

THE HONOURABLE SRI JUSTICE SANJAY KUMAR
AND
THE HONOURABLE SRI JUSTICE P.KESHAHA RAO

CIVIL REVISION PETITION NO.1503 OF 2019

ORDER

(Per Hon'ble Sri Justice Sanjay Kumar)

The petitioners herein approached the learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad (*hereinafter*, 'the Commercial Court'), by way of COP No.14 of 2019 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), to set aside the arbitral Award dated 06.12.2018 and consequently, to allow their claims. Therein, they filed I.A.No.140 of 2019 under Section 36(2) of the Act of 1996 to suspend the operation and effect of the arbitral Award dated 06.12.2018 as well as the notice of termination, so as to enable them to continue in possession of the property pending disposal of the main petition. By order dated 21.06.2019, the Commercial Court dismissed the IA. Aggrieved thereby, they filed this revision petition under Article 227 of the Constitution.

The first respondent herein is a Government of India Undertaking registered under the provisions of the Andhra Pradesh Societies Registration Act, 2001. The then Andhra Pradesh Tourism Development Corporation Limited allotted and transferred an extent of Acs.6.00 guntas in Survey No.91 of Gachibowli Village, Serilingampally Mandal, Ranga Reddy District, to the first respondent for setting up a star hotel. Thereupon, the first respondent issued an advertisement in daily newspapers on 28.02.2009 proposing to set up a four-star hotel on Build, Operate and Transfer (BOT) basis under Public Private Partnership mode and invited proposals through competitive bidding process. Upon acceptance of the petitioners' proposal, a lease agreement for a period of 33 years was executed by and between the

petitioners and the first respondent on 04.11.2010. They also entered into a Development and Management Agreement on 10.08.2011.

However, owing to delay in execution of the project, the first respondent issued termination notice dated 23.07.2016, alleging that the petitioners had committed breach of trust and violation of the lease agreement and the development and management agreement, and terminated the said agreements with immediate effect. The first respondent requested the petitioners to hand over the project site before 30.07.2016, apart from paying it a sum of Rs.4,03,74,225/-. The first respondent cautioned the petitioners that in the event they failed to do so it would initiate appropriate legal action against them. The petitioners replied, *vide* letter dated 30.08.2016, citing the reasons for delay in execution of the project and sought withdrawal of the termination notice. The first respondent however encashed the bank guarantee furnished by the petitioners on 03.10.2016.

Thereupon, arbitration proceedings were initiated at the behest of the petitioners in terms of Article 11.2 of the Lease Agreement dated 04.11.2010 and Article 14.2 of the Development and Management Agreement dated 10.08.2011. The Arbitral Tribunal comprised two retired Supreme Court Judges and a retired Judge of the erstwhile Andhra Pradesh and Calcutta High Courts. This Tribunal was constituted on 01.03.2017.

The petitioners raised the following claims before the Arbitral Tribunal:

- a) 'To declare that the Termination Notice dated 23.7.2016 of both the Lease Agreement dated 24.11.2010 and Development and Management Agreement dated 10.08.2011 as arbitrary, illegal and unsustainable in law and consequently restore the said Agreements and direct the Respondent to abide by the terms and conditions of the said agreements;

- b) Grant Specific performance of both the Lease Agreement dated 24.11.2010 and Development & Management Agreement dated 10.08.2011 to enable the Claimants to execute the development work and to reach the stage of revenue sharing and also for enjoyment of the same for a period of 33 years from the Commercial Operational Date (COD) of the hotel in the interest of justice;
- c) Award damages of Rs.90,00,75,000/- (Rupees Ninety Crores and Seventy Five Thousand only) as mentioned in the Annexure-I, in addition to Specific performance in favour of the Claimants and against the Respondent and also award the costs of the arbitral proceedings; and
- d) In the event of the Hon'ble Tribunal not granting Specific performance of the Lease Agreement dated 24.11.2010 and Development & Management Agreement dated 10.08.2011 for any reason, the Claimants pray for grant of overall damages in lieu of Specific performance as mentioned above and for which the claimant reserves its right to amend the Claim Statement with the permission of the Tribunal.'

