IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMM. ARBITRATION PETITION NO. 163 OF 2016

M/s.Raunak Infra (Girgaum) ...Petitioner
vs.
Premji Kara Charitable Trust ...Respondents

Mr. Aliabbas Delhiwala, instructed by Mr. Gouresh C. Mogre, for the Petitioner.
Mr. Shyam Mehta, Senior Advocate, instructed by Ms. Neeta Solanki for the Respondents.

CORAM: S.J. KATHAWALLA, J.
DATE: 22nd December, 2016

P.C.:

1. The above Petition is filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") seeking an order and injunction against the Respondents from in any manner creating any third party rights in respect of the property, being the piece and parcel of land bearing S. No. 175 corresponding C.T.S. No. 1323,Collector's new number 1/783, 795, 3148 ad 235 of Girgaon Division admeasuring about 799 sq.yds. i.e. 668.06 sq.mtrs. along with a building standing thereon known as "Suratwala Building", bearing Street Nos. 211-211A, consisting of two wings being Front and Rear Wings, both comprising of ground plus four upper stories, situate, lying and being at Raja Rammohan Roy Marg, Girgaum, Mumbai-400 004 ("the Suit Property").

2. The Petitioner is a Partnership Firm having its Office at the address shown in the cause-title of the Petition. The Petitioner is carrying on business of construction and redevelopment of properties. The Respondent is a Public Trust registered under the provisions of the Bombay Public Trust Act, 1950 under Registration No. E-398 (Bom.) and is sued through its Trustees.

3. The Respondent is the owner of the Suit Property. Since the structures on the Suit Property are in a dilapidated condition, the Respondent invited offers vide Public Notice dated 10th September, 2012, issued in the Free Press Journal and in the Marathi newspaper Navshakti for the sale of the said property subject to the permission being granted by the Charity Commissioner, Mumbai in respect thereof. The highest offer received for the purchase of the Suit Property was of the Petitioner. In view thereof, after due negotiations and discussions, the Respondents, subject to receipt of the sanction from the Charity Commissioner, agreed to sell the Suit Property to the Petitioner, subject to tenancies on "as is where is basis" at and for a lumpsum consideration of Rs. 5,31,00,000/- payable by the Petitioner to the Respondent, as per the terms and conditions agreed upon between the Petitioner and the Respondent.

4. Pursuant to the said MoU, the Petitioner paid the Respondent a sum of Rs. 51,10,000/- as earnest money deposit and a further sum of Rs. 2,14,50,000/- as part-payment of the consideration amount, leaving a balance sum of Rs. 2,65,60,000/- towards the sale consideration of the said property. Clauses 4 and 6A of the MoU dated 11th December, 2012 are reproduced hereunder:

"4. *That the balance sum of Rs. 2,65,40,000/- (Rupees Two Crores Sixty Five Lacs forty Thousand only) shall be payable by the Purchasers to the Vendors within two weeks from the date and time of receipt of accord, sanction and permission from the Hon'ble Charity Commissioner to sell the said property without committing any default or excuse."*

"6 (A) That the Vendors shall with the help of the Purchasers as well as at the cost of the Purchasers attempt that the Application for sale before the Hon'ble Charity Commissioner is disposed off within a period of twelve (12) months from the date of submission of application to the Hon'ble Charity Commissioner."

5. The hearing in the above Petition commenced on 13th December, 2016.

6. According to the Petitioner, the Respondent failed to obtain sanction from the Charity Commissioner within the stipulated period of 12 months. The Petitioner therefore made efforts for getting the sanction from the Charity Commissioner and the same was obtained on 27th January, 2016. According to the Petitioner, due to considerable delay in obtaining the sanction from the Charity Commissioner, the Petitioner had to face some technical modification, which in the meantime were carried out by the State Government and the Municipal Corporation of Greater Mumbai in the Development Control Rules and Regulations. According to these modifications the Fire Fighting Authority insisted on 6 meters of marginal open space from the road side in each and every building project for their vehicle manoeuvring purpose. Due to the said Rule the Petitioner's technical team is facing difficulty to design the redevelopment project

and hence the Petitioner is making efforts to purchase the adjacent property for combined development.

