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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO.1610 OF 2018

M/s.Emerald Buildcon Pvt. Ltd.
A Company incorporated under
the provisions of the Companies Act
1956 and having its registered office
at C8/1A Vasant Vihar, New Delhi - 110057
through its Authorized Representative ..Petitioner

V/s.

1. M/s. New Millenium India Property
Developers Private Limited
Unit No. 907, Aston, Sundervan Complex
Lokhandwala Road, Andheri (W), Mumbai
Bandra Suburban MH 400053.

2. Mr. Nikhil Mathur
13/14, Neel Gagan, A Wing,
Four Bunglows Junction, J. P. Road,
Versova, Andheri (W), Mumbai 40053
Also at : Unit No. 907, Aston,
Sundervan Complex, Lokhandwala Road
Andheri (W), Mumbai Bandra
Suburban MH 400053.

3. Mrs. Vandana Mathur
13/14, Neel Gagan, A Wing,
Four Bunglows Junction, J. P. Road,
Versova, Andheri (W), Mumbai 40053
Also at : Unit No. 907, Aston,
Sundervan Complex, Lokhandwala Road,
Andheri (W), Mumbai Bandra
Suburban MH 400053.

4. Silverglades Infrastructure Private
Limited
(formerly known as Silvergaldes
Buildmart Pvt. Ltd.)
C8/1A Vasant Vihar,
New Delhi – 110057. ..Respondents

Mr.Madhur Rai I/b. PRS Legal for the petitioner.
Mr.P.Modi, Senior Advocate with Mr.Alakhani, Mr.Nirav Shah I/b. Little & Co. for respondent Nos.1 to 3.

CORAM: G.S.KULKARNI, J.

DATE : DECEMBER 20, 2018

ORAL ORDER

Heard learned counsel for the petitioner and learned senior counsel for respondent Nos.1 to 3.

2. This is a petition under section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act") whereby the petitioner is seeking interim reliefs pending arbitral proceedings.

3. The case of the petitioner is that disputes and differences have arisen between the parties under the agreement dated December 26, 2006 under which the petitioner had paid

respondent Nos.1 to 3 (for short "the respondents") an amount of about Rs.41 crores, details of which are set out at Exhibit-P2. According to the petitioner under the said agreement the amount was utilised by the respondents to purchase of lands in Raigad District in Maharashtra. The land so purchased was required to be conveyed to the petitioner subject to the option to be exercised by the petitioner as provided in clause 5.1 of the agreement which reads thus :-

> "*5.1 JVC shall have the sole option but not the obligation to purchase the said lands / property or portions thereof (which portion shall not be less than Tranche) from Millenium from time to time upto a maximum contiguous 1000 acres to be identified (out of the aforementioned 1300) by the parties in writing. Millenium covenants that it shall complete the acquisition of at least 1000 acres of the said lands / property as will be identified by the Parties such that JVC will have the right to exercise its option to purchase the 1000 acres so identified by the parties by May 31, 2007. However, the JVC will have the right to extend this period until October 31, 2007. The JVC shall have the option but not the obligation to acquire the balance 300 acres of the said lands/property along with an additional area of 100 acres as identified by the Parties in accordance with the broad terms and conditions, as may be amended, annexed hereto as* ***Annexure C.*** "

4. Learned counsel for the petitioner refers to clause 9.4 of the Agreement which is one of the representation and warranties of respondents under clause 9 which reads as under:-

“ 9. REPRESENTATIONS AND WARRANTIES

Millenium hereby makes the following representations and warranties based on which the JVC has entered into this Agreement, acknowledging that the JVC shall be entitled to seek remedies against Millenium for any breach thereof.

9.4 it has not and shall also not transfer, sell or otherwise dispose off any interest in the said lands/property or Shares to any other Person or enter into an agreement or similar arrangement with any other Person for the transfer, sale or disposal of any interest in the said lands/property or Shares ”

5. The case of the petitioner is that the respondents have not accounted for the amount of Rs.29 crores and also, has held on to the land, which has caused a serious prejudice to the petitioner's rights and interest under the agreement. To support the said argument, the learned counsel for the Petitioner has drawn my attention to the averments as contained in paragraph 8 of the petition.

