

\$~

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

Decided on : 17.07.2015

+ **FAO(OS) 322/2015, C.M. APPL.11287-11288/2015**

+ **FAO(OS) 320/2015, CAV.628/2015, C.M. APPL.11279-11280/2015**
LUDHIANA IMPROVEMENT TRUST Appellant

Versus

M/S. MAPLETREE PROPERTY & INFRASTRUCTURE PVT.
LTD. & ORS. Respondents

Through: Sh. Salil Sagar, Sr. Advocate with Sh. Ajay Pal, Sh. Samarth Sagar, Sh. Vishal Yadav and Sh. Sankalp Sagar, Advocates, for appellants.
Sh. Gaurav Pachnanda, Sr. Advocate with Sh. Ashok Rajagopalan and Ms. Shruti Gupta, Advocates, for Respondent No.1.
Sh. Vivek Sibal, Sh. Rahul Sharma, Ms. Nivedita Bhaskar and Ms. Pooja. M. Saigal, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

%

1. The present appeals are preferred by the Ludhiana Improvement Trust (hereafter "LIT") questioning the judgment and order dated 21.04.2015 of the learned Single Judge in a petition (filed by LIT), being OMP No. 240 of 2015, under Section 34 of the Arbitration and Conciliation Act, 1996 in (hereinafter "the Act"). LIT had challenged the Interim Arbitral Award dated 29.11.2014 (hereafter "the Interim Award") of the arbitral tribunal,

under Section 31 (6) of the Act. The Single Judge declined to interfere with the award and consequently dismissed LIT's objections to it. The Interim Award was with reference to an arbitration between the first Respondent in the present appeal, M/s Maple Tree Property Pvt. Ltd (hereafter referred to as MPTL), the Claimant and the second Respondent Today Homes and Infrastructure Pvt. Ltd. (hereafter referred to as "THIL"). The Appellant was a party to the arbitral proceedings; impleaded as the fifth Respondent in the claim of MPTL.

2. The brief facts are that a LIT, pursuant to Punjab Government approval, sought bids from interested parties for the construction of the Ludhiana City Centre (hereafter "LCC project"). THIL had successfully bid in this process; it had earlier entered into a Consortium arrangement with other builder/parties- impleaded as the second, third and fourth respondent along with THIL. THIL was the lead member and power of attorney holder of the Consortium. An agreement was signed with THIL on 24.05.2005, by the Chairman LIT, for enabling the Consortium to go ahead with development and sale of constructed building. A Tripartite Agreement was entered into between THIL, LIT and HDFC Bank on 25.08.2005. The Tripartite agreement stated that the entirety of the proceeds received from the booking of the saleable area was to be deposited in an Escrow Account opened with HDFC Bank. The amounts received were to be credited 30:70 between LIT and THIL respectively. On the strength of the said power of attorney a contract was entered into by THIL on 10.01.2006 with MPTL for sale of 1,50,000 sq.feet of constructed area in the building forming part of the project, with proportionate undivided area of the land, for a consideration of ₹51.84 crores. This agreement contained an arbitration

clause. Likewise, the agreement with THIL/consortium also contained an arbitration clause.

3. On 14.09.2006 a notification was issued by the Punjab Department of Local Government whereby the LIT was dissolved. This was followed by a resolution dated 04.10.2006, which decided that the power of attorney executed in favour of THIL would be cancelled. Subsequently, on 05.10.2006, the power of attorney was revoked. On the same day a letter was sent to MPTL appraising them of this development.

4. The arrangement between it THIL and LIT collapsed. MPTL sent a notice dated 19.10.2007 to both the said parties, requesting them to settle the dispute with regard to the sale of land under the Contract to arbitration. When this notice went unanswered by all the Respondents (as listed in the Interim Award), MPTL filed Arbitration Application No. 113 of 2008 under Section 11(6) of the Act. The matter eventually reached the Supreme Court wherein LIT submitted an affidavit that the entire money from the Contract was lying in the Escrow account. LIT also admitted before the Supreme Court to having received 30% of the said amount. On 18.01.2010 MPTL issued a statutory notice under Section 98 of the Punjab Town Improvement Act, 1922, whereby they asserted that having admitted to receiving 30% of the sale consideration, LIT could neither dispute the existence of the Contract nor refute their liability to return the amount received thereunder.

