THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION NOs.5836 OF 2015 AND 2366 OF 2016

COMMON ORDER

(per Hon'ble Sri Justice Sanjay Kumar)

Jain Housing and Construction Limited, Chennai, is the petitioner in these two revisions. Registered development agreement-cum-General Power of Attorney dated 18.06.2007, bearing Document No.6039 of 2007, was entered into by the petitioner company with respondents 1 to 11 herein. Respondents 1 to 11 herein, being the owners of various extents of land aggregating to 4,248 square metres, situated in Sy.No.71 (Part), Bandlaguda Jagir Village, Rajendra Nagar Mandal and Municipality, Ranga Reddy District, entered into the said development agreement with the petitioner company for developing the land by construction of a multistoried residential apartment complex/commercial complex for the mutual benefit of all parties. Therein, the land owners were to get 40% proportionate share and the petitioner company, being the developer, was entitled to 60% proportionate share out of the total constructed area, parking area, amenities etc. The construction of the complex was to be completed within 30 months from the date of obtaining sanction, with a grace period of three months over and above the stipulated 30 months. Clause 23 of the agreement provided that in the event, the petitioner company failed to complete the construction and deliver the constructed area within the time stipulated, it had to pay penalty of Rs.5/- per square foot per month to the land owners, calculated on the entire entitled constructed area falling towards their share, upto 12 months and in case the delay went beyond 12 months, the compensation was to be decided by the mutually appointed Arbitrator. However, if the delay in delivery of possession of the land owners' constructed area was by reason of any Government restrictions and/or by reason of civil commotion, any act of God or due to other natural events and accidents of fire, cyclone, incessant rains, riots, disturbances of peace and other events of *force* *majeure* to any injunction or prohibitory order (not attributable to any action of the developer or conditions of *force majeure* and in any of the aforestated events which were beyond the control and responsibility of the developer, the developer was entitled to corresponding extension of time for delivery of the land owners' constructed area.

The parties thereafter entered into a supplemental agreement on 16.11.2009. Thereunder, the earlier agreed sharing ratio of 40:60 was modified as 28:72, whereby the land owners were to collectively get 28% of the constructed areas while the petitioner company, the developer, was to get the balance 72%. This was however subject to certain conditions. This supplemental agreement required the petitioner company, the developer, to commence construction activity within 90 days from the date thereof and the developer was to complete the project in all respects and deliver the land owners' share within 30 months from the date of the agreement, with a grace period of three months thereon. If the project completion went beyond 33 months, the penal terms remained the same to the extent of the developer paying a penalty of Rs.5/- per square foot as prescribed in Clause 23 of the earlier agreement if the delay was upto 12 months but, if the delay continued beyond the said period of 12 months, the penalty was to be Rs.10/- per square foot for the period of delay beyond 12 months.

In terms of Clause 31 of the development agreement dated 18.06.2007, arbitration proceedings were resorted to in Arbitration Application No.62 of 2013. The 11th respondent was the claimant in these arbitration proceedings, wherein the petitioner company was shown as the 1st respondent and respondents 1 to 10 herein were shown as respondents 2 to 11. The 12th respondent in CRP No.2366 of 2016, a retired Judge of this Court, is the sole Arbitrator.

The claim statement filed by the 11th respondent in Arbitration Application No.62 of 2013 enumerated four claims. The first claim was that the share of the claimant and the land owners should be 40% share of the constructed area in the project as opposed to the reduced share of 28% stipulated in the supplemental agreement. The second claim was that the claimant and the land owners were entitled to a sum of Rs.985.30 lakhs from the petitioner company along with a sum of Rs.65.69 lakhs per month till the date of completion of the project and handing over of possession. The third claim was to direct the petitioner company to pay the claimant and the land owners the refundable balance security deposit as on the date of expiry of the extended period, i.e., as on 17.05.2012, along with interest till the date of completion of the project or till the date of actual deposit. The fourth claim was for costs.

