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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 02th August, 2018

+ ARB. A. (COMM.) 39/2018
KOPASTIN HOLDINGS LIMITED Petitioner
Through: Mr.Jayant Mehta, Mr.Madhav
Khosla, Advs.

versus

UDAY BAHADUR AND ANR. Respondents
Through: Mr.Arun Kathpalia, Sr. Adv. with
Mr.P.R.Rajhans, Mr.Neeraj Kapoor,
Mr.Samaksh Goyal, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

IA No. 10172/2018 (Exemption)

Allowed, subject to all just exceptions.

IA No. 10171/2018

For reasons stated in the application, the delay in refiling of the appeal is condoned.

ARB.A. (COMM) 39/2018

1. This appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the order dated 22.01.2018 passed by the Sole Arbitrator dismissing the application filed by the appellant under Section 17 of the Act.
2. The disputes between the parties have arisen in relation to the Joint

Venture Agreement executed between the appellant and respondent no. 1 on 03.03.2008 with respect to the respondent no. 2 company. It is the case of the appellant that in terms of the Joint Venture Agreement, the appellant was to invest in respondent no. 2 a sum of USD 5 million and respondent no. 1 was to invest USD 0.5 million. It is further submitted that in discharge of its obligation, the appellant invested a sum of Rs. 15,24,98,558/- in respondent no. 2 from the financial year 2007-08 to 2010-11, however, the respondent no. 1 failed to invest its part of the committed amount.

3. It is further alleged by the appellant that in terms of the Joint Venture Agreement, the Board of Directors of respondent no. 2 was to consist of Directors of which 3 were to be nominated by the appellant and 2 were to be nominated by respondent no. 1 and all decisions of the Board were to be taken by a majority. The appellant submits that with the money invested by the appellant, the respondent no. 2 purchased approximately 11 acres of land at Village Nistauli, Loni Road, Ghaziabad, UP. It is alleged that in April, 2008 the respondent no. 1 informed the appellant over emails that respondent no. 1 wished to enter into a Joint Development Agreement with one M/s Samiah International Builders Pvt. Ltd and thereafter, a Joint Development Agreement dated 05.05.2008 was also executed between respondent no. 2 and the said Company.

4. The appellant alleges that the respondent no. 1 inducted one Mr. Kumbashi Srinivasanirudha as an alternative Director in place of the nominee Director of the appellant Mr. Yeouda Eitan Passo in 2012 without the consent of and information to the appellant or its nominee Director Mr. Yeouda Eitan Passo. It is alleged that the respondent no. 1 took charge and control of respondent no. 2 and started conducting business and affairs

of the respondent no. 2 in an arbitrary manner and without any approval and consent of the appellant. The appellant further alleges that respondent no. 1 assured the appellant that the land owned by respondent no. 2 would be sold by respondent no. 1 and the entire investment of the appellant would be returned in due course. In May, 2015 when the appellant sought return of the investment and sharing of all records of the transaction made by the respondent no. 2, respondent no. 1 refused to share the same or return the investment of the appellant. Thereafter, the appellant in January, 2016 instructed a Chartered Accountant Firm to help the appellant ascertain the Balance Sheet and functioning of respondent no. 2. It is only upon receiving a report from the Chartered Accountant that the appellant realised that the respondent no. 1 had been selling the immovable properties of respondent no. 2 and had even received advance against the same. In fact, in the course of hearing of the petition filed under Section 9 of the Act, the appellant learnt that almost the entire land owned by respondent no. 2 had been sold. The said sale was without knowledge or consent or approval of the appellant. It is further alleged that respondent no. 1 had availed certain unsecured loans from respondent no. 2 in the financial year 2011-12 and 2012-13 and has been drawing remuneration of approximately Rs. 1.08 crores per year from respondent no 2.

5. With these allegations, the appellant had earlier filed an application under Section 9 of the Act seeking interim relief against the respondent no. 1. This Court vide its order dated 25.04.2016 had passed an *ex parte* order of injunction in favour of the appellant *inter alia* restraining the respondent no. 1 from creating any third party interest in his undivided share in the house property being C-424, Defence Colony, New Delhi-110024. Vide order

dated 21.10.2016 of this Court, the said order was directed to continue till such time the Arbitrator appointed by the parties varies/modifies the same. The said order was challenged by the respondent no. 1 before the Division Bench of this Court by way of an appeal being FAO (OS) (COMM) 138/2016. The appeal was allowed by the Division Bench vide its order dated 09.12.2016 directing the Single Judge to decide the petition under Section 9 of the Act filed by the appellant on merits.