6. Learned counsel for the petitioner contends that the present petition is filed as the respondents have not responded to the petitioner's notice dated September 5, 2018 whereby the petitioner pointed out its grievances to the respondent *inter alia* of

not fulfilling the terms and conditions under the said agreement. It is sated that the petitioner also called upon respondent to provide information and documents for inspection. The relevant averments in the said context are made in para 16 and 17 of the Petition. As these averments are of some relevance they are extracted hereunder :-

> "16. The Respondents have failed to comply with the notice dated 05.09.2018, due to which the Petitioner is under the reasonable apprehension that the Respondent Nos.1 to 3 are in discussion, negotiations and are in the process of creating encumbrance, transfer and / or third party rights or interest over shares of the Respondent No.1 and / or the land / property acquired by the Respondent No.1 Company pursuant to the Agreement dated 26/12/2006. The Petitioner has numerous times tried to communicate with the Respondents No.1 to 3 in this regard, but to no avail and the Respondents No.1 to 3 have3 failed to even reply to the said notice dated 5-09-2018 sent by the Petitioner.
>
> 17. That from the aforesaid facts, it is clear that the disputes have arising between the Parties, which are required to be adjudicated by arbitration. However, pending dispute adjudication and in view of the facts and circumstances stated above and in view of the facts and circumstances stated above and in view of the various breaches of the terms of the Agreement, committed by Respondent Nos.1 to 3, it is apprehended by the Petitioner that Respondent Nos.1 to 3 in order to defeat the Claims and rights of the Petitioner under the Agreement, may create encumbrance, transfer and / or create third party rights or interest over shares of the Respondent No.1 and / or the land / property acquired by the Respondent No.1 Company pursuant to the Agreement dated 26-12-2006. thus to protect the rights of the petitioner under the Agreement it is incumbent upon the Petitioner to approach this Hon'ble Court, injunction restraining Respondent Nos.1 to 3 from in any manner selling or creating third partyt rights in the shares and land / property of the Respondent No.1 Company until adjudication of disputes / claims of the Petitioner under the Agreement. "

7. The agreement between the parties contains a dispute resolution mechanism in clause 16.2 which reads thus :-

" *16.2 Dispute resolution*

16.2.1 Notice. In the event any Party is in breach of any of the terms of this Agreement, the Interested Entity may serve written notice to require the Party in breach to cure such breach within thirty (30) Business Days of the receipt of such written notice thereof.

16.2.2 Amicable Resolution, In the case of any dispute or claim arising out of or in connection with or relating to this Agreement, or the breach (where such breach has not been cured by the Party in breach within thirty (30) Business Days of a written notice thereof), termination or invalidity hereof, the Party in breach and the Interested Entity shall attempt to first resolve such dispute or claim through mutual discussions amongst themselves.

16.2.3. Arbitration (i) Any dispute, controversy or claims arising out of or relating to this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

16.2.3.1. The arbitral tribunal shall be composed of three (3) arbitrators. Each Party shall appoint one (1) arbitrator each and the two (2) arbitrators so appointed shall appoint the third arbitrator.

16.2.3.2. The place of arbitration shall be Mumbai and any award whether interim or final, shall be made, and shall be deemed for all purposes between the Parties to be made, in Mumbai.

16.2.3.3. The arbitral procedure shall be conducted in the English language and award or awards shall be rendered in English. The procedural law of the arbitration shall be Indian Law.

16.2.3.4 The award of the arbitral tribunal shall be final and conclusive and binding upon the parties, and the Parties shall be entitled (but not obliged) to enter judgment thereon in any one or more of the courts at Mumbai. Judgment upon any arbitral award rendered hereunder may be entered in the courts of Mumbai only, or application may be made to courts only in Mumbai for judicial acceptance of the award and an order of enforcement, as the case may be.

16.2.3.5. The rights and obligations of the Parties under, or pursuant to, this clause, including arbitration, shall be governed by and subject to Indian Law. "

8. It is in the above circumstances the petitioner has approached this Court seeking the following reliefs pending the arbitration proceedings :-

