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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL NO. 86 OF 2017
IN
ARBITRATION PETITION (L) NO. 214 OF 2017

The Republic of Maldives through its
Ministry of Housing and Infrastructure
having its office at Ameenee Magu,
Maafannu, Male 20392, Republic of Maldives. .. Appellant/
Org. Respondent

Versus

Apex Realty Pvt. Ltd. a private limited
company incorporated under the laws of the
Republic of Maldives and having its
Registered Office at H. Sheereen Villa,
1st Floor, Burevi Magu, Male, Republic of
Maldives. .. Respondent/
Org. Petitioner

Mr. Madhur R. Baya for appellant.
Mr. Aspi Chinoy, Sr. Advocate a/w Mr. Cyrus Ardeshir a/w Mr. Rahul Dwarkadas a/w Mr. Areez Gegder a/w Mr. Shyam Gopal i/by Veritas Legal for respondent.

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

RESERVED ON : JULY 10, 2017

PRONOUNCED ON : AUGUST 01, 2017

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

1. The respondent – original petitioner (hereinafter referred to as the respondent) filed a Commercial Arbitration Petition (L) No. 214 of 2017 under Section 9 of the Arbitration and Conciliation Act, 1996 (for short the Act of 1996). By an order dated 4/5/2017, the learned Single Judge, disposed of the petition by granting relief in terms of prayer clauses (a)(i) to (a) (iv). Being aggrieved by the same, the appellant – original respondent (herein after referred to as the appellant) has filed the present appeal.

2. Briefly stated the facts are, that the appellant – original respondent (hereinafter referred as the respondent), the Government of Maldives represented by its Ministry of Housing Transport and Environment, entered into a contract with Kargwal 18 SG Developers Private Limited on 26/5/2010. The global proposal was to construct 1300 Housing Units and Associated Commercial Areas at Male, the Capital of the Maldives and Villingili Island. The project was in phases. Phase – I of the contract with SG 18 Reality required construction of 350 housing units in Male. This contract was assigned to the respondent herein, Apex Reality

Pvt. Ltd., on 18/12/2011. The Republic of Maldives consented to this assignment and endorsed its approval. There are four different parcels of land identified in Phase – I, which are as under:

(a) Development Area 1, Block 263 (“Odeon site”)
(b) Development Area 2, Block 162 (“Arabiyaa”)
(c) Development Area 3, Block 58 (“Naadhee site)
(d) Development Area 4, Block 135 (“Gaakoshi site”)

The proposal was to construct 288 units of affordable housing. On the Gaakoshi and Arabiyya sites associated commercial areas were to be constructed. On Odeon and Naadhee sites, 126 units were to be constructed. The petitioner was entitled to develop and sell luxury villas as part of their compensation and remuneration. Under the contract, the Government of Maldives were to sell or lease to nominees of Maldives Government the public housing units. In turn, the Government of Maldives were to receive the consideration at contractually accepted rates from the purchasers.

3. On 30/11/2015, Addendum No. 001/2015 was executed. Clause 8 of the Addendum reads as under :-

> “8. For clarity, both parties hereby agree and confirm that upon completion of the Government Housing Units in Gaakoshi and Arabiyya, the Developer shall be deemed to have fully discharged its contractual obligations to secure the rights of free sale areas in Gaakoshi, Arabiyya, Naadhee and Odeon sites, both for Commercial and Housing units.”

4. The Addendum stated that the obligations of Apex Reality (herein after referred to as petitioner) to provide affordable housing units will be deemed to have been completed once they completed and delivered those housing units at the Gaakoshi and Arabiyya sites. Apex Reality was entitled to secure their rates for the free-sale areas in all four sites for both commercial and housing units. Villas were to be allowed to be constructed on separate island sites.

5. It is the case of the respondent that by January 2016, respondent had completed construction of housing units and associated commercial units at the Arabiyya site and by February, 2016 at the Gaakoshi site. It is alleged that the respondent did not nominate purchasers or lessees for the constructed units. The Government of Maldives assured

to facilitate payment for all 288 units developed at the two sites by its letter dated 31/3/2016. It is further contended that on 19/4/2016, the Government of Maldives took over 198 units at Gaakoshi site and 90 units at the Arabiyya site . By communication dated 28/4/2016, the appellant agreed for making payments. The respondent submits that this payment was delayed from April to September, 2016, which affected respondent's cash flows.

6. The respondent submitted that the appellant – Government of Maldives issued notice dated 22/12/2016 stating therein that respondent delayed in commencing physical work at the other two sites at Odeon and Naadhee which amounts to breach of terms of agreement. The appellant herein issued a 90 days cure period notice to the respondent. On 22/12/2016, the respondent wrote to the appellant to reconsider its design plans. The respondent claimed that they began work at two sites, which is disputed by the appellant. On 1/2/2017, the respondent submitted revised drawings to the appellant for approval and for seeking construction permission. On 19th and 20th February, 2017 the appellant approved the revised plans.