While so, the first respondent raised four counter-claims, which read as under:

- i) 'Counter Claim No.1: Payment of arrears of lease rentals and Annual Development Premium –
- ii) Counter Claim No.2: Expected lease rentals and Annual Development Premium of Rs.133.04 crores –
- iii) Counter Claim No.3: General damages of Rs.2.00 crores –
- iv) Counter Claim No.4: Costs of the arbitration –'

The Arbitral Tribunal thereupon framed the following issues for determination in the arbitral proceedings:

- 1) 'Whether Termination Notice dated 23-07-2016 of the Lease Agreement dated 24-11-2010 and Development & Management Agreement dated 10-08-2011 is arbitrary, illegal and unsustainable in law.
- 2) Whether the delay in obtaining building permission from the GHMC and other required permission was on account of default of the Claimant or on account of the delay on the part of the respondent.
- 3) Whether the Termination Notice dated 23-07-2016 issued by the respondent for termination of the '*Lease Agreement*' and '*Development & Management Agreement*' is valid and binding on the Claimants?

- 4) Whether the Claimants are entitled to the relief of specific performance of the 'Lease Agreement dated 24-11-2010' and 'Development & Management Agreement dated 10-08-2011' to enable the Claimants to execute the project and enjoy the revenue share for (33) years from the *Commercial Operation date* (COD), as prayed for the Claimants ?
- 5) Whether the Claimants are entitled to the relief of damages of Rs.90,00,75,000/-, in addition to the relief of specific performance as prayed by the Claimants ?
- 6) Whether the respondent is entitled to recover the Claimants arrears of '*Lease Rentals*' and '*Annual development Premium*' aggregating to Rs.3,47,97,912/- due as on 23-07-2016, as prayed under Counter Claim No.I ?
- 7) Whether the respondent is entitled to recover from the Claimants expected '*Lease Rentals*' and '*Annual Development Premium*' amounting to Rs.137.04 Crores, as prayed under the Counter Claim No.II ?
- 8) Whether the respondent is entitled for general damages of Rs.10.00 Crores, as prayed under Counter Claim No.III ?
- 9) Whether the respondent is entitled for the costs of the Arbitration, as prayed under Counter Claim No.IV ?
- 10) To what relief ?

By the final Award dated 06.12.2018, the Arbitral Tribunal rejected the claims of the petitioners and also the counter-claims of the first respondent. It was however made clear therein that such rejection would not preclude the first respondent from claiming either the lease amount or the Annual Development Premium from the claimants for the period subsequent to the Award, according to law. The petitioners thereupon approached the Commercial Court by way of COP No.14 of 2019 filed under Section 34 of the Act of 1996 to set aside the final Award dated 06.12.2018 and consequently, to allow their claims as prayed for before the Arbitral Tribunal. The subject application, being I.A.No.140 of 2019, was filed by them in the said COP seeking suspension of the operation and effect of the Award dated 06.12.2018 as well as the notice of termination dated 23.07.2016, to enable

them to continue in possession of the property pending disposal of the main petition. Upon dismissal of this IA, they are before this Court.

It may be noted that even before the petitioners approached the Commercial Court under Section 34 of the Act of 1996, they filed W.P.No.46485 of 2018 before the combined High Court for the State of Telangana and the State of Andhra Pradesh assailing the action of the first respondent in attempting to dispossess them and seeking a consequential direction to it to act in accordance with law and forbear from dispossessing them from the property without following the due process of law.

Though an interim order was granted in this writ petition on 20.12.2018 directing that the petitioners should not be dispossessed from the property, the writ petition itself came to be dismissed on 06.06.2019, holding that the petitioners had to avail the common law remedy as the parameters of judicial review would not stand attracted in matters governed by contract. Aggrieved by the dismissal of their writ petition, the petitioners preferred a writ appeal in W.A.No.489 of 2019.

Sri D.Prakash Reddy, learned senior counsel appearing for the petitioners, who also appeared for them in the said writ appeal, informed the Division Bench that the petitioners had filed an application before the Commercial Court in relation to the arbitral Award dated 06.12.2018, which was to be listed for hearing on 18.06.2019, and contended that as there was a threat of dispossession, the interim order dated 20.12.2018, which was extended during the pendency of the writ petition, should be given effect to and the first respondent should be prevented from dispossessing the petitioners at least till 24.06.2019, so as to give them a chance to plead their case before the Commercial Court before which they had sought stay of

operation of the impugned arbitral Award and the termination notice issued by the first respondent.

Per contra, it was contended by Sri S.Ravi, learned senior counsel appearing for the first respondent, that even before the learned single Judge the first respondent had pleaded that possession of the property was taken over on 19.12.2018 through a panchanama, that is, even before passing of the interim order on 20.12.2018. He asserted that possession of the property was with the first respondent and was no longer with the petitioners.

By order dated 11.06.2019, the Division Bench took note of the fact that both parties claimed to be in possession of the property and observed that it would not be appropriate to express any opinion on the question of possession or on the merits or demerits of the case. The Division Bench then observed as follows:

‘Considering the fact that repeatedly the learned Single Judge had granted the interim stay in favour of the appellants, and considering the fact that the present appeal is nothing but a continuation of the Writ Petition, this Court is of the opinion that the appellants should not be dispossessed from the subject property till 24.06.2019.

