

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.214 OF 2016**

Aditya Builder & Contractors & Ors.	..Applicants
Vs.	
Gurunath Ramchandra Narvekar & Ors	..Respondents

**WITH
CIVIL REVISION APPLICATION NO.215 OF 2016**

Aditya Builder & Contractors & Ors.	..Applicants
Vs.	
Gurunath Ramchandra Narvekar & Ors	..Respondents

Mr. P. B. Shah i/b Mr. M. V. Rawool for the Applicants in Civil Revision Application No.214 of 2016

Mr. A. B. Avhad i/b Mr. M. V. Rawool for the Applicants in Civil Revision Application No.215 of 2016

Mr. Vishal Kanade a/w Mr. A. K. Rao for the Respondent Nos.1a & 1b in CRA No.214 of 2016

Mr. Dilip Rai a/w Mr. A. K. Rao for the Respondent Nos.1a & 1b in CRA No.215 of 2016

CORAM : R. M. SAVANT, J.

DATE : 7th APRIL, 2016

PC.

1 The above Civil Revision Applications take exception to the identical orders both dated 28-4-2015 passed by the learned District Judge Sindhudurg at Oros, by which order, the Appeals in question being Appeal No.1 of 2014 and Appeal No.2 of 2014 filed by the above-named Applicants came to be dismissed and resultantly the order dated 1-7-2014 passed by the Learned Arbitrator i.e. the Respondent No.11 allowing the applications filed under Section 16 of Arbitration and Conciliation Act, 1996, by the Respondent No.1 came to be confirmed. Since the above Civil Revision Applications

involve common facts, they can be conveniently disposed of by a common order.

2 The Respondent No.1 herein is the original claimant before the Arbitral Tribunal comprising of the Respondent No.11 herein. The arbitration proceedings came to be initiated pursuant to the notice dated 27-8-2011 issued by the Respondent No.1 in terms of clause (34) of the two Memorandum of Understandings (MOU's) dated 2-2-2006. By the said MOU's the Respondent Nos.2 to 10 in Civil Revision Application No.214 of 2016 and the Respondent No.2 in Civil Revision Application No.215 of 2016, had agreed to sell the lands in question mentioned therein to the Respondent No.1 herein i.e. the claimant. The cause for invocation of the arbitration clause was the factum of the Respondent Nos.2 to 10 executing Sale Deeds in respect of CTS No.2159 and CTS Nos.2152 and 2153 in favour of the Applicants herein who are developers, which Sale Deeds have been executed on 7-2-2011. Since pursuant to the notice dated 27-8-2011, the Respondents did not communicate the decision either to appoint Arbitrator or to go for arbitration, the Respondent No.1 i.e. the claimant in terms of the arbitration clause which is clause 34 of the MOU's appointed Justice S.M. Jhunjhunwala as the Arbitrator. However, it seems that some objections was raised to the said appointment as a result of which Justice S. M. Jhunjhunwala recused himself and the Respondent No.1 thereafter appointed the Respondent No.11 as the

Arbitrator.

The Respondent No.1 filed his statement of claim before the Respondent No.11 and the claim made therein was to the following effect :-

“(a) that it be declared that the Suit Memorandum of Understanding dated 2-2-2006 at Exhibit 'D' hereto in respect of Suit Property more particular described in Exhibit 'A' hereto is valid, subsisting, binding and enforceable against the Respondents and that the Sale Deed dated 7-2-2011 at Exhibit 'L' hereto is not binding upon the Claimant;

(b) that the Respondents be ordered and decreed to specifically perform the said Suit Memorandum of Understanding dated 2-2-2006 at Exhibit 'D' hereto in respect of suit property more particularly described in at Exhibit 'A' hereto.”

The Respondent claimant died after the claim was filed and the proceedings are now being prosecuted by the Respondent Nos.1A and 1B who are his heirs.

