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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L.) NO.55 OF 2019

Ornate Housing Private Limited ..Petitioner
Vs.
Tata Housing Development Company Ltd. ..Respondent

WITH
NOTICE OF MOTION (L.) NO.155 OF 2019
IN
ARBITRATION PETITION (L.) NO.55 OF 2019

Ornate Housing Private Limited ..Applicant
In the matter between
Ornate Housing Private Limited ..Petitioner
Vs.
Tata Housing Development Company Ltd. ..Respondent

Mr.Chirag Modi i/b. Mr.Harshad Rajshirke for Applicant/Petitioner.
Mr.Gautam Ankhad with Mr.Pradeep Mane, Mr.Jay Zaveri i/b. M/s.Crawford Bayley & Co. for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 28th JANUARY, 2019

P.C.:

Heard Mr.Modi, learned Counsel for the petitioner and Mr.Ankhad, learned Counsel for the respondent.

2. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “the “ACA”) assails the arbitration award dated 21 December 2018 passed by the learned sole arbitrator whereby the learned arbitrator has partly allowed the claims as made by the

respondent/org.claimant and has rejected the counter-claim of the petitioner/org.respondent. The operative portion of the award reads thus:-

> "(i) It is hereby declared that the Development Management Agreement dated 9th October 2014 and the Subscription Agreement dated October 2014 are not binding and/or subsisting between the Claimant and the Respondent after 6th July 2016.
>
> (ii) That the Respondent is directed by this Award to pay to the Claimant a sum of Rs. 5 lakhs with simple interest thereon at the rate of 9% per annum from 7th July 2016 till payment and/or realization towards refund under the Subscription Agreement.
>
> (iii) There shall be a permanent injunction against the Respondent in terms of prayer (d) of the Statement of Claim. Prayer (d) is reproduced hereunder:
>
> > "d) That this Hon'ble Tribunal be pleased to pass permanent injunctive reliefs, Ordering and directing the Respondent, its members, directors, officers, representatives, agents and/or servants restraining, injuncting, prohibiting and/or preventing them"
> >
> > i) from in any manner asserting and/or acting upon in furtherance of Development Management Agreement dated 9th October 2014; and
> >
> > ii) from in any manner using intellectual property belonging to the Claimant or generated pursuant to Development Management Agreement dated 9th October 2014 including but not limited to the Claimants name, trademark, slogans, logos and any publicity or marketing material whatsoever"
>
> (iv) The claim of damages made by the Claimant is rejected.
>
> (v) The Counter Claim of the Respondent is rejected.
>
> (vi) The Respondent shall pay to the Claimant towards costs of the arbitration proceedings a sum of Rs. 5,50,000/- being the share of arbitral fees borne by the Claimant. The said cost to be paid within 4 weeks of the date of receipt of the Award, failing which, the Respondent shall pay interest on the sum of Rs. 5,50,000/- at the rate of 18% per annum after the expiry of 4 weeks.
>
> (vii) Upon payment of Rs. 5 lakhs with interest as above

> and upon payment of costs, the Respondent shall be entitled to withdraw the sum of Rs. 5 Crores deposited in the Hon'ble High Court in Arbitration Petition (L) No.345 of 2015."

3. Relevant facts are;

One Abhyuday Nagar Sahakari Gruhanirman Sansthancha Sangh Ltd. (for short, "the Federation") in its meeting held on 15 July 2014 decided to redevelop the properties of its member societies under Development Control Regulation 33(9). In this regard tenders were issued on 24 August 2014. The petitioner intended to participate in the said tender and accordingly entered into a Development and Management Agreement (for short, "**DMA**") dated 9 October 2014 and Subscription Agreement (for short, "**SA**") dated 9 October 2014 with the respondent. In pursuance of the said agreements, the petitioner also made an earnest money deposit of Rs.5 Crores with the respondent.

4. The Federation had received bids from seven bidders out of which four bidders came to be shortlisted. The petitioner was one of the shortlisted bidders. This was the position in December 2014.

