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

COMMERCIAL APPEAL LODGING NO. 35 OF 2017
IN
COMMERCIAL ARBITRATION PETITION (L) NO. 29 OF 2017

B. E. Billimoria and Company Limited
a Company incorporated and existing
under the provisions of Companies Act, 1956
and having its registered office at Shivsagar
Estate, A Block, 02nd Floor, Dr. Annie Besant
Road, Worli, Mumbai – 400 018. .. Appellant/
(Org. Petitioner)

Versus

1. Mahindra Bebanco Developers Limited
a Company incorporated and existing under
the provisions of Companies Act, 1956
and having its registered office at
Mahindra Towers, 05th Floor, Worli,
Mumbai – 400 018.

2. Mahindra Lifespace Developers Limited
a company incorporated and existing under
the provisions of Companies Act, 1956 and
having its registered office at Mahindra
Towers, 5th Floor, Worli, Mumbai 400 018. .. Respondents
(Org. Respondents)

Mr. S. U. Kamdar, Senior Advocate a/w Mr. Yashesh Kamdar, Mr. Amit Vyas and Mr. Rohan Mathur i/by Vertices Partners for appellant.

Mr. Pravin Samdhani, Senior Advocate a/w Mr. Mayur Khandeparkar, Ms. Alisha Ningoo and Mr. Ayush Khandelwal i/by Lodha Legal for respondent no.1.

Mr. Milind Sathe, Senior Advocate a/w Mr. Simil Purohit, Mr. Swapnil Khatri, Mr. Manish Vora, Mr. Akash Lodha, Mr. Abinash Khatri i/by Wadia Ghandy and Co. for respondent no.2.

CORAM: NARESH H. PATIL &
SMT. BHARATI H. DANGRE JJ.

RESERVED ON : AUGUST 01, 2017

PRONOUNCED ON : AUGUST 29, 2017

P. C. [Per Naresh H. Patil, J.] :

1. The appellant – original petitioner filed a petition on 17/1/2017 under Section 9 of the Arbitration and Conciliation Act, 1996 (for short Arbitration Act) seeking following reliefs against the respondents:

(a) Pending the initiation and final disposal of the arbitration proceedings between the parties, by an order and injunction of this Hon'ble Court, the Respondent No.1 be restrained from taking any steps in pursuance to their letter dated 05th January, 2017 and 13th January, 2017 annexed as Exhibit “I” & “K” to the Petition;

(b) Pending the initiation and final disposal of the arbitration proceedings between the parties, the Respondent and / or its agents, officers and servants and / or anyone claiming through it and / or acting on its instructions be restrained by an order and injunction of this Hon'ble Court, from in any manner breaching the said Agreement dated 28th September 2011 annexed as Exhibit “B” to the Petition;

(c) Pending the initiation and final disposal of the arbitration proceedings between the parties, the Hon'ble Court be pleased to pass an order of Status Quo with respect to the Agreement dated 28th September 2011 annexed at Exhibit “B” to the Petition;

(d) Pending the initiation and final disposal of the arbitration proceedings between the parties, the Respondents and the person claiming through them be directed to furnish security for the amount of Rs.14,10,46,948/- (Rupees Fourteen Crores Ten Lakhs Forty-Six Thousand Nine Hundred and Forty-Eight only) being the amount encashed by the Respondent No.1 by invoking the Bank Guarantees provided by the Petitioner under the said Agreement dated 28th September 2011 either by way of a bank guarantee in favour of the petitioner or by depositing the said amount with the Hon'ble Court or in such manner as the Hon'ble Court deems fit;

2. It is contended that the appellant – petitioner is a Company incorporated under the provisions of the Companies Act, 1956. Respondent Nos.1 and 2 are also companies incorporated under the provisions of the Companies Act, 1956. The appellant herein states that it is one of India's leading, dynamic and diversified firms of civil engineering construction contractors. The respondent nos.1 and 2 are engaged in the business of real estate development and/or operations and/or maintenance of integrated townships, special economic zones, IT parks and many other activities associated with infrastructure projects at different locations around India. The respondent no.1 – Company was incorporated and constituted under the consortium formed by the appellant and respondent no.2.