5. This Court then appointed Justice R.C. Lahoti (Former Chief Justice of India) as the Sole Arbitrator to adjudicate the dispute between the parties. MPTL claimed refund of the principal amount of ₹15,55,20,000/- paid to THIL along with interest @12.5% per annum compounded quarterly from the date of the payment till 31.03.2014. MPTL also claimed damages

including loss of interest and rental income. After the filing of Statement of Claim and replies (by LIT and THIL) MPTL sought for an interim award under Section 31(6) of the Act, for the refund of the principal amount with interest, 70% of which is to be paid by THIL and the balance 30% to be paid by LIT.

6. The Arbitral Tribunal (consisting of a Sole Arbitrator, Shri Justice R.C. Lahoti, retired Chief Justice of India) passed an interim award which held that MPTL is entitled to the recovery of the principal amount of ₹15,55,20,000/- along with simple interest @12.5% per annum from the date of the payment till the date of realisation, the division of the payment taking place in the manner stated in the preceding paragraph (70% by THIL and 30% by LIT). The Arbitral Tribunal was of the view that since the factum of the agreement, the payment of the money by the claimant, and a deposit of the amount in the Escrow account were not denied, the entitlement of MPTL must be satisfied. Observing that the principles for passing an interim award are akin to the principle embodied in Order XII Rule 6 of the Civil Procedure Code, the Ld. Arbitrator opined that the relief sought by MPTL was one which could not be denied in any eventuality and would subsist irrespective of the final apportionment of the liabilities between THIL and LIT *inter se*.

7. By the impugned common order (made on objections under Section 34 by the appellant LIT and THIL, for itself and the consortium) the Single Judge upheld the Interim Award. Noting that *inter se* disputes between LIT and THIL or the validity of the contracts between them whether or not they were vitiated by fraud or not would not affect the monetary relief of MPTL, the Single Judge held that that the same was legitimately and undoubtedly

due to them. On the point of the import of the principles of Order XII Rule 6 CPC, the Ld. Single Judge cited *Uttam Singh Duggal and Co. Ltd. v. United Bank of India and Ors.* 2000 (7) SCC 120, that admissions are of many kinds, including those implied from pleading by non-traversal. Accordingly, the Court dismissed the objections.

8. At the outset, it may be noticed also that THIL too had lodged an appeal against the impugned order of the learned Single Judge, which upheld the interim award and directed payment of 70% of the amount claimed by MPTL in its Section 31 (6) application. However, on 14.07.2015, the said appeal (FAO (OS) No. 299/2015) was permitted to be withdrawn, as requested.

9. LIT argues, both in its appeal and through its senior counsel, Shri Salil Sagar, that the Interim Award discloses patent illegality on the face of the record. In support, he argues that for an order of award on admission, the plea which is relied on as an admission should be unambiguous and unequivocal. It is argued that furthermore, courts have insisted that any plea should be seen in the overall context rather than in isolation to determine if it amounts to an admission. Counsel relied on the reply of LIT to the application for interim award on admission, filed before the arbitral tribunal to drive home his point. It was suggested that the arbitral tribunal had struck several issues which required trial. The alleged admission (of LIT/THIL's) liability could not be determined without considering the overall effect of the other pleas. Learned senior counsel particularly highlighted the fact that the legality of the agreement – dated 10.1.2006 between THIL and MPTL itself was in issue; the controversy was whether it was unenforceable, being void. Such being the case, without a full appreciation of all the

circumstances after the parties were afforded opportunity to lead evidence, it was not permissible for the arbitral tribunal to draw an interim award.

10. Learned counsel laid particular emphasis on the fact that in terms of Clause 5 of the contract between MPTL and THIL, which reads as follows:

“It has been agreed that the Purchaser shall have the option to cancel this Agreement in case the Concession agreement signed by LIT in favour of the Consortium/company is cancelled. In such an event the Company shall be liable to immediately refund all the amounts paid by the Purchaser to the Company along with interest at the agreed rate, i.e. 12.5% (which shall be quarterly compounded) per annum within 30 days of such cancellation.”

It was argued that the arbitral tribunal completely ignored the said contractual term, which rendered the impugned interim award suspect in the eyes of law and the learned Single Judge fell into error in not holding such omission to be a patent error on the face of the record.

11. Learned senior counsel submitted that the Interim Award also suffered from patent illegality for the reason that the well established principles applicable to decree on admissions, under Order XII Rule 6, Code of Civil Procedure, were given a go-bye. It was submitted that unless the plea amounts to an unequivocal and categorical admission, a direction allowing a claim or part of it finally, is not only unwarranted but results in miscarriage of justice. He also stated that neither the arbitral tribunal nor the learned Single Judge cared to consider and extract – by way of juxtaposition- the claimant’s plea and the alleged admission. Learned counsel relied upon the ruling of the Supreme Court in *Jeevan Diesel & Electricals Limited v. Jasbir Singh Chadha & Another*, (2010) 6 SCC 601 and submitted that for the grant of a decree on admissions under Order XII

Rule 6 CPC, the admission would have to be unequivocal or unambiguous and not one which is qualified. To the same effect, *Uttam Singh Duggal & Co. v. United Bank of India & Ors* 2000 (7) SCC 120 was relied upon.