7. On 18/4/2017, the appellant issued a breach of contract notice stating therein that no significant work was carried out in the 90-day cure period. The contract does have a dispute resolution clause. Para 40 of the contract referring to dispute resolution reads as under :-

> "40. If informal resolution of any dispute, arising out of interpretation or implementation of this agreement, has failed, then either party may refer the dispute to arbitration by a retried judge of High Court of Republic of India, under UNCITRAL Arbitration Rules, 1976, and the Arbitration Proceedings shall be conducted in the city of Mumbai in India and in English Language. The award of said arbitration shall be final and binding on the parties. The cost of arbitration shall be borne by the Party who raised and initiated arbitration excepting that engaging legal counsel shall be borne by the Party who engages the legal counsel."

In this premise, the petition under Section 9 of the Act of 1996 was filed invoking jurisdiction of the learned Single Judge.

8. Learned counsel appearing for the appellant submitted that in view of the provisions of Section 86 of the Code of Civil Procedure, 1908, prior sanction of the Central Government was necessary since the

Republic of the Maldives is a sovereign state. The counsel submitted that no relief in terms of specific performance could be granted in respect of the subject contract. The respondent failed to complete the construction within the stipulated time and inspite of notice of 90-day cure period, respondent failed to take significant steps and, therefore, the contract was terminated. Grant of relief in favour of the respondent would amount to compelling the appellant to perform the contract. In the view of the counsel, under the impugned order, the respondent would get an undeserving advantage. Learned counsel placed reliance on the following judgments:

(a) Indian Oil Corporation Ltd. vs. Amrtsar Gas Service and ors. **[(1991) 1 SCC 533]**.

(b) Adhunik Steels Ltd. vs. Orissa Manganeses and Minerals (P) Ltd. **[(2007) 7 SCC 125]**.

(c) Arvind Constructions Co. (P) Ltd. vs. Kalinga Mining Corporation and ors. **[(2007) 6 SCC 798]**.

(d) Govt. of Goa, Represented by the Director of Tourism vs. Jaisu Shipping Co. Pvt. Ltd. **[2010 (6) Mh.L.J. 612].**

(e) Mirza Ali Akbar Kashani vs. The United Arab Republic and anr. **[AIR 1966 SC 230]**.

(f) Firm Ashok Traders and anr. vs. Gurumukh Das Saluja and ors. **[(2004) 3 SCC 155].**

9. We would refer to some of the judgments relied upon by the learned counsel for the appellant.

In the case of **Firm Ashok Traders and anr. vs. Gurumukh Das Saluja and ors**. (Supra), the Supreme Court, in para 13, observed asunder :

> "13. …........In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application under Section 9 of the A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of the A & C Act."

In the case of **Mirza Ali Akbar Kashani vs. The United Arab Republic and anr.** (Supra), the Supreme Court, in paras 17, 21 and

25 observed as under :-

> "17. In this connection, it is necessary to bear in mind that even when the Ruler of a State sues or is sued, the suit has to be in the name of the State; that is the effect of the provision on S. 87, so that it may be legitimate to infer that the effect of reading Ss. 84, 86 and 87 together is that a suit would be in the name of the State, whether it is a suit filed by a foreign State under S.84 or is a suit against the Ruler of a foreign State under S. 86. As a matter of procedure, it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler. For the purpose of procedure, in every case the suit has to be in the name of a State. That is another factor which cannot be ignored.
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> 21. That takes us to S. 86. Section 86(1) with which we are directly concerned reads thus :-
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> > "No ruler of a foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government".
>
> There is a proviso to this section with which we are not concerned in the present appeal. Section 86(2) deals with the question of consent which the Central Government is authorised to give, and it lays down how the consent can be given and also provides for cases in which such consent shall

not be given. Section 86(3) refers to the question of arrest and provides that no Ruler of a foreign State shall be arrested except with the consent of the Central Government and no decree shall be executed against the property of any such Ruler. Section 86 (4) extends the preceding provisions of S 86 to the three categories of Officers specified in Cls. (a), (b) and (c).