3 The proceedings commenced before the Respondent No.11 and an objection was raised on behalf of the Applicants in both the above Civil Revision Applications that since the Applicants were not party to the MOU's dated 2-2-2006, the Learned Arbitrator had no jurisdiction to enter upon the arbitration involving the Applicants. The said objection to the jurisdiction of the Arbitrator was treated as Misc Applications. The Learned Arbitrator ruled upon his jurisdiction and held that he has the jurisdiction to enter upon the

arbitration in view of the fact that the Applicants herein had stepped into the shoes of the original owners i.e. the Respondent Nos.2 to 10. The said order of the Learned Arbitrator is dated 1-4-2013. The Applicants have challenged the said order by way of Appeals before the Learned District Judge. The Learned District Judge -1 is ceased of the matter and he has passed order dated 8-12-2015 by which order issues were framed in the said Appeals. The order passed by the Learned District Judge is a subject matter of Writ Petition St.1063 of 2016, which is a companion matter to the above Civil Revision Applications. Pending the said arbitral proceedings, the Respondent No.1 also filed Misc Applications for injunction and the injunction sought was to the following effect :

(a) that pending the hearing and final disposal of the arbitration case the Arbitral Tribunal Receiver or such other fit and proper person be appointed as receiver in respect of the suit property more particularly described in Exhibit a to the Statement of Claim with all powers under Order XL Rule 1 of the Civil Procedure Code 1908.

(b) that pending the hearing and final disposal of the arbitration case, the Respondents their servants and agents, family members and any person claiming through them, be restrained by an order and injunction of this Hon'ble Arbitral Tribunal in any manner carrying and continuing any development and construction of any buildings or any kind of structure/s on the suit property more particularly described in Exhibit A to the statement of claim and or using the Floor Space Index (FSI) of the suit property in any other property.

(c) that pending the hearing and final disposal

of the arbitration case, the Respondents their servants and agents, family members and any person claiming through them, be restrained by an order and injunction of this Hon'ble Arbitral Tribunal from in any manner dealing with alienating, disposing off, encumbering or creating any third party rights or parts with the possession of and/or inducting third party in the said property or any part thereof including any flats and other premises in the building/s that may be constructed in the suit property more particularly described in Exhibit A to the Statement of Claim.

4 In so far as the said Misc Applications for injunction are concerned, it is required to be noted that the Applicants and the Respondents did not file any reply. The Learned Arbitrator considered the said Misc Applications and has by his order dated 1-7-2014 allowed the application for injunction in terms of prayer clause (c). The gist of the reasoning of the Learned Arbitrator as can be seen from the said order dated 1-7-2014 was to the effect that the Applicants herein had purchased the properties in question with notice of the claimant the Respondent No.1 as the Sale Deed dated 7-2-2011 executed in favour of the Applicants by the Respondent Nos.2 to 10, made a reference to Regular Civil Suit No.80 of 2006 filed by the brother of the Respondent No.2 after the Respondent No.1 herein i.e. the claimant had published a notice as regards his claim in respect of the properties in question on the basis of the MOU's executed by the Respondent Nos.2 to 10. The Learned Arbitrator held that balance of convenience is in favour of the Respondent No.1 herein as also irreparable loss would be caused to the

Respondent No.1 if the injunction is not granted as the buildings have already been constructed and if the flats are allowed to be sold then the Respondent No.1 would be left without any recourse in the event the Award is passed in his favour. The Learned Arbitrator has also recorded that the claimants who are the heirs of the original claimant were always ready and willing to perform their part of the contract as contained in the MOU's, but the MOU's could not be completed because of the suit filed by the family member of the Respondent No.2 herein i.e. the Respondent No.1 before the Arbitral Tribunal. However, the Respondent No.2 herein was not able to fulfill his obligations under the MOU's on account of the opposition from his other family members.

5 The order dated 1-7-2014 passed by the Learned Arbitrator allowing the Misc Applications for injunction came to be challenged by the Applicants by filing Appeals under Section 37 of the Arbitration and Conciliation Act, 1996. The said Appeals were heard by the Learned District Judge, Sindhudurg. Before the Learned District Judge, written submissions were filed on behalf of the Respondent No.2 herein who was the Respondent No.1 in the Appeals. The claimants also filed their written submissions. The Learned District Judge has by the impugned orders dated 28-4-2015 dismissed the Appeals and has confirmed the orders dated 1-7-2014 passed by the Learned Arbitrator. The Learned District Judge has reiterated the findings of the Learned Arbitrator, that the Applicants have purchased the properties in