In its statement of defence, the petitioner company, while denying the claims put forth against it, raised a counter claim for a sum of Rs.7,00,00,000/-, being the deposit made by it with the land owners, along with interest and for a sum of Rs.47,52,37,924/- towards the expenditure incurred by it during construction and a sum of Rs.14,00,000/- towards cost of litigation and Arbitrator fee.

Two interim applications were filed before the sole Arbitrator, one by respondent No.11 herein and the other by respondents 1 to 10, being Interim Application No.2 of 2014 and Interim Application No.3 of 2014 respectively. These applications were filed under Section 17 of the Arbitration and Conciliation Act, 1996 (*hereinafter*, 'the Act of 1996'). It is in relation to the penalty clause that the subject IAs were filed by the land owners seeking an interim award for payment of the stipulated compensation amount, as the petitioner company had failed to deliver the constructed areas falling to the share of the land owners.

Thereupon, the sole Arbitrator rendered common interim award dated 04.07.2014 on these applications, holding that the petitioner company liable to pay a sum of Rs.3,07,79,760/- towards penalty for 22 months along with interest thereon to the 11th respondent within two months. The petitioner company was also held liable to pay Rs.76,96,172/- towards penalty for 22 months along with interest to respondents 1 to 10 herein within two months.

Aggrieved by the aforestated interim award dated 04.07.2014, the petitioner company filed C.M.A.No.14 of 2015 before the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, in so far as it pertained to Interim Application No.3 of 2014 in Arbitration Application No.62 of 2013.

This appeal was filed under Section 37(2) of the Act of 1996. By judgment dated 01.04.2016, the appellate Court dismissed the appeal and confirmed the interim award.

As the petitioner company failed to comply with the directions contained therein, respondents 1 to 10 herein filed E.P.No.29 of 2014 before the learned XXV Additional Chief Judge, City Civil Court, Hyderabad. By order dated 17.12.2015, the executing Court directed attachment of the EP schedule immovable property belonging to the petitioner company and adjourned the matter for filing sale papers. CRP No.5836 of 2015 was filed by the petitioner company assailing this order on the ground that its appeal in C.M.A.No.14 of 2015 was still pending. By interim order dated 05.01.2016, this Court granted stay of further proceedings in E.P.No.29 of 2014 on the file of the learned XXV Additional Chief Judge, City Civil Court, Hyderabad. Thereafter, the petitioner company filed CRP No.2366 of 2016 against the judgment dated 01.04.2016 in CMA No.14 of 2015 on the file of the learned XXV Additional Chief Judge, City Civil Court, Hyderabad. Both the revisions were filed under Article 227 of the Constitution.

Heard Sri S.Ravi, learned senior counsel representing Sri Pushyam Kiran, learned counsel for the petitioner company, and Sri K.Prabhakar, learned counsel for respondents 1 to 10. The 11th respondent in both the CRPs and the 12th respondent in CRP No.2366 of 2016 are shown as not necessary parties to the revisions.

It is significant to note that the petitioner company earlier approached this Court directly, by way of Civil Revision Petition Nos.3229 and 3364 of 2014, challenging the interim award dated 04.07.2014 passed by the sole Arbitrator in Interim Application Nos.2 and 3 of 2014 in Arbitration Application No.62 of 2013. By common order dated 15.12.2014, a Division Bench of this Court dismissed both the revisions holding that, against an interim order passed under Section 17 of the Act of 1996, an appeal would lie under Section 37(1) thereof before the Principal Civil Court of original jurisdiction. It was consequent to this order that the petitioner company filed CMA No.14 of 2015, in so far as Interim Application No.3 of 2014 in Arbitration Application No.62 of 2013, relating to respondents 1 to 10 herein, is concerned. It is stated before us that as regards Interim Application No.2 of 2014 filed by 11th respondent in both these revisions, the petitioner company has come to some sort of settlement with it out of Court. We are therefore concerned with the interim award dated 04.07.2014 only in so far as it relates to respondents 1 to 10 in these revisions.