> a) *Order restraining Respondent Nos.1 to 3 transferring and / or creating any encumbrance, and / or creating any third party rights or interest over shares of the Respondent No.1 Company;*
>
> (b) *Order restraining the Respondent No.1 Company from settling, alienating, gifting, creating any encumbrance, transferring and / or creating any third party rights or interest whatsoever on any lands / property or other immovable assets owned by Respondent No.1 Company or having interests in them;*
>
> (c) *Order restraining the Respondent No.1 Company to reconstitute the board of directors, such that the Petitioner Company can effect control over Respondent No.1 Company;*
>
> (d) *Order restraining the Respondent No.1 Company to disclose/ provide disclosures of all the agreements, documents, audited/unaudited financial statements, balance sheets, pending litigations by or against the Respondent No.1 Company (if any), status of total land acquired, status of N.A. obtained along with all documents pertaining to the same, and any other information sought by the Petitioner pursuant to the Agreement dated 26-12-2006 and the Notice dated 05-09-2018;*
>
> (e) *Order restraining the Respondent No.1 to handover to the Petitioner all original documents including, inter alia, the Sale deed, agreement to sell, Power of Attorney, land approvals and/or all land related and conversion of land use related documents pertaining to the land acquired by Respondent No.1 with money advanced by the Petitioner under the terms of the Agreement.*

9. Respondents have appeared and opposed the reliefs as prayed in this petition. At the outset, learned senior counsel for the respondent submits that the petitioner is not entitled for any reliefs as there is clear suppression of material facts by the petitioner in seeking discretionary and equitable reliefs. It is submitted that

there is extensive correspondence between the petitioner's partners and respondents after the notice dated September 5, 2018, on the basis of which the present petition has been filed. My attention is drawn to a compilation of documents placed on record which contains *emails* addressed by the respondents to the joint venture partners of the petitioner, namely Brack Capital (Cyprus) Ltd (for short "Brack Capital").

10. From these extensive *e-mails* between respondents and the said joint venture partners, it clearly appears that there were meetings between the parties after the said notice was issued by the petitioner whereby the parties have referred that in 2008-09 it was mutually decided that the petitioner wanted to make an exit from the project. It is referred in the *email* that against the advances made to respondent No.1 for land acquisition, it was mutually agreed to secure the petitioner by signing a deed of assignment and transferring approximately 115 acres of land. It is necessary to note that the relevant contents of the *email dated* October 21, 2018 of respondent no.2 *to* Brack Capital, which read thus:-

" *It was a pleasure to meet you in Mumbai on Wednesday, 17th October,* *2018, at Grant Hyatt. It was useful to have a joint meeting with you, Mr.Ravi Khanna and Mr. Pradeep Dubey to discuss the status of our compan New Millenium India Property Developers Pvt. Ltd. Although I am sure that you were aware of the details, in this email I would like to record and confirm what we had agreed to during our meeting.*

When we had started the project in 2006, we obtained permission from the Collector of District Raigad, Maharashtra, under Section 64 (BTAL Act 1948) to acquire land in various villages in the region of Khalapur for developing a Township project. In 2008-09 it was mutually decided that Emerald Buildcon wanted to take an exit from this project. The company had acquired about 418 acres of land in Khalapur till that time. Against the advances made to the company for land acquisition, it was mutually agreed to secure Emerald Buildcon by signing a deed of assignment and transferring approximately 115 acres of land, the details of the land transferred to Emerald Buildcon and its nominees are as under :

- *Emerald Buildcon Pvt. Ltd. = 27.40 acres*
- *Goldshine Apartment Pvt. Ltd. = 6.30 acres*
- *Other nominees. = 82.28 acres*

I had also mentioned to you that I had been meeting the Directors and representatives of Emerald Buildcon, Mr.Sanjay Jain & Mr.Pradeep Jain along with my C.A. for formulate the entire transaction to be executed and accordingly the documentation were prepared, the copies of which are with Mr.Sanjay Jain. It was agreed that the valuation of the payment to Emerald Buildcon and its nominees for the release of 115 acres would be of a total of Rs.45.00 crores, with the breakdown as under:-

- *Rs.32.5 crores, payable to Brack Capital (Cyprus) 2 Ltd. One of the shareholders of Emerald Buildcon*
- *Rs.12.50 crores to Goldshine Apartment Pvt. Ltd. + other nominees*

<u>After the mutual decision of Emerald Buildcon taking an exit from the project, we procured permission under Section 63(1)(a) (BTAL Act 1948) to acquire and develop an Industrial Park in Khalapur along with some other investors</u>. It is to be noted that this permission does not allow for commercial trading of the land, the acquired land can only be developed for an Industrial Park

Project. The permissions obtained for the Industrial Park project were also forwarded to Emerald Buildcon.