question with notice of the claim of the Respondent No.1 herein i.e. the claimant. The Learned Arbitrator has also confirmed the findings recorded by the Learned Arbitrator that if the injunction is not granted, the Respondent No.1 herein would suffer irreparable loss, if the third party rights are allowed to be created in respect of the flats in question, the same would prejudice the Respondent No.1 herein. The learned District Judge observed that the learned Arbitrator has considered all the facts whilst considering whether there is a prima facie case made out by the claimants, whether the balance of convenience is in favour of the claimants and whether irreparable loss would be caused to the claimants. The learned District Judge observed that the learned Arbitrator has rightly held that there is a need for granting injunction in terms of prayer clause (c). Before the Learned District Judge a contention was sought to be raised opposing the grant of injunction on the ground that the Arbitrator did not have the jurisdiction to enter upon the arbitration as the Applicants were not party to the MOU's. The said contention was not accepted by the Learned District Judge on the ground that the Learned Arbitrator having decided that he has the jurisdiction to enter upon the arbitration, has to proceed with the arbitration and the remedy of the aggrieved party is to challenge the order ruling upon the jurisdiction at the time of challenge to the Award. The Learned District Judge, Sindhudurg accordingly dismissed the Appeals by the impugned orders dated 28-4-2015.

6 On behalf of the Applicants contentions were urged by the Learned Counsel Mr. Shah and Mr. Avhad. It was the contention of Mr. Shah that since the Respondent No.1 has prayed for damages of Rs.3.50 crores, the Learned Arbitrator erred in granting injunction in terms of prayer clause (c) as then there would be no irreparable loss to the Respondent No.1 if the damages are claimed. Reliance is sought to be placed on the judgment of the Apex Court in the matter of **Best Sellers Retail (India) Pvt Ltd. Vs. Aditya Birla Nuvo Ltd & Ors.**¹. It was also the submission of Mr. Shah that though MOU's were executed in the year 2006, the arbitration proceedings have been initiated in the year 2011 and the relief by way of injunction was sought long after the development had started and was completed and therefore the Learned Arbitrator as well as the Learned District Judge erred in granting and confirming the said injunction.

The Learned Counsel Mr. Avhad would submit that since the Applicants are not party to the MOU's, the said fact ought to have been a relevant consideration which ought to have weighed with the Learned Arbitrator and the Learned District Judge whilst considering the grant of injunction and confirmation of the same. The said submission was sought to be buttressed by Mr. Avhad by relying upon a Judgment of a learned Single Judge of this Court in the matter of **Rakesh S Kathotia Vs. Milton Global Ltd & Ors.**² It was therefore the submission of Mr. Avhad that the Learned

1 2012 AIR(SC) 2448

2 2014(4) Bom.C.R.512

Arbitrator had erred in granting injunction having regard to the fact that the Applicants were not party to the MOU's

7 Having heard the Learned Counsel for the parties I have considered the rival contentions. Before the Learned Arbitrator, it is an undisputed position that the Applicants herein have not filed their reply to the Misc Applications for injunction filed in the two arbitral proceedings. The Learned Arbitrator has therefore proceeded on the basis of non-traverse. In so far as the other Respondents are concerned, i.e. the Respondent Nos.2 to 10 who are the original owners of the properties in question, though Mr. Shah sought to contend that in fact a reply was filed before the Learned Arbitrator, he has not been able to support the said contention by any record either of the said reply being served upon the Respondent No.1 or by any endorsement made by the Learned Arbitrator that any reply was taken on record. In my view, therefore in the absence of the replies filed by the contesting parties and especially the Applicants who have stepped into the shoes of the original owners, the Learned Arbitrator was right in proceeding on the basis of non-traverse and accordingly granted injunction in favour of the Respondent No.1 in terms of prayer clause (c) . However, notwithstanding the non-traverse of the averments made in the applications by the Applicants and the Respondent Nos.2 to 10, the Learned Arbitrator has prefaced the grant of injunction by his short findings recorded on the aspect of prima-facie case,

balance of convenience and irreparable loss. The Learned Arbitrator has observed that if the injunction is not granted and in the event an award is passed in favour of the Respondent No.1 then prejudice would be caused to the Respondent No.1. It is required to be noted that the ground of delay has been raised by the Applicants for the first time in the present proceedings.

8 In so far as the Appeals are concerned, the Lower Appellate Court i.e. the learned District Judge, Sindhudurg has adverted to the antecedent facts and as indicated above has reiterated the findings of the Learned Arbitrator that the Applicants are purchasers of the properties in question with notice of the claim of the Respondent No.1 herein i.e. the claimants. The Lower Appellate Court has also confirmed the findings of the Learned Arbitrator in so far as the aspects of prima-facie case, balance of convenience and irreparable loss is concerned.