6. On the remand, as in the meantime the Arbitrator had been appointed pursuant to the orders of the Supreme Court, the learned Single Judge of this Court vide order dated 26.07.2017 directed that the petition filed by the appellant be considered as one under Section 17 of the Act and shall be decided expeditiously by the Arbitrator. The Impugned Order has been passed on the said application.

7. The learned counsel for the appellant submits that the Arbitrator has erred in passing the Impugned Order as he has failed to appreciate that it was only the appellant who had made investment in the respondent no. 2 company pursuant to the Joint Venture Agreement and respondent no. 1 did not make any investment in respondent no. 2 company and on the other hand had transferred the entire land holding of respondent no. 2 without returning the investment made by the appellant. He further submits that the only protection available to the appellant would be in form of an order restraining respondent no. 1 from in any manner alienating or parting with the possession of the abovementioned property at Defence Colony.

8. The learned senior counsel for the respondents, who appears on advance notice, submits that the present appeal is liable to be dismissed on ground of suppression of relevant documents alone. He submits that while

passing the Impugned Order, the Arbitrator has taken note of various correspondence exchanged between the parties as also the minutes of meetings of the Board of Directors of respondent no. 2 company, which has intentionally not been filed by the appellant on record. He further submits that the Arbitrator has passed a reasoned order and the arbitration proceedings are also at an advanced stage with the witness of the respondents being cross-examined by the appellant.

9. Learned senior counsel for the respondents has submitted that even otherwise, no case has been made out for seeking an order of restraint on the respondent no. 1 against his personal residential property.

10. I have considered the submissions made by the counsels for the parties. The Arbitrator in his Impugned Award has, after considering the documents filed and submissions made by the parties, recorded the following *prima facie* findings:-

“26. After considering the submissions made by the Ld. Counsel for the parties and examining the pleadings and documents placed on record it cannot be prima facie held that the Claimant did not know as to what was happening in Respondent No. 2. It kept silence for a period of 7-8 years before invoking arbitration without questioning the Respondent No. 1 in regard to the developments made regarding the Real Estate business. Copies of the emails placed on record by the Respondents prima facie show that the Claimant knew about the purchase of the Project land of 11 acres in Village Nistauli, partnership between Respondent No.2 and M/s Samia International, the difficulties being faced by Respondent No. 1 in regard to the purchase of the additional parcels of land and above all the problems arising on account of non-contribution of the committed investment by the Claimant. It also appears that the Claimant was under some financial stress and as such was not inclined to contribute further funds in Respondent No. 2.

27. The case set up by the Claimant in regard to the non-contribution

of the funds by Respondent No.1, withdrawal of salary by Respondent No. 1 without the approval of the Board of Directors or the Claimant Company, non-supply of the financial statements and balance sheets of Respondent no.2 to the Claimant and fabrication and manipulation of the Minutes of the Board Meetings including appointment of alternative Director without the knowledge or consent of the Claimant is prima facie not acceptable as the documents placed on record show that the Respondent No.1 had contributed the agreed investment in Respondent No.2 whereas the Claimant had not abided by its commitments made in the JVA. The Financial Statements and Balance Sheets of the Claimant Company were on the website of ROC and as such were in public domain. The Claimant therefore could have accessed the same and seen as to what was happening in Respondent No.2. Mere absence of the signatures of the Claimant's Representative on the Minutes of the Board Meetings does not establish that none was present in the Meetings on behalf of the Claimant. Ld. Counsel for the Respondents has asserted that they would lead evidence to show that almost on all the dates of Meetings, Mr. Oded Turgeman of the Claimant was very much present in India and was attending Board Meetings. It is not understandable as to why for a period of 7-8 years the Claimant never lodged any protest in regard to the non-availability of the Financial Statements of Respondent No.2 or non-receipt of the Notices of the Board Meetings or any violation of the JVA on the part of Respondents. Therefore, prima facie the allegations made by the Claimant cannot be sustained at this stage and the same can be adjudicated upon after trial at the final stage only. The allegations made by the Claimant which are in the nature of mismanagement and oppression of Respondent No.2 by Respondent No.1 cannot be agitated in Civil Courts. These can be raised before NCLT only which is the appropriate Statutory Forum for looking into such allegations.