5. The petitioner in September 2015 filed S.C. Suit No.2098 of 2015 in the City Civil Court at Bombay against the Federation and one Keystone Realtors Pvt. Ltd. who had participated in the said tender inter-alia praying for the following reliefs:-

> “(a) that this Hon'ble Court be pleased to declare that the bid of the Second Defendant, having been disqualified, cannot be considered by the First Defendant and their members, officers, employees;
> (b) that this Hon'ble Court be pleased to order and direct the First Defendant to comply with the said Circular, directions of the Third Defendant and that this Hon'ble Court be pleased to declare all acts done in violation thereof including issuance of the letter dated 23rd August, 2015 as illegal and non-est;
> (c) that this Hon'ble Court be pleased to permanently restrain the First Defendant and/or their members, officers, employees from acting upon and/or considering the bid and/or permitting the Second Defendant to participate in the tender process;
> (d) that this Hon'ble Court be pleased to permanently restrain the Second Defendant and/or their agents, officers, employees from further participating in and/or interfering in and/or obstructing in any manner whatsoever in the tender process;
> (e) that pending hearing and final disposal of this suit, this Hon'ble Court be pleased to issue a temporary order of injunction restraining the First Defendant and/or their members, officers, employees from acting upon and/or considering the bid and/or permitting the Second Defendant to participate in the tender process.”

6. In the said suit, the petitioner by an interlocutory application prayed for grant of temporary injunction, which came to be rejected by the trial court by an order dated 28 October 2015. An appeal from order was filed against the said order which also came to be rejected by this Court by an order dated 7 April 2016. Further the order passed by this Court came to be challenged by the petitioner in the Supreme Court in Special Leave to Appeal (C.) No.15940 of 2016, which also came to be dismissed on 5 July 2016.

7. The respondent on a substantive belief that the petitioner would not be awarded the tender by the Federation, for which the petitioner and the respondent had entered into DMA and SA, terminated the DMA and the SA by its letter dated 18 December 2015 which reads thus:-

> "We refer to the captioned Development Management Agreement and the Subscription Agreement executed between us.
> We have come across various news clippings which report that Rustomjee has won the bid for redevelopment of Abhyuday Nagar. We enclose the news clippings, articles herewith for your reference.
> Consequently, both the Development Management Agreement and the Subscription Agreement, which were conditional upon Ornate winning the bid for re-development, have now come to an end.
> In accordance with the terms of the Development Management Agreement read with the Subscription Agreement, we enclose herewith a cheque being Cheque bearing no.402157 dated 17-12-2015 issued by IDBI Bank in favour of Ornate Housing Private Limited, the sum of Rs.4,95,00,000/- (Rupees four crore ninety five lakh only) being the sum of Rs.5,00,00,000/- (Rupees five crore only), [towards the refund of the porition of the adjustable advance paid by Ornate Housing Private Limited ("Ornate") to us under the Development Management Agreement] less the sum of Rs.5,00,000/- (Rupees five lakh only) being an amount paid by us towards the issuance of the 2,00,000 (two lakh) redeemable cumulative non-participating non-convertible preference shares of Rs.10/- each.
> Request you to please acknowledge receipt of the aforesaid cheque and do the needful including but not limited to intimation to the Registrar of Companies about the requisite changes pursuant to the above.
> We wish you the best for all your future projects."

8. As noted in the above letter, although the respondent offered to the petitioner payment of Rs.5 Crores, the petitioner by a handwritten endorsement on the said letter, refused to accept the payment of Rs.5 Crores disputing that the petitioner was no more qualified for tender

prepared by Federation and/or petitioner's bid was rejected.

9. During the pendency of the said suit, the Federation by its letter dated 6 July 2016 issued to M/s.Keystone Realtors Pvt. Ltd. (for short, "Keystone") informed Keystone that the Managing Committee of the Federation in a resolution passed in the meeting held on 6 July 2016 had resolved to award the tender in question for redevelopment of the building of the societies to Keystone. The letter also incorporated that as per clause no.3 (on page No.15 of tender document) Keystone was invited to redefine the bid on some points as set out on page 3 and 4 of the said letter. This letter of the Federation clearly records that all terms under caption of introduction, tendering process, instructions, General Conditions and general conditions of contract and all other conditions shall be mandatory and binding on Keystone and it also speaks about the further documents which are required to be executed by Keystone. It is informed that the earnest money which was deposited by Keystone would be retained by the Federation. The letter ends with a note congratulating Keystone on its selection as the developer. This letter of Federation appears to be consequence of rounds of discussion with Federation and of certain background which according to the respondent was their correct apprehension in addressing a letter dated 18 December 2015 to the petitioner terminating the DMA executed

between the petitioner and the respondent on the premise that the petitioner would not be awarded the contract by the Federation.

10. In the above circumstances, the respondent approached this Court by filing a petition under Section 9 of the ACA. By an order dated 23 December 2016 this Court directed the respondent to deposit an amount of Rs.5 Crores with the Prothonotary and Senior Master of this Court and the petitioner was permitted to withdraw the amount as deposited by the respondent. As on date the said amount continues to remain deposited in this Court. This Court also referred the dispute and difference between the parties for arbitration by appointing a sole arbitrator.