9 Now coming to the contention urged on behalf of the Applicants by Mr. Avhad that the Applicants herein being not a party to the MOU's no injunction could be granted against the Applicants. It is required to be noted that the said ground was urged by the Applicants whilst questioning the jurisdiction of the Learned Arbitrator to enter upon the arbitration. The said ground was not countenanced by the Learned Arbitrator by holding that since the Applicants herein have stepped into the shoes of the original owners i.e.

the Respondent Nos.2 to 10 herein they are bound by clause (1) of the said MOU's and therefore he has the jurisdiction to enter upon the arbitration. The said orders of the Learned Arbitrator ruling upon his jurisdiction is the subject matter of separate proceedings. However, in the context of the submission made, it would have to be held that once the Learned Arbitrator has ruled upon his jurisdiction and held that he has the jurisdiction to enter upon the arbitration then he has to proceed with the arbitration including the consideration of the applications either under Section 9 or Section 16 of the said Act. In the instant case, what was required to be seen by the Learned Arbitrator was whether the Respondent No.1 i.e. claimants had made out a case for grant of injunction pending the arbitral proceedings. That having been done by the Learned Arbitrator and confirmed by the Learned District Judge, the said contention cannot be accepted.

In so far as the contention of the Learned Counsel Mr. Shah that since the Respondent No.1 claimant has prayed for damages of Rs.3.50 crores, the grant of injunction was not necessitated. In support of the said contention reliance was sought to be placed on the judgment of the Apex Court in the matter of **Best Sellers Retail (India) Pvt Ltd's Best Sellers Retail (India) Pvt Ltd. Vs. Aditya Birla Nuvo Ltd & Ors.** case (supra)

10 In my view, there cannot be any absolute proposition that in every case where damages are prayed in the alternative, then injunction has to be

refused. It is well settled that the grant of injunction is within the discretion of the authority or the Court who is considering the same. In the facts of the present case, the exercise of discretion cannot be said to be unwarranted or erroneous. It is required to be noted that out of the properties in respect of which the MOU's have been executed, the Applicants are developing the lands which are totally admeasuring 1555 sq.mtrs. which is almost 3/4th of the area of the lands which are covered by the said MOU's, as the area of the CTS Nos.2159, 2152 and 2153 totally admeasures to 1555 sq.mtrs. while the area of the remaining CTS Nos.2154, 2159A and 2160 which are the subject matter of the MOU's is only about 325 sq.mtrs. Hence if the Applicants are allowed to go ahead with creating third party rights in respect of the developed property, the same would obviously prejudice the Respondent No.1 i.e. the claimant in the event an Award is ultimately passed in his favour. The judgment in *Best Sellers Retail (India) Pvt. Ltd.'s* case (supra) is clearly distinguishable. In the said case the Plaintiff was a limited company, which had claimed the damages under various heads and quantified the damages totally at Rs.20,12,44.398/-. The Apex Court held that the Plaintiff being a company cannot be said to suffer from any hardship or irreparable loss having regard to the fact that it can be adequately compensated by way of damages. The Apex Court in the facts of the said case had held that the Trial Court and the High Court had erred in granting and confirming the injunction. However, in the instant case apart from the fact that the claimant is an individual, if the

Petitioner is allowed to create third party rights in respect of the flats which are constructed on the buildings which are on lands which constitute 3/4th area of the lands covered by MOU's then as held by the learned Arbitrator and the learned Principal Judge-I, hardship and irreparable loss would be caused to the Respondent No.1 i.e. the claimant. In my view, therefore, the judgment in ***Best Sellers Retail (India) Pvt. Ltd.***'s case (supra) has no application.

Similarly the judgment in ***Rakesh S Kathotia's*** case (supra) would not further the case of the Applicants as in the said case an application under Section 9 of the said 1996 Act was under consideration wherein a contention was raised on the basis that injunction was sought against a party which was not a party to the Arbitration Agreement. It is in the facts of the said case that injunction under Section 9 of the said 1996 Act was refused. In the instant case as indicated above the preliminary issue of jurisdiction has been decided and the contention that the Applicant is not a party to the Arbitration Agreement and therefore the learned Arbitrator does not have jurisdiction has been rejected.

11 It is also required to be borne in mind that the Applicants have invoked the revisionary jurisdiction of this Court under Section 11 of the Civil Procedure Code. In the facts and circumstances of the case, the exercise of jurisdiction by the Learned Arbitrator in granting injunction and confirmation

of the same by the Learned District Court cannot be said to suffer from any error of jurisdiction for this Court to interdict in its revisionary jurisdiction. The Civil Revision Applications are accordingly dismissed.

[R.M.SAVANT, J]