<u>To show the bona fides of the company and our investors, we had prepared a draft of Rs.45.00 crores in 2014 in favour of Emerald Buildcon. However, we were informed that the formal approvals (RBI, filing of returns, UNI and other clearances) were not in place and therefore we had to defer the said payment</u>. After Emerald Buildcon had received all the necessary clearances, we had again requested our investors to close the deal. <u>Therefore, we had issued a draft in favour of Brack Capital (Cyprus) 2 Ltd. For a sum of Rs.32.50 crores as our bona fide intention to close the deal and show proof of funds available with us.</u>

The current position of 418 acres of land is that it is scattered and cannot be used for any project development. Hence, we and our investors are keen to develop the Khalapur land for the Industrial Park by acquiring another 200-300 acres to make the land contiguous.

In the present state, there are court cases, tehsil and prant (divisional and district-level) cases that are ongoing, and are being dealt with. There are also significant property and land taxes that are pending. Over the years the company had also accumulated some other liabilities. Out of 303 acres of land (418-115 acres), we have executed the Sale Deed for 185 acres and the rest 118 acres are still in the form of Agreement for Sale. We were unable to convert the latter into Sale Deeds due to issues of legal heirs, expiry of farmers that had given the power of attorney to the company, family disputes etc. These matters have to be dealt with and require funds to be resolved (e.g. the legal heirs are demanding more money now). I had discussed all these issues with you during our meeting.

I am grateful to you for hearing about the entire status of New Millenium so patiently during our meeting. After presenting to you all the facts you were kind enough to endorse our intentions of closing the deal by paying the agreed sum of Rs.45.00 crores as per the details mentioned above. ”

(emphasis supplied)

11. Mr.Lior Shmuel of Brack Capital responded to respondent No.2's email by his email dated October 21, 2018 whereby respondent No.2 was informed the final stage of action to be taken in that regard. The said communication reads as under:-

> *"Dear Nikhil*
>
> *It was a pleasure to meet you too and thanks for your email below.*
>
> *Without commenting on the details mentioned you in your email below, I just wanted to say that we are looking forward to progress with the proposed transaction i.e. your investors buying the entire shareholding of the current shareholders in EBPL for total consideration of 45cr. on as is where is basis. Therefore, it will be efficient if you can send the detailed list of balance information required by you / your investor to conclude the transaction at the earliest and we can meet on 26 & 27 October in Delhi to discuss the structure and modalities.*
>
> *I will appreciate your final confirmation of the meeting dates in order that we can make our arrangements. "*

12. Respondent No.2, thereafter by *email* dated October 24, 2018 responded to the abovesaid email of Brack Capital / petitioner, reconfirming the closure of the transaction for total consideration of Rs.45 crores. The details of which are as under :-

> *"Thank you for your email and for re-confirming the closure of the transaction for a total consideration of Rs.45.00 crores against 115 acres of land, as per the breakup and details in my previous email to you (Emerald Buildcon),*

Goldship Apartment and other nominees).

We have not been able to contact Mr.Pradeep Jain or Mr.Sanjay Jain yet regarding confirmation of our meeting in Delhi on 26th-27th October 2018 – perhaps they have been tied-up with something else. We will confirm the details of our visit as soon as d we consult them for their availability. "

13. Finally, by an *emai*l dated October 26, 2018, Brack Cpaital, the joint venture partner of the petitioner, informed respondent No.2 that the petitioner will consider the proposal for selling of the petitioner's / EBPL's rights over lands in the following terms. The email reads as under :-

"Thanks for your email. To clarify your email, we will be considering your proposal for selling of EBPL's rights over c.418 acres (c.303 acres held by New Millenium and c.115 acres held collectively by EBPL and Goldshine (together with the nominees) for the proposed consideration."

14. Learned senior counsel for the respondents submits that all the above emails are suppressed by the petitioner while seeking interim reliefs in this petition.

15. Apart from what is observed above, my attention is also drawn to the statement of truth appearing at page 55 of the paper-book of the petitioners wherein it is solemnly stated that there is

no false statement or “concealment of any material facts”, documents or record and that the petitioner has included information that is according to him, relevant for the present petition.

16. Learned senior counsel submits that apart from the petitioner approaching this Court pleading a false case and suppressing documents, the petitioner ought to have invoked the dispute resolution clause (supra) as contained in the agreement which was a pre-condition and surprisingly has filed the present petition.