12. Mr. Gaurav Pachnanda, learned senior counsel appearing on behalf of the respondent (MPTL) urged this court not to interfere with the impugned judgment of the learned Single Judge. He argued that the Ld. Single judge, by the impugned order, upheld the interim award, which is based on a sound principle of common law, embodied in Order XII Rule 6 CPC. He stated that given that neither LIT nor THIL ever disputed that amounts were paid by MPTL and that the power attorney in favour of THIL, categorically admitted its receipt, in the absence of any assertion how those amounts could be retained either by LIT or THIL, based on legal principle, the interim award was unexceptionable. In fact, the money received was admitted to have been deposited in the Escrow Account and subsequently transferred to the FDR pursuant to the directions of the Supreme Court. MPTL, therefore, as a bonafide third party is entitled to restitution under Sections 64 and 65 of the Indian Contract Act, 1872. In order to substantiate their assertion of an admission on the part of LIT, MPTL draws the Court's attention to the reply filed by LIT to the Claim Petition. Specifically, MPTL refers to paragraphs 2, 4, 5, and 6 of the application under Section 31(6) and the corresponding reply of LIT.

13. The main thrust of the grant for relief in both the Interim Award as well as the judgment of the Single Judge – in this case, has been the LIT's admission to the entitlement of MPTL to the money tendered by them under the Contract. The impugned judgment and award highlight that the irrefutability of the claim of MPTL, as evidenced by the admissions of

receipt of consideration by LIT and THIL. The relevant paragraph from the Interim Award where the Arbitral Tribunal relies on Order XII Rule 6 of the Civil Procedure Code is as follows:

“The principles for passing an interim award are akin to Order XII Rule 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 or on 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.”

14. Before a factual examination of whether the material on record and the admission is clear enough to warrant an interim award on MPTL's claims it is useful to recount the broad principles of Order XII Rule 6 of the Code of Civil Procedure, 1908. In *Karam Kapahi v. Lal Chand Public Charitable Trust* (2010) 4 SCC 753 the Supreme Court held that the principle of Order XII Rule 6 could be pressed into service when there existed no controversy with regard to a particular claim. In *Charanjit Lal Mehra and others v. Kamal Saroj Mahajan (Smt.) and Another* (2005) 11 SCC 279 it was held that the provision is undoubtedly wide in its import and that admissions may be inferred from the facts and circumstances of the case. Further, in *M/s Jeevan Diesels* (supra) it was held:

“Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. This question, namely whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam Kapahi (supra) may be unexceptionable they cannot be applied in the instant case in view

of a totally different fact situation.”

15. In *Uttam Singh Duggal* (supra) the Supreme Court with respect to Order XII Rule 6 stated that wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed, the principle will apply. The Court in this case also categorically refused to restrict the scope of the principle by refusing to hold that only those admissions which were made in the pleadings would attract its applicability. The question always is whether the pleadings taken as a whole point to an unambiguous and clear admission of the kind contemplated by law. The relevant standard spelt out in *Uttam Singh* and *Jeevan Diesel* (supra) that the Courts have to adopt, while considering pleadings and seeing if a decree on admission is to be drawn, is whether there is a “*clear and unequivocal admission of the case*” of the party defending the application. It is also not in dispute that there is no golden rule about what constitute as “*clear and unequivocal admission*”; the Court has to proceed on a case specific approach having due regard to the overall effect of the pleadings and documents. This is discernible from the decision in *Gilbert Vs. Smith*, 1875-76 (2) Ch 686, which was relied upon by the Supreme Court in *Jeevan Diesel case* (supra).

16. It is, therefore, evident that the Court cannot base its decision to decree (or not to grant a decree) in a suit in terms of Order XII Rule 6 CPC only on the basis of a particular pleading or admission; the overall effect of the pleadings and documents of the concerned parties are to be judicially weighed. In other words, the Court has to keep in mind the fact that what seems plainly an admission could well be explained by the litigant making it,

during the course of the trial. Moreover, the controlling expression under Order 12 Rule 6 is that Court “*may*”. It is important to analyse this aspect because admissions either in the pleadings or in a document or in the course of the statement cannot be viewed in isolation.