At the outset, Sri K.Prabhakar, learned counsel, would contend that the appeal filed under Section 37(1) of the Act of 1996 was not maintainable as the subject matter of the said appeal was an interim award and not an interim order under Section 17 of the Act of 1996. The learned counsel would submit that such an interim award is traceable to Section 31(6) of the Act of 1996 which deals with the form and contents of an arbitral award and therefore, legal recourse provided under the Act against such an interim award is only to file an application to set it aside under Section 34 of the Act of 1996. Learned counsel would point out that the definition of an 'arbitral award' under Section 2(1)(c) of the Act of 1996 includes an interim award and therefore, the appeal filed under Section 37 of the Act of 1996 was utterly misconceived. Learned counsel would rely upon ***JHANG CO-OPERATIVE GROUP HOUSING SOCIETY LIMITED V/s. PT. MUNSHI RAM AND ASSOCIATES PRIVATE LIMITED***[1], wherein a Division Bench of the Delhi High Court held that an interim award is an award under Section 2(1)(c) of the Act of 1996 and recourse to a Court against the said interim award has to be made as stipulated under Section 34 of the Act of 1996. He would also rely on ***ASIAN ELECTRONICS LIMITED V/s. M.P.STATE ELECTRICITY BOARD***[2], wherein a learned Judge of the Rajasthan High Court was dealing with a case where the Arbitrator, in exercise of power under Section 17 of the Act of 1996, directed payment of a sum of money to the claimant. When an appeal was filed against the said order under Section 37 of the Act of 1996, an objection was taken that the order was in the nature of an interim award. The learned Judge ultimately held that an interim award would be one where the arbitral tribunal determined some part of the dispute referred to it and identified the order in question passed by the arbitral tribunal to be an order in the nature of an interim measure under Section 17 of the Act of 1996, which was appealable under Section 37 of the Act of 1996.

It is however to be noticed that the order dated 15.12.2014 in CRP Nos.3229 and 3364 of 2014 was passed after hearing both the parties and Sri K.Prabhakar, learned counsel, represented respondents 1 to 10 before this Court in the said litigation also. It was never contended by him before the Division Bench at that point of time that the remedy of the petitioner company was not under Section 37 but under Section 34 of the Act of 1996. Further, being parties to the said common order, respondents 1 to 10 allowed it to attain finality. It is also to be remembered that respondents 1 to 10 herein themselves filed the application under Section 17 of the Act of 1996 and Section 37 thereof provides that an appeal would lie against any order passed under Section 17, either refusing or granting interim measures. Thus, as respondents 1 to 10 themselves sought interim relief under Section 17 and as they were parties to the earlier litigation, wherein this Court categorically held that an appeal would lie against the said interim award under Section 37 of the Act of 1996, treating it as an order under Section 17 thereof, it is too late in the day for them to now contend that CMA No.14 of 2015 before the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, under Section 37 of the Act of 1996 was not maintainable. In any event, we are not inclined to reopen this issue in the light of the order dated 15.12.2014 in CRP Nos.3229 and 3364 of 2014 which was *inter parties* and was allowed to attain finality. We therefore reject the contention of Sri K.Prabhakar, learned counsel, in this regard.

Interim Application No.3 of 2014 was filed in Arbitration Application No.62 of 2013 under Section 17 of the Act of 1996, which provides for necessary interim measures of protection by the Arbitrator in respect of the subject matter of the dispute. However, the prayer in the said application was that the sole Arbitrator should pass an interim award directing the petitioner company to pay the admitted compensation at Rs.10/- per square foot for the area allotted to respondents 1 to 10, aggregating to Rs.13,99,080/- per month from the date of expiry of the original contract period.