17. I have heard learned counsel for the parties and perused the documents on record. It is clear that the petitioner had issued to the respondents notice dated 5th September, 2018 (Exhibit-P3) on the basis of which the present petition has been filed asserting that there is no response from the respondents and thus reliefs as prayed are required to be granted. Learned senior counsel for the respondents would be right in his contention that this is a false assertion on the part of the petitioner that there was no response by the respondents to the petitioner's notice dated

September 5, 2018. From the emails as exchanged between the parties and as noted above, it is quite clear that there were extensive and considerable negotiations between the parties after the said notice was issued by the petitioner. These documents are clearly suppressed in this petition. Therefore, the case as portrayed by the petitioner as the basis to move this petition, that the respondents have not responded to the petitioner's notice and there is a complete standstill is completely falsified from the said correspondence. It cannot be countenanced that the petitioner is different from Brack Capital for the agreement in question.

18. It is also clearly seen from the documents placed on record on behalf of the respondents, that the parties were negotiating a settlement as the petitioner was considering an exit from the project after accepting Rs.45 crores. The petitioner has clearly suppressed this vital material in seeking interim reliefs of an injunction. Thus, the real intention of the petitioner to file the present petition appears to be something else.

19. It is a settled principle of law that the Courts in

exercising jurisdiction under Section 9 of the Act and in considering the prayers for injunctive reliefs, are governed by the well established principles for grant of interim injunctions. If there is a material suppression of fact or in putting forth misleading facts in seeking equitable relief, such a litigant cannot be granted any discretionary and equitable relief. The solemnity of the court proceedings cannot be left to be abused by such category of litigants, who suppress the material fact. It would be profitable to refer to a decision of the Supreme Court in case of **M/s Arvind Constructions Co. Ltd Vs. M/s Kaling Mining Corporation and Others**[1]. Justice Balasubramanya**n**, speaking for the bench observed that the Court entertaining an application under Section 9 of the Act shall have the same powers for making orders as it has for the purpose and in relation to any proceedings before it. The general rules that govern the court while considering the grant of an interim injunction, at the threshold are attracted, even while dealing with an application under Section 9 of the Act. Also a principle that when a power is conferred under a special statute on an ordinary court of the land, without laying down any special

1 AIR 2007 Supreme Court 2144

condition for exercise of that power, the general rules of procedure of that court would apply. It was also held that the Arbitration Act did not prima facie purport to keep out the provisions of the Specific Reliefs Act from consideration.

20. In **Adhunik Steels Ltd Vs. Orissa Manganese and Minerals Pvt. Ltd**.[2], similar view was taken. In paragraph-10 of the judgment, it is observed as under :-

> "10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep put the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

2 AIR 2007 Supreme Court 2563

21. Adverting to the above principles of law, I am quite certain that the Petitioner has invoked the injunctive jurisdiction of the court under Section 9 of the Act suppressing material facts as noted above and having not approached the court with clean hands, would not be entitled for the interim prayers which are the relief in the nature of an injunction.

22. There is much substance in the contentions as urged on behalf of the respondents that it was necessary for the petitioner to invoke the dispute resolution mechanism if the petitioner was of an impression that there were some disputes. Even the notice issued by the petitioner does not show that there is any dispute between the parties. The petition has only sought information for settlement which in fact is clarified through *emails* exchanged between the parties and placed on record by the respondents.

23. Despite the above conduct of the Petitioner, this court obviously would not overlook the interest of litigant if there are certain circumstances which are found necessary to be recorded. Mr. Mody, learned Senior Counsel for the Respondents has stated that as stated in the e-mail of the Respondents, an amount of Rs.45 crores is kept intact

by the Respondents. The said amount shall not be dealt by the Respondents till the disputes between the parties are resolved and/or are adjudicated interim or final before the Arbitral Tribunal. Ordered accordingly.

24. For all these reasons, at this stage I am not inclined to grant any interim relief to the petitioner pending arbitration proceedings. The petition is rejected, however, subject to the above observations and cost of Rs.25,000/- to be paid to the respondents.

25. Needless to observe that the observations as made in this order are prima facie and only in the context of adjudication of this application under Section 9 of the Act. In the event of reference of disputes to arbitration, all contentions of the parties on merits on the disputes are expressly kept open.

(G.S.KULKARNI, J.)