25. Reverting then to S. 86, there can be no difficulty in holding that when S. 86 (1) refers to a Rules of a foreign State, it refers to the Ruler in relation to the said State, and means the person who is for the time being recognized by the Central Government to be the head of that State. In view of the definition prescribed by S. 87A(1)(b), it seems difficult to accept the argument that the expression “the Ruler of a foreign State” under S. 86(1) can take in cases only of Rulers of foreign States which are governed by a monarchical form of Government. In view of the definition of a foreign Ruler, it is plaint that when S. 86(1) refers to Rulers of foreign States, it refers to Rulers of all foreign States whatever be their form of Government. If the form of Government prevailing in a foreign State is Republican, then the Ruler of the said State would be the person who is recognized for the time being by the Central Government to be the head of that State. In other words, the definition of a Ruler clearly and unambiguously shows that whoever is recognized as the head of a foreign

> State would fall within the description of Ruler of a foreign State under S. 86. That being so we do not think in reading S. 86(1), it would be permissible to import any terms of limitation; and unless some terms of limitation are imported in construing S. 86(1), the argument that the head of a Republican State is not a Ruler of that State cannot be upheld."

10. The learned Senior Counsel appearing for the respondent Shri Aspi Chinoy submitted that the objection raised on behalf of the appellant to filing of the petition under Section 9 of the Act of 1996 is baseless. Reliance on the provisions of Section 86 of the Code of Civil Procedure, 1908, for raising objection to the jurisdiction of the forum in India, was also not tenable. In the facts of the case, according to the learned counsel, the provisions of Section 86 of the CPC would not apply. Section 14(1)(c) of the Specific Relief Act covers contracts which are determinable at will or merely by issuance of a notice of termination. All contracts, under the Contract Act, are terminable for breach. According to the counsel Clauses 35 and 36 of the contract cover termination of contract for breach and would not preclude specific performance or grant of injunctive reliefs. In a petition under Section 9 of the Act of 1996, there was no question of the respondent claiming or being granted specific relief. In the subject

petition under Section 9, respondent herein had only sought interim relief in order to protect the subject matter of the dispute for a limited period i.e. till 8 weeks after the constitution of Arbitral Tribunal. The bar in Section 14(1)(d) will be inapplicable in the facts of the case. The respondent herein had fulfilled their obligations under the contract to provide 288 units for social / Government Housing. The respondent is seeking to exercise their contractual right to construct and sell the Free Sale apartments and luxury villas. The learned Senior Counsel Shri Chinoy submitted that no question of Sovereign Immunity arises, as under the Contract, the appellant has specifically agreed that disputes between the parties i.e. the appellant and respondent, relating to the Agreement shall be resolved through Arbitration conducted at Mumbai in India. This agreement necessarily attracts the Act of 1996 and the supervisory jurisdiction of the Indian Courts thereunder.

11. The learned Senior Counsel appearing for the respondent submitted that the appellant had received full consideration flowing under the contract i.e. 288 Govt./Social Housing Units. The remaining units, to be constructed by the respondent herein, are not part of any Govt/ Social Housing program. The Government had taken over the entire social

housing component of 288 units in April 2016 without any demur or without making any grievance. The counsel submitted that there is no merit in the appeal and it be dismissed. The learned counsel placed reliance on the following judgments:-

(a) Masood Mohmmed Husain vs. Gulam Rasul Mohammedali Shaikh and ors. **[2007 (2) Mh.L.J. 116]**.

(b) Nawab Usman Ali Khan vs. Sagarmal **[AIR 1965 SC 1798].**

(c) Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited and ors. **[2017 SCC OnLine SC 442].**

(d) Chhed Housing Development Corporation vs. Bibijan Shaikh Farid and ors. **[2007 (2) Bom. C.R. 587]**.

12. We would refer to some of the judgments relied upon by the learned Senior Counsel for the respondent:

In the case of **Nawab Usman Ali Khan vs. Sagarmal** (Supra), the Supreme Court, in para 8, observed as under ;

> “8. …...Now, by its own language Section 86(1) applies to suits only, and Section 141, Code of Civil Procedure does not

> attract the provisions of Section 86(1) to proceedings other than suits. Accordingly, by the conjoint application of Section 41(a) of the Indian Arbitration Act and Sections 86(1) and 141 of the Code of Civil Procedure, the provisions of Section 86(1) are not attracted to a proceeding under Section 14 of the Indian Arbitration Act, 1940. It follows that the court was competent to entertain the proceedings under Section 14 of the Indian Arbitration Act, 1940 and to pass a decree against the appellant in those proceedings, though no consent to the institution of those proceedings had been given by the Central Government. A sovereign foreign State and Ruler of such State may enjoy a wider immunity from legal proceedings other than suits under the rules of International Law recognized by our courts, but the appellant is not now a Ruler of a sovereign State, and cannot claim immunity from proceedings other than suits. The second contention of Mr.Pathak must, therefore, be rejected."