28. It has to be kept in mind that the Claimant had not paid the invested amount to Respondent No.1. This investment was in Respondent No.2 only which is a separate legal entity. The amount invested in Respondent no.2 was neither a loan nor advance but was payment towards equity which was issued and still remains with the Claimant. The Claimant therefore cannot ask the Respondents to refund the amount invested by it in Respondent No.2. It was not a debt

recoverable by the Claimant from Respondents. The only remedy available to the Claimant was by sale of the equity as per the exit provision contained in Clause 13 of the JVA. No effort was made by the Claimant to exercise its rights under Clause 13 of the JVA. The Claimant may be having any other remedy but prima facie it has no right to claim refund of its investment or Claim compensation from Respondent No.1 in respect of its investment in Respondent No.2 Company.”

11. Learned counsel for the appellant was not in a position to show how the *prima facie* findings of the Arbitrator are incorrect. Admittedly in terms of the Joint Venture Agreement and in exercise of its powers and rights, the appellant had appointed two Directors on the Board of Directors of respondent no. 2. The breaches that are being complained of, even according to the appellant, started somewhere from February 2009. It cannot be believed at this stage that the appellant was not aware of the functioning of respondent no. 2 and its dealings. It is only in 2016 that the appellant allegedly and suddenly woke up from its slumber and sought interim protection in form of restraint against respondent no. 1. There are therefore, certain disputed questions of facts which would have to be considered by the Arbitrator on receiving evidence from the parties, including whether the appellant was fully aware and had given its consent to the dealings of respondent no. 2, including the sale of land at Ghaziabad. Equally it would have to be determined whether the respondent no. 1 can at all be held liable on the basis of the allegations made by the appellant. The Arbitrator on a *prima facie* consideration of all these aspects has held that this was not a fit case for exercising jurisdiction akin to Order 38 Rule 5 of the Code of Civil Procedure, 1908 restraining the respondent no. 1 from alienating or transferring its residential property. The Arbitrator’s findings in this regard

are contained in paragraph 29 of the Impugned Order and are reproduced hereinbelow:-

“29. Apart from the aforesaid it has to be added that the remedy of attachment before judgment, which is being prayed for by the Claimant in the Application under consideration, is an exceptional remedy. It can be granted only if the grounds mentioned in Order 38 Rule 5 of the CPC are made out. There is no evidence that the Respondent No.1 is going to remove, dispose of or squander the house property No.C-424, Defence Colony, New Delhi-110024 with a view to defeat the execution of the Award that may be passed against him. Mere apprehension of the Claimant as pleaded in para 22 of Application is not sufficient to grant this extraordinary relief. Ld. counsel for the Respondents has vehemently argued that the property No.C-424, Defence Colony, New Delhi-110024 is a residential house of Respondent No.1 and as such is exempt from attachment. Ld. Counsel for the Claimant has submitted that this property is not a purely residential property of Respondent No.1 in as much as the registered office of the Company Respondent No.2 is at the same address. Ld. Counsel for the Respondents has submitted that in case a small portion of residential house is being used for business purposes the property does not lose its residential character. He has cited the following judgments in support of this submission:-

(a) Firm Ganga Ram-Kishore Chand Vs. Firm Jai Ram-Bhagat Ram reported in AIR (1957) P H 1588

(b) Brij Mohan Lal Vs. Bakhshi Ram etc., reported in AIR (1975) P H 746

(c) Ram Lal & Ors Vs. M/s Piara Lal Gobindram & Ors. reported in (1973) 2 SCC 192

In view of the cited judgments and the fact that the Claimant itself had described property No.C-424, Defence Colony, New Delhi-110024 as “house property”, it cannot be held that the said property is not a residential property. By merely giving the address of Respondent No.2 from the said property it did not lose its character of a residential property and as such it cannot be subjected to attachment as prayed.”

12. I am in full agreement with the findings of the learned Arbitrator and do not find the Impugned Order to warrant any interference from this Court.

The Arbitrator shall remain uninfluenced by any observation made by me in the present order, which shall not bind the Arbitrator while adjudicating the disputes between the parties on merits.

13. In view of the above, I see no merit in the present appeal and the same is dismissed, with no order as to cost.

NAVIN CHAWLA, J.

AUGUST 02, 2018/rv