Significantly, in its counter filed to the aforestated IA, the petitioner company did not raise any objection to the subject application being filed under Section 17 of the Act of 1996. On the other hand, it stated that it had already paid a sum of Rs.1,40,000/- to respondents 1 to 10 and that an interim award could not be passed as a precursor to the final award when their very entitlement had to be gone into by the arbitral tribunal after due and full consideration of the evidence and material on record. Sri S.Ravi, learned senior counsel, would rely on ***UNION OF INDIA V/s. RAMAN IRON FOUNDRY***[3], wherein it was observed that a claim for unliquidated damages would not give rise to a debt until the liability is adjudicated and damages are assessed by a decree or order of a Court or other adjudicatory authority and when there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation. Learned senior counsel would therefore contend that until the dispute is finally decided, the question of payment at this stage by way of an interim award does not arise.

At the outset, it may be noted that the power of the sole Arbitrator to pass an interim award cannot be doubted. Be it on an application for such relief or even independent thereof, if part of the main dispute referred to the sole Arbitrator for determination is amenable to final resolution immediately, be it on the basis of an admission or on the obtaining facts, the sole Arbitrator would be well within his power and jurisdiction in passing an interim award. Pendency of a counter claim would not divest the sole Arbitrator of this power.

A look at case law in this regard. In ***M/S.NUMERO UNO INTERNATIONAL LIMITED V/s. PRASAR BHARTI***[4], a learned Judge of the Delhi High Court held that there is no bar to the Arbitrator passing an interim award on the basis of admissions of parties contained either in the pleadings or in the correspondence that was exchanged between them. In ***GAMMON INDIA LIMITED V/s. SANKARANARAYANA CONSTRUCTION (BANGALORE) PRIVATE LIMITED***[5], a learned Judge of the Madras High Court was dealing with an interim award passed by the Arbitrator and affirmed the law laid down by the Delhi High Court that interference with such an interim award was not warranted merely because the other side had made a counter claim or because some areas of the dispute independent of the area covered by the interim award remained to be resolved. In ***NUMERO UNO INTERNATIONAL LIMITED V/s. PRASAR BHARTI***[6], a Division Bench of the Delhi High Court held that making of a counter-claim would tantamount to institution of an independent suit and this being the legal nature and character of a counter claim, its pendency would not denude the Arbitrator of the power to make an interim award in the claim, if such an interim award is otherwise justified. The Division Bench further observed that what is significant is that the legality of the interim award may have to be tested by reference to the material on which it is based rather than the areas of the dispute that may still call for adjudication between the parties. In ***NIMBUS COMMUNICATIONS LIMITED V/s. PRASAR BHARTI***[7], a learned Judge of the Delhi High Court reiterated that pendency of a counter claim would not bar the arbitrator from making an interim award to the extent of admissions and once the arbitrator exercised discretion based on the facts and circumstances of the case and gave cogent reasons therefor, interference was not warranted.

In ***LUDHIANA IMPROVEMENT TRUST V/s. MAPLETREE PROPERTY & INFRASTRUCTURE PRIVATE LIMITED***[8], a Division Bench of the Delhi High Court held that whether the material on record before the arbitrator demonstrated an admission clear enough to warrant an interim award would have to be examined is essentially a question of fact. Referring to Order 12 Rule 6 CPC, the Division Bench held that the Court cannot base its decision to decree a suit in terms of Order 12 Rule 6 CPC only on the basis of a particular pleading or admission and that the overall effect of the pleadings and documents of the parties have to be judicially weighed. The Division Bench opined that the Court has to keep in mind the fact that what seems plainly an admission could well be explained by the litigant during the course of the trial. On the facts of that case, the Division Bench found that there was a clear and unambiguous admission of receipt of the consideration and the subsistence of the contract at the time of such receipt, entitling the arbitrator to make an interim award granting the relief which was ultimately inevitable.