11. Accordingly before the arbitral tribunal the respondent/claimant filed a statement of claim making the following prayers:-

> "a) That this Hon'ble Tribunal, be pleased to order and declare that the Development Management Agreement dated 9th October, 2014 (Exhibit "B") has lapsed and/or expired as such the Development Management Agreement dated 9th October, 2014 is not valid, binding and/or subsisting between the parties thereto i.e. the Claimant and the Respondent herein;
> b) That this Hon'ble Tribunal be pleased to order and declare the Respondent to refund to the Claimant the Application Amount of INR 5,00,000 (Indian Rupees Five Lakhs only alongwith interest @ 18% p.a. paid under the Subscription Agreement.
> c) That this Hon'ble Tribunal be pleased to order and declare the Respondent to pay to the Claimant the legal costs incurred in the matter alongwith interest @ 18% p.a. and a

sum of Rs.25 crores alongwith interest at the rate of 18% p.a. from the date of repudiation of the DM Agreement till actual repayment as per the Particulars of Claim (Exhibit "Z");

d) That this Hon'ble Tribunal be pleased to pass permanent injunctive reliefs, ordering and directing the Respondent, its members, directors, officers, representatives, agents and/or servants restraining, injuncting, prohibiting and/or preventing them:

i) from in any manner asserting and/or acting upon in furtherance of Development Management Agreement dated 9th October, 2014; and

ii) from in any manner using any intellectual property belonging to the Claimant or generated pursuant to Development Management Agreement dated 9th October, 2014 including but not limited to the Claimants name, trademark, slogans, logos, and any publicity or marketing material whatsoever.

e) For costs; and

f) Pass any further order(s) or direction(s) as this Hon'ble Tribunal may deem fit, proper and necessary in the facts and circumstances of the present case and in the interest of justice."

12. The petitioner contested the respondent's claim as also made the following counter-claim:-

"A. to order and direct the Claimant to specifically perform and comply with its obligations under the DMA and the Subscription Agreement;

B. In the alternative and in case this Hon'ble Court coming to the conclusion that specific performance cannot be granted for any reason whatsoever the Claimant be ordered and decreed to pay to the Respondents the sum of Rs. 1800,00,00,000/- (Rupees Eighteen Hundred Crore Only) towards damages."

13. Learned sole arbitrator after considering the rival submissions of the parties and the oral and documentary evidence in support of their case, has partly allowed the claim of the respondent/claimant and has

rejected the petitioner's counter-claim by the impugned award. It is in the said circumstances, the present petition has been filed by the petitioner challenging the award.

14. Mr.Modi, learned Counsel for the petitioner, assailing the impugned award has very limited submissions. Mr.Modi's first submission is that the entire assumption on the part of respondent to terminate the DMA and the SA by their letter dated 18 December 2015, was that the petitioner's bid as invited by the Federation was rejected. Mr.Modi submits that the record clearly indicates that there was no formal contract as executed by the Federation with Keystone and thus, the presumption on the part of the respondent in terminating the DMA and the SA was without any basis and ought not to have been accepted by the sole arbitrator. It is submitted that the letter dated 6 July 2016 of the Federation to Keystone, would clearly go to show that it was not an award of the contract by the Federation to Keystone as Keystone was called upon by the Federation to redefine the bid offer on various issues. The second contention as urged by Mr.Modi is that the termination of the DMA and SA by the respondent would also make the Suit No.2098 of 2015 as filed by the petitioner before the City Civil Court, infructuous, in as much as it was the only ad-interim reliefs, in the suit which came to be rejected. The substantive rights of the petitioner to be asserted in the suit are still open and the petitioner was thus entitled for a relief of a

specific performance of DMA and SA before the arbitral tribunal. It is, therefore, submitted that all these issues are clearly overlooked in partly allowing the claim as made by the respondent and in rejecting the petitioner's counter-claim.

