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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 08.05.2017

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Pronounced on: 25.05.2017

+ **ARB. A. (COMM.) 8/2017 & IA No.4249/2017**

JASSUM PROPCON PROJECTS LTD Petitioner
Through Mr.B.K.Sood and Mr.Sandeep
Thukral, Advs.

versus

MUNISH ARORA & ANR. Respondent
Through Mr.Kapil Arora and Mr.Karan
Khanna, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present petition is filed under section 37 of the Arbitration and Conciliation Act, 1996 seeking to quash the impugned order dated 13.1.2017 passed by the learned Arbitral Tribunal directing the petitioner to furnish a bank guarantee for a sum of Rs.4 crores to secure the respondents.
2. The case of the appellant is that on 30.09.2009 the parties entered into the Space Buyer's Agreement for purchase of a unit on the ground floor measuring 2529.76 sq.ft for a multistoreyed commercial building ABW Tower. On 29.10.2009 an MOU for purchase was entered into between the parties. As per the MOU respondent agreed to purchase the said unit for a total consideration of Rs.1,21,44,000. Necessary consideration was paid. The unit was already leased out to M/s. Panasonic India Private Limited on a

monthly lease amount of Rs.110 per sq.feet. Lease amount of Rs.2,78,273/- was payable to the respondents. It was also held out by the petitioner that the unit was mortgaged by the petitioner and the petitioner shall execute the sale deed in favour of the respondents after getting the unit released from the mortgager. The MOU also provided that in case the petitioner fails to get the sale deed in respect of the property executed/registered in favour of the respondents within one year then the petitioner shall buy back the unit and pay an amount of Rs.19,000/- per sq.feet of the super area to the respondent. It is the case of the parties that pursuant to the MOU the petitioner started paying the agreed monthly rental of Rs.2,78,273/-.

3. However, on 11.7.2013 the parties entered into an MOU-cum-cancellation agreement. As per the said MOU the petitioner agreed to buy back the said unit at the said agreed consideration of Rs.19,000/- per sq.feet, A sum of Rs.50 lacs was paid to the respondents at the time of signing of the MOU. It was also agreed that the petitioner shall pay to the respondent interest on outstanding consideration @ Rs.18% per annum from the date of the Agreement. The petitioner confirmed that they have neither sold/endorsed or entered into an agreement to sell in respect of the said unit from the date of signing of the space buyer agreement and MOU and nor shall the petitioner enter into such an agreement to sell. It was also agreed that in case the petitioner fails to make the payment before 31.8.2013 for any reason whatsoever he will be liable to pay interest @21%.

4. On 30.12.2013 the parties entered into an addendum to the MOU dated 11.7.2013 whereby the time period for making payment of balance consideration was extended till 10.1.2014 provided the petitioner pays

compound interest @21% per annum from 1.9.2013 on the balance consideration amount.

5. Disputes having arisen between the parties the present Arbitration commenced. The respondents filed the present application under Section 17 of the Act seeking relief that pending disposal of the arbitration proceedings the petitioner be restrained from dealing with the property which was subject matter of the agreements between the parties.

6. The learned Arbitrator vide the impugned order noted that as per the MOU dated 11.7.2013 the petitioner has specifically confirmed and undertaken that it has not sold and would not enter into an Agreement to Sell of the unit/flat in question. He also undertook that in the case he fails to pay the balance payment within the stipulated period he will be liable to pay interest @ 21% per annum. The payment was not made. The petitioner without intimation sold the unit contrary to the agreed terms and undertaking. The learned Arbitrator also noted that an order was passed on 7.9.2016 whereby petitioner was directed to take instructions regarding the manner in which the subject matter of the claim could be secured by security of any other immoveable property or otherwise. The petitioners did not respond. Noting that the respondent had not received balance sale consideration or rentals/assured return since July 2014 and in view of the fact that the petitioner has sold the flat to a third party, the learned Arbitrator held that the respondents have made out a good prima facie case and accordingly the learned Arbitrator passed a direction to the petitioner to furnish a bank guarantee for a sum of Rs.4 crores for securing the claim of arbitration within three weeks.

7. I have heard learned counsel for the parties. Learned counsel appearing for the petitioner has vehemently argued that the learned Arbitrator has passed the impugned orders contrary to the provisions of Order 37 CPC. It is stated that in the application under Section 17 of the Act only a relief of stay was sought. He submits that the learned Arbitrator has converted this relief for injunction into a relief under Order 38 Rule 5 CPC without the respondents' pleading or showing the necessary ingredients for application of Order 38 Rule 5 CPC. The learned counsel relies upon the judgments of this court in the cases of *Intertoll ICS Cecons. O & M CO.Pvt. Ltd. v. National Highways Authority of India*, 2013 (4) R.A.J. 733 (Del) and *Lanco Infratech Ltd. v. Hindustan Constructions Company Ltd.*, 2016 (234) DLT 175 to support his submissions. He further submits that the learned Arbitrator has wrongly concluded that a prima facie case is made out. He submits that the respondents had made an investment at best of Rs.1.21 crores. The property was leased out to a tenant on account of which the respondent received rent of about Rs.2.5 lacs per month. He further submits that Rs.50 Lakhs has admittedly been received by the respondents when the MOU dated 11.7.2013 was signed. He stresses that the stipulation in the MOU dated 11.7.2013 providing for payment of interest @21% per annum or the term in the MOU stating that the petitioner would buy back the property at Rs.19,000/- per sq.ft. is a draconian provision hit by section 74 of the Contract Act. He submits that for an investment of Rs.1.21 crores the respondents are demanding a refund of Rs.4.30 crores. He relies upon judgments of the Supreme Court in *Kailash Nath Associates vs DDA*, (2015) 4 SCC 136 and *Fateh Chand vs. Bal Kishan Das*, AIR 1963 SC 1405 to

submit that a demand like the present one is hit by Section 74 of the Contract Act as the demand in question as stated in the MOU is penal in nature.