The issue presently is whether a case was made out before the sole Arbitrator warranting the passing of an interim award. In this regard, perusal of the statement of defence filed by the petitioner company in the main arbitration proceedings reflects as under:

After execution of the development agreement dated 18.06.2007, followed by an oral agreement between the parties modifying certain terms and conditions thereof, plans were drawn up and submitted to the authorities for obtaining necessary permission and approval. While so, on account of market conditions in real estate not being conducive for construction activity due to the Telangana agitation, downwards market trend, economic meltdown and other local problems, the petitioner company stated that its construction activity had to encounter a lot of hardships. According to the petitioner company, these factors led to the execution of the supplemental agreement dated 16.11.2009, as per which its share in the constructed area went up to 72%. According to the petitioner company, construction activity was carried on in full strength in terms of the time stipulation of commencing the same within 90 days from the date of supplemental agreement. In para 18, reference was made to what had been stated in para 9 with regard to the unforeseen situation which prevailed in the market owing to the Telangana agitation, other bundhs and deterioration in real estate and retail market which led to execution of the supplemental agreement dated 16.11.2009. The petitioner company stated that the construction work was in progress and as on date, the current stage of construction was that reinforced cement concrete structures were completed in Blocks A and B and the brick works were completed partly in Blocks A and B and in respect of Block C, the reinforced cement concrete structure was completed upto 35%. The retaining wall was stated to have been completed upto 80% and the petitioner company claimed that it had spent upto Rs.36,07,04,156/- in this regard. In para 24, the petitioner company stated that the delay in completion of the work was not within its control. The material for construction, viz., sand, mineral and raw-material could not be procured because of several governmental restrictions and there were occasions when some of the developers approached the High Court for the relief of getting raw-material and also for stay of the restrictions imposed by the Government. The Telangana movement also created problems in the progress of the construction as there were continuous riots, strikes and bundhs and as a result thereof, transportation of the raw-material to the works area was greatly affected. It was owing to this, the petitioner company claimed that it could not continue construction activity as per schedule. It also went on to state that intending purchasers had not come forward and as such, it could not pool up finances as expected. All these factors were stated to be beyond its control amounting to *force majeure* events.

Even in its counter to the subject interim application, the petitioner company echoed the same defence and reiterated that delay in the construction work was due to reasons beyond its control and that no compensation was liable to be paid by it.

Perusal of the interim award passed by the sole Arbitrator reflects that the plea of *force majeure* was duly considered by him. However, as the petitioner company placed no evidence before the sole Arbitrator in support of its grounds attracting the *force majeure* clause stipulated in the development agreement and the supplemental agreement, the sole Arbitrator rejected this ground. In appeal, the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, accepted the reasoning of the sole Arbitrator and opined that the matter had been considered in detail by the sole Arbitrator while coming to the conclusion that the penalty was liable to be paid by the petitioner company for the delay in completion of the project. The interim award was accordingly confirmed.

Though Sri S.Ravi, learned senior counsel, would contend that the plea raised by his client, as to *force majeure* events contributing to the delay in completion of the project, had to be considered by the sole Arbitrator and that at this stage, an interim award ought not to have been passed directing payment of the penalty overlooking the said plea, this Court finds no merit in this submission.

It is significant to note that the development agreement was entered into on 18.06.2007, while the supplemental agreement was executed on

16.11.2009. According to the statement of defence filed by the petitioner company before the sole Arbitrator, the reason for entering into the supplemental agreement were the various factors set out in para 9 thereof. Para 9 speaks of the market conditions in real estate not being conducive due to the Telangana agitation, market downward trends, economic meltdown and other local problems which constituted hardship in continuing with the construction activity. Again, in para 18, the petitioner company adverted to what it had stated in para 9 and reiterated that it was only due to this unforeseen situation prevailing in the market, viz., Telangana agitation, other bundhs, deterioration in real estate and in retail market, particularly construction business in Hyderabad, that it could not proceed with the project. It was only after citing these reasons as grounds for non-completion of the project that the petitioner company entered into the supplemental agreement dated 16.11.2009. The petitioner company stood benefited under this supplemental agreement as its share in the constructed areas went upto from 60% to 72%. Under this new agreement, the petitioner company committed itself to completing the project within 30 months from the date of the said agreement along with a grace period of three months, in all, 33 months.

