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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 407 OF 2016

Nirmal Infrastructure Pvt. Ltd. ...Petitioner
vs
Aanant Developers Pvt. Ltd. ...Respondent.

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Mr S.V. Kamdar Sr. Advocate a/w Mr Simil Purohit, Ashok Paranjpe, Mr Deepan Dixit, Ms Radhika Dixit i/b MDP & Partners for the Petitioner
Mr Virag Tulzapurkar Sr. Advocate a/w Cyrus Ardeshir, Mr Rahul Dwarkadas and Ms Prachi Dhanani i/b Veritas Legal for the Defendant.

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CORAM : S.C. GUPTE, J.

MARCH 03, 2016

P.C. :

This is a petition under Section 37 of the Arbitration and Conciliation Act, 1996 ("Act"), challenging an order passed by the Arbitral Tribunal under Section 17 of the Act. By the impugned order, the Arbitral Tribunal rejected the Petitioner's application for interim reliefs. The prayer in the interim application had sought temporary injunction against the Respondent restraining it from alienating or encumbering or creating third party rights in the property which is the subject matter of the arbitration reference.

2 The disputes between the parties arise out of a development agreement entered into between them on 31 March 2008. Under this development agreement, the Respondent agreed to acquire and transfer or grant development rights to the Petitioner in respect of land aggregating 375 acres at an agreed consideration; the Petitioner had agreed to pay, in consideration, an interest free deposit of Rs.49,78,20,000/-. The Petitioner's case is that the Petitioner had already paid a substantial sum from out of this amount and was put in possession of the subject property; but that the Respondent prevented the Petitioner from commencing development by reason of failure of the former to

perform its obligations under the contract which were pre-requisites for commencement of the development work. It is the grievance of the Petitioner that the Respondent, thereafter, wrongfully terminated the development agreement and the power of attorney by its letter dated 3 February 2015. The termination of the development agreement and power of attorney is challenged by the Petitioner before the Arbitral Tribunal. The petitioner seeks specific performance of the development agreement.

3 On the basis of this case, the Petitioner had originally applied to the Arbitral Tribunal under Section 17 of the Act for the very same relief which is sought in the present application. At that time, after considering the rival cases of the parties, the Tribunal came to the conclusion that the Petitioner had failed to make out a *prima facie* case in respect of specific performance claimed by it. The Tribunal also came to the conclusion that the Petitioner could not be said to likely to suffer any irreparable loss if the prayer for interim relief was refused. The Tribunal also held that the balance of convenience was in favour of the Respondent and not the Petitioner. In the premises, the Tribunal refused to grant any interim reliefs to the Petitioner in respect of the subject property. This order of the Arbitral Tribunal was carried by the Petitioner before this Court in an appeal under Section 37 of the Act. By his detailed order and judgment dated 26 November 2015, a learned Single Judge upheld all the findings arrived at by the Arbitral Tribunal and dismissed the Petitioner's appeal. In his appellate order, the learned Single Judge not only confirmed the finding of the Arbitral Tribunal that in the event of succeeding in the arbitral reference, the Petitioner could be compensated in terms of money but also noticed that *prima facie* there was no readiness and willingness on the part of the Petitioner to comply with its obligations by commencing construction within the time stipulated under the development agreement. The learned Single Judge, in the premises, observed that the Arbitral Tribunal had rightly rejected the application for interim measures.

4 The basis of the present application before the Arbitral Tribunal, for the same relief as claimed in the earlier application, namely, seeking a restraint on alienation and creation of third party rights in respect of the suit property, is

that after the earlier order of the Arbitral Tribunal, on 16 December 2015, the Petitioner carried out another search in the record of Registrar of Companies; that this search indicated that there was no reserve or surplus or other money available with the Respondent to satisfy the award of damages that may be passed in the arbitration reference. The Arbitral Tribunal found that what was sought to be put forth for the consideration of the Tribunal in the second application was available or could have been available to the Petitioner by exercise of due diligence when the Tribunal considered the Petitioner's earlier application. The Tribunal was of the considered opinion that no case for considering afresh the prayer for grant of interim relief was made out. The application was, accordingly, rejected by the Arbitral Tribunal.

5 Mr. Kamdar, learned Senior Counsel for the Petitioner, submits that the second application before the Arbitral Tribunal was based on a change of circumstances and that the Arbitral Tribunal was bound to take into account the changed circumstances, which warranted granting of interim reliefs.

6 Mr Tulzapurkar, learned Senior Counsel appearing for the Respondent, submits that the order of the Arbitral Tribunal on the first application under Section 17 was carried in appeal before this Court; this court, whilst dismissing the appeal by a detailed speaking order, not only accepted the findings of the Arbitral Tribunal, but also indicated additional reasons why the interim relief should be refused. He submits that under the doctrine of merger the order of the Arbitral Tribunal on the earlier application had merged with the appellate order passed by this Court under Section 37 of the Act. He also submits that the material which is sought to be produced in the new application was practically the same material which was already available when the Petitioner had carried out its first search in the records of ROC and noted the financials of the Respondent in the balance sheet for the year ending 31 March 2014. He submits that under Explanation IV to Section 11 of the Code of Civil Procedure, 1908 ("CPC") or principles analogous thereto, the Petitioner cannot be permitted to seek a fresh consideration for grant of ad-interim reliefs refused to it earlier.

7 The Petitioner's first application under Section 17 claimed the very same relief, which is now sought in the second application before the Arbitral Tribunal. Even the financials of the Respondent company (which were disclosed in the balance sheet of the company for the year ending 31 March 2014) were placed before the Arbitral Tribunal, after regrouping and rearranging the various figures. The financial circumstances of the Respondent including its unsecured loans, investments, advances received against the development agreement were all put forth before the Arbitral Tribunal. Based on this material, the Arbitral Tribunal came to the conclusion that there was no *prima facie* case for grant of specific performance and that even the considerations of irreparable loss and balance of convenience were against the Petitioner. Mr Kamdar is not right in submitting that what prompted the Petitioner to move the Arbitral Tribunal in its second application was a change of circumstances. What is alleged is the circumstances faced by the Respondent as on 31 March 2015, that is to say, for a period much prior to the date when the Arbitral Tribunal decided the first application. It may be that these circumstances came to the knowledge of the Petitioner after the first order was passed by the Arbitral Tribunal. Even in that case the principles of res-judicata and particularly, constructive res-judicata require the Petitioner to satisfy the Court that the matter might and ought to have been made a ground of attack in the earlier application. There is nothing to indicate that the Petitioner could not have made this material a ground of attack in its earlier application. In fact, as I have noted above, more or less same or substantially similar material was actually placed by the Petitioner before the Arbitral Tribunal when the first application for interim reliefs was made. Nothing, in that case, could have prevented the Petitioner from formulating the very plea which is made in the present application back then, when the first application was heard.

8 Learned counsel for the Petitioner submits that the Arbitral Tribunal, in its impugned order, has not considered the impact of non-availability of the benefit of Section 52 of the Transfer of Property Act to the petitioner, since the matter is pending before an Arbitral Tribunal and not before a court of law. Once

again, non-availability of the benefit of Section 52 was a matter which was already before the Arbitral Tribunal or, at any rate, ought to have been urged before it when the first order refusing interim relief was passed by it. It does not reflect on any change of circumstances. Merely because an additional argument is urged by the Petitioner before the Court, the order passed by the court earlier need not be revisited.

9 In that view of the matter, there is no merit in the petition. The petition is dismissed. There shall be no order as to costs.

(S.C.GUPTE J.)