7. According to the Petitioner, they were shocked to receive a Notice dated 31st March, 2016 from the Respondent's Advocate calling upon the Petitioner to pay an amount of Rs. 2,65,40,000/- within a period of two weeks from the date of receipt of the said notice. The Petitioner vide their letter dated 20th April, 2016 requested the Respondent to withdraw the said Notice and to cooperate with the Petitioner for quick development in order to complete the transaction. The Petitioner assured the Respondent of its willingness to comply with the terms and conditions of the said MoU dated 11th December, 2012. The Respondent thereafter vide their Advocate's letter dated 20th April, 2016 cancelled/terminated the MoU dated 11th December, 2012 and also stated that the amount paid by the Petitioner to the Respondent stood forfeited. Further correspondence was exchanged by and between the parties wherein both the parties made allegations against each other. In fact, the Respondent through their Advocate's letter sent an interim reply to the Petitioner's Advocate’s letter dated 29th July, 2016, and without prejudice to its rights and contentions called upon the Petitioner to deposit the balance consideration within seven days. The Petitioner thereafter took a stand that the permission granted by the Charity Commissioner had lapsed and they would pay the balance consideration upon extension of time by the Charity Commissioner. The Petitioner has filed an application before the Charity Commissioner seeking extension of time for executing the conveyance in favour of the Respondent. It is

submitted on behalf of the Petitioner that the Respondent has miserably failed to carry out their part of the contract and they apprehend that the Respondent may create third party rights in the said property and therefore they are entitled to the reliefs as sought in the Petition, restraining the Respondents from creating third party rights in respect of the said property.

8. The Learned Advocate appearing for the Respondent has taken me through the MoU as well as the correspondence annexed to the Petition and has submitted that by the time the Charity Commissioner's sanction was obtained, admittedly there were some changes in the Development Control Rules and Regulations because of which the Respondent was unable to develop the said property. The Respondent was therefore not willing to pay the balance amount until they could negotiate and enter into a Deed qua an adjacent property for a combined development. The Petitioner was therefore not ready and willing to perform its part of the contract and the Respondent cannot be blamed for the same. The question therefore of granting any relief in favour of the Petitioner, who has committed default in complying with the agreed terms of the contract, does not arise. It is submitted that the Respondent has no defence qua its conduct of not performing its part of the contract. The Petitioner is trying to blame the Respondent for being responsible for the delay in getting the permission for sale of the said property from the Charity Commissioner, though clause 6A of the MoU dated 11th December, 2012 categorically stated that, the "*Vendors shall with the help of the purchasers as well as at the cost of the purchasers* ***attempt*** *that the*

Application for sale before the Hon'ble Charity Commissioner is disposed off within a period of twelve months from the date of submission of application to the Hon'ble Charity Commissioner". It is submitted that the sanction granted by the Charity Commissioner lapsed on account of the default on the part of the Petitioner in making payment of the balance consideration within a period of two weeks from the date of the sanction by the Charity Commissioner. However, Mr. Shyam Mehta, Senior Advocate appearing for the Respondent, without prejudice to the rights and contentions of the Respondents, submitted before the Court that the Respondent is sure that the Petitioner does not have the money to pay the balance consideration even at this stage and are not ready and willing to perform their part of the contract, the Court may to test their bona fides call upon them to at least deposit the balance consideration in this Court within a period of one week from today, and if the same is done the Charity Commissioner can be directed to expedite the extension of the sanction and the Respondents will transfer the property in favour of the Petitioner.