Further, being fully aware of the fact that the Telangana agitation and other associated negative factors were still very much operative, the petitioner company not only reiterated its commitment to pay the penalty for delay, if any, in completion of the project, but went further and committed itself to payment of penalty at Rs.10/- per square foot if the delay went beyond 12 months.

This being the situation, it is not open to the petitioner company to fall back on the issue of the Telangana agitation once again as a ground for not completing the project and cite it as a *force majeure* event. It may have well been a *force majeure* event under the original development agreement dated 18.06.2007, but ceased to be so after the supplemental agreement dated 16.11.2009, as it, along with the other factors, was the very basis for the said agreement.

As regards the other aspects cited by the petitioner company, i.e., non-availability of raw-material for the construction activity, as rightly pointed out by the sole Arbitrator and the Court below, no material whatsoever was produced by the petitioner company in support thereof. A vague reference was made to Government restrictions and Court cases in this regard, but no documentary proof was produced. Having committed itself to the terms and conditions stipulated in the supplemental agreement dated 16.11.2009, the petitioner company could not have cited any failure on its part to pool up finances because intending purchasers were not coming forward. This cannot be treated as a *force majeure* event at all.

The terms and conditions of the supplemental agreement between the parties required the petitioner company to make payment of penalty once the delay went beyond the stipulated period of time. The only exception was if the petitioner company could cite and demonstrate a *force majeure* event, as contemplated in the agreement. The petitioner company failed to substantiate its plea that the completion of the project by it was delayed by any *force majeure* event. Further, as it is a settled legal position that mere pendency of a counter claim would not bar the sole Arbitrator from passing an interim award, this Court finds no reason to interfere with the interim award under challenge on that ground. The sole Arbitrator was therefore well within legal bounds in entertaining the application of the land owners for an interim award in relation to this aspect of the dispute. As this claim fell within the four corners of the claims raised in the main dispute and as its determination by the sole Arbitrator was in accordance with the admitted clauses in the supplemental agreement dated 16.11.2009, the interim award under challenge does not suffer from any irregularity or illegality.

On the above analysis, Civil Revision Petition No.2366 of 2016 filed against the judgment dated 01.04.2016 in C.M.A.No.14 of 2015 on the file of the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, upholding the interim award dated 04.07.2014 in Interim Application No.3 of 2014 in Arbitration Application No.62 of 2013, fails and is accordingly dismissed.

Civil Revision Petition No.5836 of 2015 was filed on the ground that execution proceedings were being taken up without disposing of

C.M.A.No.14 of 2015. As the said appeal was dismissed thereafter, there is no hindrance to the land owners now proceeding with the execution proceedings filed by them in relation to the interim award. Civil Revision Petition No.5836 of 2015 also fails and is accordingly dismissed. Interim order dated 05.01.2016 shall stand vacated.

Pending miscellaneous petitions, if any, in both the revisions shall also stand dismissed.

There shall be no order as to costs.

SANJAY KUMAR, J

DR. B. SIVA SANKARA RAO, J

11th AUGUST, 2016
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[1] 2014 (1) R.A.J. 252 (Del)

[2] 2008 (3) R.A.J. 603 (MP)

[3] AIR 1974 SC 1265(1)

[4] 2008 (2) R.A.J. 666 (Del)

[5] 2009 Law Suit (Mad) 3558

[6] 2008 (5) R.A.J. 1 (Del)

[7] 2016 Law Suit (Del) 2186

[8] FAO (OS) 322/2015 and batch decided on 17.07.2015