3. It is further contended that the appellant and respondent nos.1 & 2 were parties to the Shareholders Agreement dated 27/5/2011 pursuant to which 70% of the equity share capital of respondent no.1 is owned by respondent no.2 and the remaining 30% equity share capital of respondent

no.1 is owned by the appellant. The appellant and respondent no.1 entered into an agreement dated 28/9/20111, pursuant to which the respondent no.1 awarded a contract to the appellant for constructing a residential complex with all necessary infrastructures in accordance with the approved plans, specifications and the agreed terms and conditions.

4. In the month of March, 2008, the Maharashtra Airport Development Company Limited (for short MADC), Government of Maharashtra Undertaking had invited proposals for developing a residential township on a area of approximately 25.252 acres of land in Nagpur District. On 24/3/2008, the appellant and respondent no.2 executed Memorandum of Understanding to form a consortium to bid for the above-mentioned proposal and if successful, to jointly promote a company for the purpose of developing the residential townships. On 18/4/2008, the consortium was able to obtain a Letter of Intent (LOI) from MADC for the purpose of developing the residential township. Consequent thereto, the appellant and respondent no.2 constituted respondent no.1 – Company.

5. Under the Development Agreement dated 13/10/2010, MADC granted development rights to the respondent no.1 for construction of the

residential complex. Under the Share Purchase Agreement dated 27/5/2011, the appellant and respondent nos.1 & 2 agreed that 70% of equity share capital of respondent no.1 – Company will be owned by respondent no.2 and remaining 30% equity share capital will be owned by appellant herein. They decided to appoint the appellant to carry out the construction work.

6. The appellant and respondent no.1 entered into an Agreement dated 28/9/2011, which is referred as “Construction Contract”. The appellant states that it was prevented from carrying out the subject construction at the contract rate and from completing the construction in the scheduled period due to extensive delays and disruptions caused by respondent no.2. The RCC drawings for the foundations were issued about one month after the completion of the excavation work, due to which execution in respect of some of the buildings and row houses was very adversely affected and greatly hindered due to the delay in shifting / relocating of the HT Power line. The appellant suffered financial losses.

7. The appellant issued a notice on 4/10/2016 raising various issues and claimed Rs.53,50,07,753/- (Rupees Fifty-Three Crore Fifty

Lakhs Seven Thousand Seven Hundred and Fifty Three only) calculated upto 27/9/2016 from respondent no.1. The appellant received a reply to the said notice from respondent no.1 vide their letter dated 21/12/2016. They denied allegations and made counter claim of Rs.77,64,01,508/- (Rupees Seventy Seven Crore Sixty Four Lakhs One Thousand Five Hundred and Eight only) towards their alleged losses for non completion of work within the stipulated time. It was contended that the appellant was entitled to an extension of time to complete the construction work and also for reimbursement of costs. The appellant, therefore, submitted that in view of arbitrary, mala fide and wrongful conduct of the respondents, necessary orders are required to be passed, protecting the interests of the appellant and restraining the respondent no.1 from breaching the subject agreement dated 28/9/2011.

8. The respondents contested the claim of the appellant in the proceedings of the Arbitration Petition. They denied the contentions made by the appellant herein. The respondents referred to various clauses of agreement in support of their contentions. By an order dated 2/5/2017, the learned Single Judge dismissed the Arbitration Petition as devoid of merits.

9. We may refer to certain clauses of the agreement executed by the parties which are relevant for the purpose of deciding the present appeal.

A Shareholders Agreement was executed on 27/5/2011 between the appellant and respondent nos.1 & 2. Clauses 10 (10.4), (10.10), (10.28) and 30 (30.9) of the said agreement read as under :-

10. OBLIGATIONS AND RESPONSIBILITIES OF THE COMPANY

The Company shall be responsible to MADC for the implementation of the Project as per the Development Agreement. The Company shall:

10.1 …..
10.2 …..
10.3 …..

