimant* should be satisfied in the proportion of 70% and 30% and the precise liability and other equitable issues can be left open at the stage of final adjudication. The learned Arbitrator has also observed that the principles for passing an interim award are akin to Order XII Rule 6 of the Code of Civil Procedure, and being convinced that the relief sought by way of an interim award is the one which in any case, cannot be denied at the stage of the final award, the Arbitrator shall not hesitate in passing of an interim award, and went on to grant the relief to the *claimant* which is already referred to above.

<u>Submissions in OMP No. 236/2015</u>

11. Mr. Sandeep Sethi, learned Senior Counsel appearing for the *Consortium* would submit that his clients had a right to sell the space to the third party. The revenue was to be deposited in an Escrow Account and the amount was to be proportionately divided in the ratio of 70% and 30% between them and *LIT* respectively. The power of Attorney which was executed in favour of the *M/s. Today Homes*, was cancelled. He would state that the *M/s. Today Homes* had received an amount of Rs.54 Crores against 70% revenue received by them for selling the space. It is his submission that the *Consortium* has put in their own money over and above Rs.54 Crores in the project. According to him, the claim of the *claimant* cannot be adjudicated without determining the inter se disputes between *Consortium* and *LIT*. In other words it is his case that the liability of the claims has to be determined. He would also state that the interim award of the learned Arbitrator is pre mature as the learned Arbitrator framed issues on the arbitrability/maintainability of the claims and also whether the *claimant* perse is entitled to refund of the amount 15,55.20,000. According to him, till such time, issues of these nature are decided by recording evidence of all the parties concerned, the claim of the *claimant* for Rs.15,55,20,000/- could not have been allowed. He

would state that there is serious issue of force majeure. According to him when it is not the case of the *claimant* that the possession of the property has to be delivered by *Consortium* then the liability of the claim made by the *claimant* cannot be fastened upon *Consortium* even to the extent of 70%. He would state that all the acts of *Consortium* before the termination of the agreement dated May 24, 2005 and Power of attorney, dated August 29, 2005 would bind the *LIT*. If that be so, then the liability to the extent of the claim of the *claimant* need to be discharged by the *LIT*. It is his contention that an interim award under Section 31 (6) can only be rendered on an admission. Mere saying that they had received money is not an admission of liability to pay back He would also state that the admission must be clear unequivocal and would refer to the judgment of the Supreme Court in the case reported as ***2010 (6) SCC 601 Jeevan Diesels and Electricals Vs. Jasbir Singh Chadha and another (HUF).*** He would state that the Arbitrator has not referred to the pleadings of the parties to form an opinion on admission on the part of the *Consortium*. In the last, it was his case that the *claimant* was in the knowledge of the nature of relationship between the *Consortium* and the *LIT* i.e. of an agent and principal and the claim cannot be directed against the agent. He would rely upon Section 204, 222, 223, 230 of the Contract Act to contend that the liability cannot be fastened upon his clients.

<u>Submissions in OMP 240/2015</u>

12. Mr. Salil Sagar, learned Sr. Counsel appearing for *LIT*, the petitioner in OMP 240/2015 would also on similar lines, contend that the learned Arbitrator having framed issues which included the issues on the maintainability of the Claim petition; validity of agreement dated January 10, 2006; enforceability of the agreement; entitlement of the *claimant* for refund of the principal amount of Rs.15,55,2000/-, the learned Arbitrator could not, till such time evidence is led and the maintainability is determined, have rendered the interim award. According to him, it was the case of the *LIT* that the agreement dated May 24, 2005 and power of attorney dated August 29, 2005 were vitiated by fraud and in violation of the statute and the rules made thereunder. Hence, any right accrued to the third party based on such agreement/power of attorney would also be actuated by fraud and being illegal cannot be enforced against the *LIT*.

<u>Submissions on behalf of the *claimant* (respondent No. 1, in both the petitions):</u>

13. On the other hand, Mr. Gaurav Pachnanda, learned Sr. Counsel appearing for the *claimant* in both the petitions would justify the interim award by stating that it was not the case of the opposite parties, the agreement dated January 10, 2006, was actuated by fraud/wrong doing on

the part of the *claimant*. In other words it was his case that the *claimant* is a bona fide purchaser having purchased the area on a consideration. He would also state that the receipt of the money by *M/s. Today Homes* and the *LIT* has been accepted by them. He would also state that the said parties have also accepted that the amount so received from the *claimant* was deposited in the Escrow account from where 70% of the amount was transferred to *M/s. Today Homes*. According to him even *LIT* has accepted the deposit of its 30% which is now lying in an FDR pursuant to the directions of the Supreme Court. It is his case that none of the opposite parties have denied the entitlement of the *claimant* to the amount paid by the *claimant* pursuant to the agreement dated January 10, 2006. He has drawn my attention to the pleadings in Claim Petition and the reply filed by *LIT* and *Consortium* to submit that the receipt of money and entitlement to the claim not being disputed is a sufficient admission to enable the learned Arbitrator to grant the amount of Rs.15,55,20,000/- with interest @ 12.5% per annum. He has also drawn my attention to the averments made in paragraphs No. 2 , 4, 5, 6 of the application filed by the *claimant* under Section 31(6) of the Act and the corresponding reply of the opposite parties to highlight that the opposite parties shifting the liability of payment on each other. He would also draw my attention to the award given by the learned Arbitrator more specifically, paras 26 and 28 to state that the learned Arbitrator had rightly come to a conclusion that the *Consortium*/*LIT* except shifting the liability on each other have not denied the claim of the *claimant* which itself is an admission. He would rely upon the provisions of Sections 64 and 65 of the Indian Contract Act, 1872 to state that it is a case of restitution and have been rightly awarded by the learned Arbitrator.