15. Mr.Ankhad, learned Counsel for the respondent would oppose the petitioner's submissions. It is submitted that the record clearly indicates that there was a valid basis for the respondent to terminate the contract. It is submitted that the respondent's letter dated 18 December 2015 was clear that the contract was not being awarded to the petitioner despite substantial lapse of time, it was not awarded. Contention of the respondent is that the entire basis of the DMA and SA executed between the parties was frustrated on account of the award of the tender/contract not forthcoming to the petitioner from the Federation. It is submitted that the petitioner therefore could never take up a position on a presumption of a future award of the contract, which itself was illusory and assert that the respondent ought to continue under the DMA/SA. It is thus submitted that termination of the contract by the respondent vide letter dated 18 December 2015 was valid and the same was completely fortified by the letter dated 6 July 2016 as issued by the Federation to Keystone. It is submitted that the learned arbitrator considering the material and evidence on record has rightly passed the impugned award in not granting the claim of the respondent. It is

submitted that the award in fact puts the parties in the same position as they stood before the DMA and SA come to be executed for the reason that the petitioner's bid was successful with the Federation. It is submitted that the contentions as urged on behalf of the petitioner challenging the award are such, which would not warrant any interference in the limited jurisdiction of the Court under Section 34 of the ACA.

16. Having heard learned Counsel for the parties and having perused the documents placed on record and the award passed by the learned arbitrator, I am not persuaded to accept the submissions made on behalf of the petitioner. This is for two fold reasons. Firstly, it appears to be quite clear from the record that the petitioner could not succeed in their bid as it was not accepted by the Federation. Moreover the letter dated 6 July 2016 as addressed by the petitioner to Keystone clearly indicates that Keystone was accepted to be a successful bidder and that the Federation clearly intended to award the contract to Keystone by a resolution passed by the Managing Committee as clearly set out in the said letter of Federation to Keystone. The contention as urged on behalf of the petitioner that this letter of the Federation cannot be considered as an intention to award the contract to Keystone *prima-facie* cannot be accepted looking at clear contents of the said letter. Moreover the Federation had not kept open any other option, to accept the bid of any

other bidder, much less of the petitioner. The argument of the petitioner on the basis that certain clarifications were sought in respect of some part of Keystone's bid and therefore, it ought not to be considered as a award of the contract also cannot be accepted. There is no material as placed on record by the petitioner before the arbitral tribunal which in any manner, would indicate that in fact, it was the petitioner whose bid was sought to be accepted by the Federation. If that be the case on record, the respondent would be correct in its contention that there was sufficient basis for the entire foundation for the DMA and the SA to stand extinguished and there was no embargo on the respondent to terminate the said contract.

17. In fact a perusal of the statement of claim as made on behalf of the petitioner as also the assertion as made by Mr.Modi, in the present proceedings, one would wonder of any real need for these arbitration proceedings. It can be very well observed that the respondents were right in approaching this Court under Section 9 of the ACA and in pursuance to the order passed in the said petition, the respondents justifiably deposited Rs.5 Crores with this Court which it could not retain after termination of the contract dated 9 October 2014.

18. The intention of the petitioner however appears to be something else as rightly contended on behalf of the respondent namely to

continue the partnership for some undue commercial gains despite the fact that the bid of the petitioner was not accepted by the Federation. According to the respondent, the petitioner are more interested to use the respondent's name for this project. A perusal of the record and proceedings clearly indicate that the petitioner had in fact pursued its counter-claim and had asserted a position of continuation of DMA and SA without any foundation of the contract being awarded by the Federation to the petitioner.

19. A perusal of the award clearly states that the learned Arbitrator has considered the evidence as placed on record and considering the same has recorded findings. The learned arbitrator has held the reasons as set out in the termination letter dated 18 December 2015 as issued by the respondent, valid and justified, and has observed that the facts clearly indicate the respondent was not entitled for specific performance of DMA and SA. There cannot be any re-appreciation of evidence in these proceedings.

20. In view of the foregoing reasons, in my considered opinion, there is no ground whatsoever, which is made out by the petitioner to interfere in the award, on any ground as would be available under Section 34 of the ACA. The petition is devoid of any merits. It is accordingly rejected.

21. As a consequence of disposal of this petition under Section 34 of the ACA, the petitioner would be entitled to withdraw the amount of Rupees Five Crores along with accrued interest which remains deposited in this Court, pursuant to the order dated 23 December 2016 passed in the proceedings under Section 9 of the ACA.

22. Mr.Modi, learned Counsel for the petitioner, at this stage, submits that any observations made in the award and this judgment shall not come in the way of petitioner pursuing the S.C. Suit No.2098 of 2015 as pending in the City Civil Court. It is the petitioner who has instituted the said suit. From perusal of the cause title, it is quite clear that the respondent is not party to the suit and the said suit is therefore not based on any contractual arrangement between the petitioner and the respondent. Thus all contentions of the petitioner in the said suit are required to be kept open.

23. In view of disposal of the petition, nothing survives in Notice of Motion (L.) No.155 of 2019. It is accordingly disposed of.

[G.S. KULKARNI, J.]