10.4 Award Construction Contract to BEBL on competitive and arms length basis as per the document named as "Terms for award of contract by the Company to BEBL in respect of construction of residential project at MIHAN Nagpur" executed by the Company, MLDL and BEBL on 14 September 2010 and as enclosed as Annexure 4 to the Agreement.

10.5
To
10.9

10.10 Award Contract for Sales & Marketing of the Project to MLDL on competitive and arms length basis as per the document named as “Terms for award of marketing contract by the Company to MLDL in respect of residential project at MIHAN Nagpur” executed by the Company, MLDL and BEBL on 14 September 2010 and as enclosed as Annexure 5 to the Agreement.

10.11
To
10.27

10.28 Be liable to customers /Unit holders against claims, if any, for breach of terms.

30. MISCELLANEOUS

30.1
To
30.8

30.9 Supersession.

Except as otherwise agreed among the Parties, this Agreement constitutes the entire agreement of the Parties as to its suject matter and supersedes and overrides any such conflicting or inconsistent provision in any previous understanding or agreement on such subject matter *Inter se* MLDL, and/or BEBL and/or the Company, memorandum of understanding, or any written or oral communication or correspondence.

10. The Construction Contract was executed on 28/9/2011

between the appellant and the respondent no.1 Clauses 2(9) and 6 read as under:-

2. The following documents shall comprise the Construction Contract:

1) ….
2) ….
3) ….
4) ….
5) ….
6) ….
7) ….
8) ….
9) Annxure VII Terms for Award of Construction Contract by MBDL to BEBL dated 14th September 2010 [SHA].

The Annexure – I to Construction Contract refers to various clauses. Clause 7 states that time is of the essence for the completion of the Construction Works in the phase-wise manner described in the contract.

11. By communication dated 5/1/2017, respondent no.1 informed the appellant as under :-

"Dear Sir,

Re: Project `Bloomadale' for a residential township on a land admeasuring about 25.2524 Acres in the non-processing area of the MIHAN project ("Project Bloomdale/said Project/Project").

1. We refer to the Construction Contract dated 28th

September 2011 entered into between us ("Construction Agreement").

2. Kindly note that the Construction Agreement shall come to an end on 10th January, 2017 i.e. the completion date, time being the essence of the same. In view thereof, BEBL is hereby called upon to remove itself and its sub-contractors, workers, employees, personnel etc. together with all their belongings including material, tools, tackles and equipment belonging to BEBL and /or its sub-contractors by or before 19th January, 2017 i.e. within the period of 9 days from 10th January, 2017 for demobilization as aforesaid at the project site.

3. Please note that if BEBL fails to demobilize as aforesaid within the time as stipulated above, MBDL will not be responsible for the maintenance, care, loss, damage of material etc. thereon and MBDL shall deal with the same entirely at the risk, costs and responsibility of BEBL.

4. Further, with regards to the settlement of accounts, the same is set out in our letter dated 21st December, 2016 contents whereof are self-explanatory.

5. Also, note that the content of this letter are without prejudice to all rights and remedies of MBDL under the Construction Agreement and /or the applicable laws or otherwise."

12. Learned Senior Counsel Mr. Kamdar, appearing for the appellant, submitted that the Shareholders Agreement, Term Sheet, Development Agreement, Share Purchase Agreement are interwoven and cannot be considered in isolation. There was gross delay on the part of respondent no.1 at site due to several reasons attributed to respondent no.1. Foundation designs were not brought in time, RCC drawings for the foundation were issued one month after excavation work due to which the construction work of row houses got adversely affected. The appellant could do work worth only Rs.51.11 crores for Phase I, II and IV against Rs.169.26 crores. The counsel submitted that several efforts were made by the appellant to bring to the notice of the respondents the lapses done on their part but things could not improve. The counsel submitted that the date of completion of contract was extended till the end of December, 2018 under Clause 3(h)(2) of the minutes of the meeting dated 24/10/2015. In view of these minutes, it was unreasonable on the part of respondent no.1 to cancel the contract by terminating the same. The learned counsel placed reliance on Clauses 7.1, 7.3.1 and 7.12 of the Shareholders Agreement dated 27/5/2011. Clause 7.2 provide for extension of time for completion of contract. The learned counsel submitted that agreements entered into between the appellant and respondent no.1 and Shareholders