In the case of **Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited and ors**. (Supra), the Supreme Court, in paras 12 and 16, observed as under :-

“12. In an instructive passage, this Court stated that an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause as follows:

> “Thus, it is clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognises the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal, England in C v. D [2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] wherein it is observed that :
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> “It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award.”
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> In the aforesaid case, the Court of Appeal had approved

the observations made in A v. B [(2007) 1 All ER (Comm) 591 : (2007) 1 Lloyd's Rep 237] wherein it is observed that :

> "... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy.... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."

In the case of **Masood Mohammed Husain vs. Gulam Rasul Mohammedali Shaikh and ors.** (Supra), the Division Bench of this Court, in para 13, observed as under :

> "13. …... Though the Supreme Court has expressed its opinion to be "prima facie" and "tentative", in our considered view the opinion that an application under section 9 of the Arbitration and Conciliation Act, is neither in a suit nor a right arising from a contract is founded on a sound legal principle that a right arising from a partnership deed or conferred by the Partnership Act is enforced in a arbitral tribunal and the Court under section 9 is only formulating interim measure so as to protect the right before the arbitral tribunal from being frustrated.......

13. We have perused the record placed before us, the judgments cited (Supra) and considered the submissions advanced. The contractual provisions stipulate that in case of dispute either party may refer the dispute to arbitration by a retired Judge of High Court of Republic of India under the UNCITRAL Arbitration Rules, 1976. It further stipulate that arbitration proceedings shall be conducted in the city of Mumbai in India and in English language. The award of said arbitration shall be final and binding on the parties. Considering the provisions of Section 86 of CPC and the judgment cited on this issue, we are of the considered view that in the light of the agreement reached between the parties and the specific dispute clause in the contract, prior permission or sanction from the Central Government is not necessary. As the parties had entered into contract for choosing juridical State of arbitration in India, the law applicable to such location would be operational. The parties have chosen a place of arbitration in a particular country. In this case, the parties chose to resort to arbitration proceedings at Mumbai in India.

14. The parties entered into a second Addendum to agreement dated 30/11/2015 being Addendum No. 001/2015 whereby the parties, inter

alia, agreed to the following :-

> 8. For clarity, both parties hereby agree and confirm that upon completion of the Government Housing Units in Gaakoshi and Arabiyya, the Developer shall be deemed to have fully discharged its contractual obligations to secure the rights of free sale areas in Gaakoshi, Arabiyya, Naadhee and Odeon sites, both for Commercial and Housing units."

The above stated clause is clear to observe that after completion of Government Housing Units in Gaakoshi and Arabiyya, the developer shall be deemed to have fully discharged its contractual obligations to secure the rights of free sale areas in Gaakoshi, Arabiyya, Naadhe and Odeon sites, both for commercial and housing units. It is stated that the respondent - Apex Reality constructed 288 housing units developed at Gaakoshi and Arabiyya sites and the same were taken over by the Government of Maldives.

15. The respondent pleaded that the delay in payments by the appellant for units completed at Gaakoshi and Arabiyya sites which adversely affected the cash flow and its ability to commence work at other two sites i.e. Naadhee and Odeon. In the facts of the case, we do not find

that the learned Single Judge passed interim relief in the nature of directing performance of the contract by the appellant herein, but by an interim measure, pending appointment of Arbitrator, protected the contractual rights of the developer in securing rights of free sale areas on the given sites. The learned Single Judge was conscious enough of the fact that after discharge of their liability to construct 288 units under the contract, the respondent had right to deal in free sale of the units to be constructed by them both for commercial and housing units. In that sense of the matter, the plea advanced on behalf of the appellant herein in respect of the principles of specific performance of the contract cannot be accepted.

16. The petition was filed by the petitioner under Section 9 of the Act of 1996 which deals with interim measures before or during the arbitral proceeding or at any time after making of the arbitral award. In the present case, learned Single Judge directed that the respondent will invoke arbitration by 15/6/2017 and the order in terms of prayer clauses (a)(i) to (a)(iv) will continue for a period of eight weeks after the Arbitral Tribunal is constituted. The order was made subject to continuation, modification or cancellation of the Arbitral Tribunal. It was made very clear that if not

continued by the Arbitral Tribunal, the order will lapse without further reference to the Court at the end of eight weeks from the date of appointment of the Sole Arbitrator. We are informed that very soon the parties would decide on the appointment of sole Arbitrator, meaning thereby that after appointment of Arbitral Tribunal, ad-interim relief will continue for eight weeks.

17. Needless to mention that the parties would be free to raise appropriate issues before the Arbitral Tribunal in respect of the subject matter of this petition.

18. In the facts of the case, we find that the learned Single Judge adopted reasonable and proper view. We do not find the impugned order to be erroneous one. The balance of convenience is in favour of the respondent - original petitioner. There is no merit in the appeal.

19. The appeal is dismissed. No order as to costs.

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