14. Having heard the learned counsel for the parties, insofar as the submission of Mr. Sandeep Sethi, in view of the issues, the interim award could not have been rendered, is concerned, suffice to state, the same have to be seen and understood from the perspective at whose instance, the same have been framed. It is noted, the said issues were framed on the objections of the *LIT* in para 64 and 65 of its reply wherein it has averred that the agreement dated May 24, 2005 and the power of attorney dated August 29, 2005 executed by the then Chairman of the *LIT* in favour of *M/s. Today Homes* were in violation of instruction/statute/rules and are non-est in law. Similarly, the consequential agreements entered by the *M/s. Today Homes* with the third parties including the *claimant* are also hit by fraud being against statutory provisions and such agreements are not enforceable against *LIT* and claim need to be dismissed on the ground of lack of jurisdiction. Meaningfully read, it is the case of *LIT* that any claim of the third party cannot be enforced against it. I note

from the petition, OMP No. 236/2014, the *Consortium* has conceded that the issue of maintainability is based on the pleadings of *LIT*. The said issues relate to the maintainability, enforceability of the claims and agreement dated January 10, 2006 against the *LIT* only. The said issues even if decided in favour of *LIT*, would not absolve the *Consortium* of its liability towards the *claimant*.

15. Further, from a reading of the respective stand of the *Consortium*/*LIT*, it is clear, they are trying to shift the liability on each other. The aforesaid aspect has been dealt with by the learned Arbitrator in para 26 and 28 of the impugned interim award with which I am in agreement.

16. I agree with the submission of learned Senior Counsel for the *claimant*, that the *Consortium*/*LIT* has not denied the receipt of money from the *claimant* nor stated that the *claimant* was not entitled to the amount claimed. This negates the submission of Mr.Sethi that there was no admission of the *Consortium*, accepting the liability towards the *claimant*. Further, I note, the learned Arbitrator in para 29, was of the view that any interim award by the Arbitrator can be passed on principles akin to Order XII Rule 6 of the Code of Civil Procedure on admissions or on the availability of adequate material on record with a satisfaction that the relief sought for by way of interim award is one which cannot in any

case, be denied at the stage of final award. In this regard, I note for benefit, the Supreme Court in ***Uttam Singh Duggal and Co. Ltd. Vs. United Bank of India and Ors., 2000 (7) SCC 120,*** that admissions are of many kinds including, implied from pleading by non-traversal. The judgment of the Supreme Court in the case of ***Jeevan Diesels and Electricals (supra)*** would not be applicable to the facts of this case. In that case, as noted by the Supreme court in para 12, the parties have confined their case of admission to their pleadings only; whereas, in the case in hand, the conclusion of the learned Arbitrator is that, an interim award can be on the basis of admission or on availabi*lit*y of adequate material on record, and is satisfied that the relief sought for by way of interim award cannot be denied at the final stage. There is a conclusion of the learned Arbitrator that, to the extent interim award is being passed, the entitlement of the *claimant* cannot be denied.

17. On the submission of force majeure and the one related to Sections 204, 222, 223, 230 of the Contract Act, the same would not effect the claim of the *claimant*. Similarly, the submissions made by Mr.Sagar are primarily inter-se issues with the *Consortium*, which would be adjudicated by the learned Arbitrator and, to that extent, the learned Arbitrator has kept the issues open by observing as under:

"29. The principles for passing an interim award are akin to Order XII Ru1e 6 of the Code of Civil Procedure. Rather, I feel that the power vesting in an arbitrator to make an interim award is wider in its scope. Once the arbitrator forms an opinion, either based on admissions on or availability of adequate material on record and is satisfied that the relief sought for by way of interim award is one which cannot in any case be denied at the stage of the final award, the arbitrator shall not hesitate in passing an interim award. All the relevant facts providing foundation for passing of an award are set out in para 27 herein above. To the extent to which the interim award is being passed, the entitlement of Claimants cannot be denied, not even doubted. There is no reason why the Claimants should wait till the stage of passing of final award for such monetary relief as is legitimately and undoubtedly due to them. To the extent to which the dispute may be arguable, calling for adjudication after a detailed hearing, is being left open and untouched."

20. In view of the above discussion, I do not see any merit in the petitions. The same are accordingly dismissed.

(V.KAMESWAR RAO)
JUDGE

APRIL 21, 2015
akb