Agreement are interwoven. The learned counsel placed reliance on the following judgments :-

(a) Ashok Kumar Jaiswal vs. Ashim Kumar Kar (2014 SCC online Cal 3497)

(b) Chheda Housing Development Corporation vs. Bibijan Shaikh Farid and ors. [2007 (3) Mh.L.J. 402]

13. Learned Senior Counsel Mr. Samdhani appearing for respondent no.1 submitted that appellant cannot claim any interest in the assets of the respondent no.2 as a shareholder. The respondent no.1 had development rights and, therefore, is responsible to the MADC. The appellant is merely a construction contractor. The appellant cannot take benefit of Shareholders Agreement in creating interest in favour of its assets. It was pointed out that the contract was awarded to the appellant at arm's length and on competitive basis. If the appellant had committed any default, the respondent no.1 was responsible to MADC. The Construction Agreement dated 28/9/2011 and the Shareholders Agreement were not executed contemporaneously, simultaneously or on the same day. The counsel placed reliance on Clause 10 of the Shareholders Agreement. A

reference was also made to Clause 10.3.3 It was submitted by the learned counsel that the respondent no.1 was given right to sale / dispose of all the tenements, apartments etc. Respondent No.1 agreed to perform obligations under the Development Agreement. The minutes of the meeting dated 24/10/2015 could not modify construction contract as the said minutes of meeting were not agreed upon by and between the parties. The contract for construction entered into between the appellant and respondent no.1 had expired by efflux of time. It was submitted that the respondent no.1 raised a counter claim of Rs.77,64,01,508/- against the appellant.

14. Learned counsel further submitted that the construction contract even otherwise is not specifically enforceable under Section 14 of the Specific Relief Act, 1963 (for short the Act of 1963) and therefore, no interim measures could be granted by the court while exercising power under Section 9 of the Arbitration Act. Reference was made to provisions of Section 14(3)(c) of the Act of 1963. The construction work could be enforced only at the instance of the owner of the property and not by the contractor under Section 14(3)(c)(iii) of the Act of 1963. The learned counsel submitted that in the facts and in view of the provisions of the Act of 1963, the court cannot compel respondent no.1 to continue with the

contract. The counsel submitted that even after obtaining ad-interim orders, the appellant could not carry out the work. The balance of convenience is not in favour of the appellant. The learned counsel placed reliance on the following judgments :-

(a) Bacha Guzdar, Bombay vs. Commissioner of Income Tax, Bombay [**(1955) 1 SCR 876]**.

(b) Satyanarayana Construction Company vs. Union of India and ors. **[(2011) 15 SCC 101]**.

(c) M/s. Shah and Jhaveri Developers vs. M/s. Classic Development Pvt. Ltd. **[unreported order dated 13/4/2007 in Notice of Motion No. 3820 of 2006 in Suit No. 3151 of 2006]**.

15. The learned Senior Counsel Mr. Sathe appearing for respondent no.2 adopted the submissions of the learned Senior Counsel Mr. Samdhani, appearing for respondent no1.

16. We have perused the record placed before us, impugned order, case laws cited (supra) and considered the submissions advanced. A contract was awarded to respondent no.1 for developing residential township in Nagpur District by MADC. The appellant and respondent

nos.1 & 2 executed a Shareholders Agreement. A separate Construction Contract was executed between the appellant and respondent no.1 on 28/9/2011. Time to complete the contract was extended upto December 2018. Reliance is placed by the appellant on the minutes of the meeting dated 24/10/2015, but the record indicates that the respondent no.1 did not agree to the suggestions made by the appellant regarding the said draft minutes of the meeting dated 24/10/2015. A Supplementary Agreement was not entered into by the parties for extending period of contract. Under the contract, the appellant completed the work of Phase-I. The further work could not be completed within time. The minutes of meeting dated 24/10/2015 were not finalized. We find that learned Single Judge granted ad-interim relief in favour of the appellant but even thereafter the appellant could not demonstrate that any progress in the work took place.