8. It may be noted that the conduct of the petitioner inspires no confidence. At every stage of the transaction the petitioner has backtracked from his assurances and representations. As per the MOU dated 29.10.2009 the petitioner had undertaken to have the unit released from mortgage and execute the sale deed in favour of the respondent. Upon its failure to do the needful the petitioner had undertaken to re-purchase the property back and pay Rs.19,000/- per sq.ft of super area to the respondents. The petitioner failed to get the property released from mortgage or execute a sale deed in favour of the respondent. Thereafter the parties entered into an MOU dated 11.7.2013 whereby the petitioner agreed to refund the entire dues of the respondent on or before 31.8.2013 alongwith interest @ 18% per annum and pay to the respondent at the agreed rate of Rs.19,000/- per sq. ft. No doubt, a sum of Rs.50 lacs admittedly was paid at that time. The petitioner claims to have paid Rs.75 lacs but this figure is disputed by the respondent. The petitioner also confirmed and undertook not to sell the unit. It also agreed that in case he fails to make the payment on or before 31.8.2013 for any reason whatsoever he will have to pay interest @ 21% per annum. On failure to abide by these conditions an addendum was executed on 30.12.2013 extending the dates of payment upto 10.01.2014. Despite these acknowledgments and promises to fulfil the terms of the contract the petitioners substantially failed to abide by the agreed terms. Now, it transpires that contrary to the terms of the MOU dated 11.07.2013 the petitioner has sold the unit. Clearly the petitioner has been deliberately trying to avoid their promises that have been made at various stages.

9. My attention has been drawn to the arbitration proceedings held on 7.9.2016 before the learned Arbitrator where a direction was made to the petitioner to place on record the complete particulars and details of the alleged transfer/sale done. An opportunity was also given to the petitioner to take instructions regarding the manner in which the claim of the respondent can be secured. The petitioners failed to take steps pursuant to the said directions of the learned Arbitrator.

10. Coming to the submission of the learned counsel for the petitioner about the applicability of Order 38 Rule 5 CPC, it is no doubt true that in the application that was filed by the respondent under Section 17 of the Act, no relief regarding issuance of bank guarantee was sought for. The respondent had sought an injunction order to restrain the petitioner from dealing with property which was subject matter of the agreement between the parties. However, it is in the course of adjudication of the said application that it came to light that contrary to the terms of the agreement between the parties, the petitioner has merrily sold the property. The learned arbitrator on 07.09.2016 directed the petitioner to place on record complete particulars and details of the alleged transfer/sale together with copies of the documents and affidavit of the director of the petitioner. An opportunity was also given to the petitioner to take instructions regarding the manner in which subject matter of the claim can be secured by security of any immovable property or otherwise. On the next date of hearing, namely 22.09.2016, the petitioner did not file any affidavit or comply with the direction of the learned arbitrator dated 07.09.2016. The conduct of the petitioner clearly does not inspire confidence.

11. This court in *Intertoll ICS Cecons. O & M CO.Pvt. Ltd. v. National Highways Authority of India*(supra) held as follows:

“29. The essential condition for the party seeking relief under Order XXXVIII Rule 5 CPC is to show that the Defendant is about to dispose of or to remove the whole or any part of his property from the local limits of the Court. In the instant case it is admitted by both parties that the Appellant is impecunious. The question of the Appellant removing any property from the jurisdiction of the Court simply did not arise.

30. In *Raman Tech. & Process Engg. Co. v. Solanki Traders* (2008) 2 SCC 302 the Supreme Court explained why the power of ordering attachment before judgment under Order XXXVIII Rule 5 CPC was ‘drastic’. For such an order to be passed the Plaintiff had to satisfy the Court that it had a prima facie case. It was only thereafter that the Court would proceed to the next stage of examining whether the interests of the Plaintiff should be protected. It was explained as under:

“5. The power under Order XXXVIII Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.” (Emphasis added)”

12. Conduct of the petitioner has noted above gives rise to serious doubt about the bonafides of the petitioner. The conclusions of the learned

arbitrator in these facts to exercise powers akin to Order 38 Rule 5 CPC cannot be held to be based on no material or improper material.

13. As far as the submission of the learned counsel for the petitioner regarding the applicability of Section 74 of the Contract Act is concerned, these are issues which would be adjudicated upon by the learned arbitrator at the final stage. For the present, it may be noted that the petitioner is a shrewd and a seasoned builder. He has been holding out lucrative promises to his customers including the respondent promising lucrative returns on their investment if they buy property from him. Now, when the customer/respondent has been enticed, the petitioner seeks to wriggle out of his promises claiming that what he promised is hit by Section 74 of the Contract Act. Prima facie the compensation stipulated in the agreement between the parties appears to be reasonable and not a penalty as stated in Section 74 of the Contract Act. Of course, a confirmed view can only be taken at the final stage.

14. There are no reasons to interfere with the impugned order passed by the learned arbitrator. The present petition is dismissed.

(JAYANT NATH)
JUDGE

MAY 25, 2017/n