9. In my view, the application of the Petitioner is completely lacking in merits. Clause 6A of the MoU which is reproduced hereinabove clearly states that the Respondent shall with the help of the Petitioner as well as at the cost of the Petitioner, 'attempt' that the application for sale before the Charity Commissioner is disposed off within a period of 12 months from the date of submission of the application to the Charity Commissioner. Obviously the Respondent cannot set out the specific period by which the Charity Commissioner would grant his sanction to

the application filed before him seeking his permission for sale of the said property. Therefore the clause did not make it mandatory on either of the parties to obtain the sanction of the Charity Commissioner within a period of 12 months, but provided that an attempt would be made to obtain the sanction within a period of 12 months. That the Office of the Charity Commissioner took more than 12 months to grant the sanction as sought, cannot be held against the Respondent. The Petitioner has not terminated the MoU on the ground that they were not interested in pursuing the same after a lapse of 12 months from the date of submission of the application to the Charity Commissioner. The Petitioner accepted the sanction granted by the Charity Commissioner on 27th January, 2016. However, the Petitioner failed to pay the balance consideration to the Respondent as agreed under clause 4 of the MoU within a period of two weeks from the date of such sanction. The Respondent was therefore justified in sending a Notice dated 31st March, 216 to the Petitioner calling upon them to pay the balance amount of Rs. 2,65,40,000/- within a period of two weeks from the date of receipt of notice. The Petitioner failed to do so but instead blamed the Respondent for the delay in obtaining the sanction of the Charity Commissioner. However, in their reply letter dated 20th April, 2016, the Petitioner recorded in paragraph 13 that " *We hereby undertake that we shall finalise the deal with the adjoining plot owners as early as possible and we shall complete the transaction with your clients within a period of _____ months from the date of execution of the requisite documents with adjoining plot owners"* thereby admitting that the balance amount was not paid to the

Petitioner because the Petitioner was carrying out negotiations with the adjoining plot owners with which the Respondents were not concerned. Interestingly, even in its reply letter the Respondents have left the period blank within which they would complete the transaction with the Respondent. Though the Respondents thereafter terminated/cancelled the MoU by Notice dated 5th August, 2016, once again without prejudice to their rights and contentions they gave an opportunity to the Petitioner to pay the balance amount of Rs. 2,65,60,000/- within seven days, which the Petitioner failed to do and instead continued to blame the Respondent for not performing their part of the contract which allegation, in my view, is false and incorrect to the knowledge of the Petitioner. The Petitioner has therefore miserably failed to perform their part of the contract i.e. by making payment of the balance amount of Rs. 2,65,60,000/- within two weeks from 27th January, 2016, as agreed. The question therefore of granting any relief to the Petitioner restraining the Respondent from creating third party rights in respect of the said property does not arise. However, only since the Senior Advocate appearing for the Respondents informed the Court that if the Petitioner is willing to deposit the entire balance amount in Court within a period of one week, the Respondents even at this stage are willing to transfer the property in favour of the Petitioner at the same consideration which was agreed upon in the MoU dated 11th December, 2012, this Court on 13th December, 2016 enquired from the Advocate appearing for the Petitioner, whether the Respondents were willing to accept the offer. This Court also informed the parties that if the amount is so deposited by the Petitioner, the

Court will direct the Charity Commissioner to extend the sanction granted by him on 27th January, 2016, at the earliest. The Learned Advocate appearing for the Petitioner after taking instructions informed the Court, that the Petitioner is willing to deposit the balance amount of Rs. 2,65,60,000/- with the Prothonotary and Sr. Master of this Court on or before 20th December, 2016. In view thereof on 13th December, 2016, the following Order was passed:

> *" "The learned Advocate for the Applicant states on instructions that the Applicant will deposit an amount of Rs. 2,65,40,000/- with the Prothonotary and Senior Master of this Court on or before 20th December, 2016.The statement is accepted. Stand over to 22-12-2016."*

10. Today when this matter is called out the learned Advocate for the Petitioner has expressed the inability on the part of the Petitioner to deposit the said amount of Rs. 2,65,60,000/-. In view thereof it is established beyond any doubt that the Petitioner is not in a position to perform its part of the contract and therefore the question of granting an injunction against the Respondents from creating third party rights in respect of the said trust property does not arise. In fact, if any relief as prayed by the Petitioner is granted, the same would amount to penalising the Respondent for the default committed by the Petitioner.

In view thereof the above Petition is dismissed with costs.

(S.J. KATHAWALLA, J.)