17. It was submitted that the appellant and respondent no.2 were shareholders in the respondent no.1 – Company. 70% of the equity share capital of respondent no.1 is owned by respondent no.2 and the remaining 30% equity share capital of respondent no.1 is owned by the appellant. It was submitted on behalf of the appellant that in view of the Shareholders Agreement, the appellant shall have right in the assets of the respondent

no.1 – Company and, therefore, in the facts, would be entitled to claim relief under the Act of 1963. In view of the submissions advanced on behalf of the respondents and the judgment cited (supra), we are of the view that Shareholders Agreement did not create any interest in the assets and the properties in favour of the shareholders. Section 14 of the Act of 1963 refers to Contracts not specifically enforceable. Section 14 reads as under :-

> **14. Contracts not specifically enforceable.-** (1) The following contracts cannot be specifically enforced, namely:-
>
> (a) a contract for the non-performance of which compensation in money is an adequate relief;
>
> (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
>
> (c) a contract which is in its nature determinable;
>
> (d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:-

(a) where the suit is for the enforcement of a contract,-

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lendor is willing to advance the remaining part of the loan in terms of the contract ; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for, -

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely: -

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

Persons for or against whom contracts may be specifically enforced."

18. The record indicates that the Construction Agreement and the

Shareholders Agreement were not executed on the same day. The relief claimed by the appellant under the provisions of the Act of 1963 depend on the nature of agreement, facts and circumstances, the conduct of parties. In prima facie consideration, we find that the learned Single Judge has rightly observed that the appellant could not maintain suit for specific performance in view of provisions of the Act of 1963. The learned Single Judge referred to the relevant clauses of the agreements executed between the parties, the provisions of law for arriving at a prima facie conclusion that balance of convenience was not in favour of the appellant. The learned Single Judge has referred to various cases cited by the parties. We may not refer to these cases again.

19. The appellant failed to perform its contractual obligations within the stipulated time frame. In the facts, appellant would not be entitled to claim specific performance of the contract. In our prima facie view the appellant is not even entitled to claim interim relief under Section 9 of the Arbitration Act.

20. We find substance in the submissions of the learned Senior Counsel appearing for the respondents that the appellant had already

claimed compensation in its notice of demand and the said issue would be considered at the relevant time. Learned counsel further refer to provisions of Section 14(1)(c) and 14(1)(d) of the Act of 1963, as quoted above.

21. According to the learned Senior Counsel for the respondents, the appellant does not have any right in the land or in the structure and, therefore, could not be entitled to claim specific performance by praying for interim measures under Section 9 of the Arbitration Act.

22. In the facts of the case, in the present matter, the plea raised on behalf of the appellant regarding the contract being interlinked and interwoven can not be accepted. The contract was granted on arm's length and on competitive basis. We find substance in the submissions of the learned Senior Counsel appearing for the respondents that the appellant was allowed to carry out construction on payment of consideration amount without granting right to sell the tenements. At the most the appellant in such case would claim compensation which appellant had already claimed. The respondent no.1 has also raised counter claim.

23. In the facts of the case, we do not find that the learned Single Judge erred in appreciating the material on record and applying the

principles of law governing the field. The view adopted by the learned Single Judge is reasonable and sound one. The appellant, prima facie, failed to establish its case for grant of relief under Section 9 of the Arbitration Act. There is no merit in the appeal.

24. The Appeal is accordingly dismissed.

(SMT. BHARATI H. DANGRE,J.) (NARESH H. PATIL,J.)

25. After pronouncement of the order, the learned counsel appearing for the appellant prays for continuation of ad-interim relief granted earlier by this court. The request is opposed by the learned counsel appearing for the respondents.

26. In the facts of the case, we are not inclined to continue ad-interim relief. Request stands rejected.

(SMT. BHARATI H. DANGRE,J.) (NARESH H. PATIL,J.)