17. Coming to the facts of the case, this Court is of the opinion that the validity or otherwise of the parent agreement and/or the power of attorney will not affect the primary responsibility of the THIL and LIT to refund the principal amount. Refuting the validity of the contracts and agreements in question is a matter entirely different from questioning the very *existence or factum* of a contract and the money that has been disbursed by a party under it, the party at the time of payment of the consideration, genuinely believing that the contract is valid and subsisting. What is vital is that for all intents and purposes and within the opinion of all parties involved, the parent agreement, the power of attorney as well as the Contract, all three were legal and subsisting at the time of the receipt of the consideration from MPTL. This Court finds that the argument of MPTL, that no matter which way the issue of validity of the parent agreement and the power of attorney is decided, LIT cannot be absolved of its liability to return what it has gained through the Contract, contains merit. In other words, while the adjudication with regard to the validity of the parent agreement and the power of attorney may have two different possible conclusions, the result with respect to MPTL shall remain the same, i.e. there exists only one possible outcome, that being the entitlement of MPTL to the refund of the consideration paid under the Contract. Illustratively, if the parent agreement is adjudged to be valid, there shall exist no question as to the claim of MPTL. If adjudged to

be void by reason of fraud, there is no escaping the consequences of Section 65, the same becoming applicable and necessitating that all benefits derived under the void contract to be returned. Section 65 of the Indian Contract Act, 1872 states as follows:

“65. Obligation of a person who has received advantage under void agreement, or contract that becomes void.- When an agreement is discovered to be void, or when a contract becomes, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.”

18. Plainly, Section 65 not only covers contracts that subsequently become void *but also* agreements that are *discovered* to be void. Hence, even if the parent agreement and power of attorney are adjudged to have been void, the refund of the amounts paid by MPTL will have to be actuated. If at all there exists a question with respect to the entitlement of MPTL, it exists with reference to the ultimate quantum it may be entitled to (which may include damages and additional interest on the sums) along with the consequent apportionment of the liability.

16. Proceeding to the facts which constitute the material and admissions on the basis of which the Interim Award has been passed, in Paragraph 27 of the Interim Award, the Ld. Arbitrator takes note of the basic undisputed facts of the case:

- “(i) that the Claimant did pay an amount of Rs. 15,55,20,000 to the Respondent No. 1*
- (ii) That the amount was received by the Respondent No.1 at a point of time when the power of attorney executed by the Respondent No. 5 in favour of Respondent No. 1 was in force.*
- (iii) That the amount was deposited in an Escrow account*

wherefrom 70% of the amount has gone to and been utilized by the Respondent No. 1 and the balance 30% has been appropriated by the Respondent No.5.

(...)

(v) That from the money collected from the Claimant, the Respondent No. 1 (representing Respondent Nos. 1 to 4) and the Respondent No. 5 have been benefitted in the proportion of 70:30 although in the agreement between the Claimants and Respondent No. 1 the latter has undertaken to refund the money paid by the Claimant in case the Project may fail or fall.”

19. It can be seen from the evidence on record that there is a clear, unambiguous admission of the receipt of the consideration paid by MPTL and subsistence of the Contract at the time of such receipt. Ld. Counsel for LIT seems to draw a distinction between admission of mere receipt of the money and a clear admission of liability. An admission as to a fact which establishes the liability of a party, such that there is no scope for discussion, is an admission which will entitle the arbitrator to make an interim award awarding relief which is ultimately inevitable. This Court is therefore of the opinion that all that is necessary to give rise to the liability of LIT towards MPTL is in fact, the receipt of the money. This Court holds the other submission (of LIT) that by virtue of Clause 5 of the contract, the claimant can recover amounts only from THIL is unsound and without any merit. Firstly clause 5 employs the expression “company” which, in the first paragraph of the agreement has been defined compendiously as including the LIT. Thus, it cannot distance itself from liability. Secondly, it is undisputed that 30% of the amounts did enure to LIT’s benefit. The Court is therefore satisfied that the impugned judgment of the learned Single judge correctly appreciated and applied the parameters for considering objections

to an interim award (under Section 31 (6)), preferred under Section 34, i.e patent illegality, or the award being contrary to public policy or contract between the parties, whilst rejecting the appellant's pleas.

20. As a result of the foregoing discussion, this Court does not find any merit in the appeal and affirms the judgment of the Single Judge. The appeals are accordingly dismissed along with the pending applications without any order as to costs.

JULY 17, 2015



**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**