However, it is made abundantly clear that, merely because this Court is directing, presently, that the appellants shall not be dispossessed from the subject property, even this *prima facie* direction should not adversely influence the decision of the Arbitration Court while deciding the application filed by the appellants along with their appeal filed under Section 34 of the Arbitration and Conciliation Act. Moreover, any observations made by the Learned Single Judge in the impugned order should not adversely effect the objective assessment by the Arbitration Court while considering the appeal and the application for interim relief filed by the appellants. This Court certainly expects the Arbitration Court to assess the merits of the case, and to pass its order strictly in accordance with law.

Learned Senior Counsel Mr. D. Prakash Reddy is directed to submit the certified copy of the impugned order on or before 24.06.2019.

List this case on 24.06.2019.’

It was thereafter that the Commercial Court took up I.A.No.140 of 2019 filed in COP No.14 of 2019, whereby the petitioners herein had sought stay of the arbitral Award dated 06.12.2018 and the termination notice dated 23.07.2016. Exs.P1 to P4 were marked by the petitioners before the Commercial Court while the first respondent got marked Exs.R1 and R2.

Exs.P1 to P12 are photographs while Ex.R1 is the photocopy of the letter dated 15.12.2018 addressed by the District Collector to the Deputy Collector and Tahsildar with regard to taking over of possession under a panchanama and requesting necessary action in that regard. Ex.R2 is the photocopy of the panchanama dated 19.12.2018 drawn in relation to the taking over of possession of the site. The following point was framed for consideration by the Commercial Court:

'Whether the petitioners are entitled for an order to suspend the operation and effect of the Arbitral Award dt.06-12-2018 by the Arbitral Tribunal as well as the Notice of termination, to enable the petitioner to continue in possession of the subject property, pending disposal of the main petition COP No.14/2019?'

By order dated 21.06.2019, the Commercial Court dismissed the I.A. Perusal of the said order reflects that, having dealt with the merits of the arbitral Award dated 06.12.2018 in the light of the rival contentions advanced before it, the Commercial Court adverted to the order dated 06.06.2019 passed in W.P.No.46485 of 2018 and the order dated 11.06.2019 passed in W.A.No.489 of 2019 by this Court and observed that there were absolutely no equities in the case of the petitioners. Reference in this regard was made to the factual aspects of the dispute and the Commercial Court concluded that there were no merits in the petitioners' case and as such, they were not entitled to suspension of the operation and effect of the arbitral Award dated 06.12.2018 and the termination notice dated

23.07.2016, so as to enable them to continue in possession of the property pending disposal of the main OP.

At the outset, it may be noted that the arbitral Award dated 06.12.2018 is in the nature of a 'nil' award. The only relief granted to the first respondent was that despite rejection of its counter-claims, it was at liberty to claim the lease amount/annual development premium from the petitioners for the period after the Award. Except for the leave granted to the first respondent to claim such relief, no other relief was granted to either of the parties. They were also directed to bear their own respective costs.

The provisions of Section 36 of the Act of 1996, as it now stands, assume importance in the light of the aforestated character of the Award dated 06.12.2018. Section 36(2) and (3) are relevant for the purposes of this case and are extracted hereunder:

'36. Enforcement.—

(1)

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).'

In the light of the above statutory milieu, the primary question that arises is whether the Commercial Court had power under this provision to grant any interim relief other than suspension of the arbitral Award. The

language used in the provision does not lend itself to the interpretation that any such independent interim relief can be granted. Be it noted that even after passing of an arbitral award, Section 9 of the Act of 1996 entitles the parties thereto to apply for interim measures of protection under Section 9(1)(ii), be it for preservation of property which is the subject matter of the dispute in arbitration or such other interim measure of protection as may appear to the Court to be just and convenient, amongst other reliefs. The only caveat in Section 9 is that such an application must be made before enforcement of the award in accordance with Section 36 of the Act of 1996. Therefore, the power under Section 36(2) and (3) of the Act of 1996 is limited only to stay of operation of the arbitral award and nothing further.

Significantly, the petitioners' application in I.A.No.140 of 2019 was only filed under Section 36(2) of the Act of 1996 and not under Section 9 thereof. The principle of law that even if a wrong provision is mentioned, the Court would be entitled to take recourse to the correct provision of law and exercise power, if it is vested with the same, is ordinarily applied to the provisions of the Code of Civil Procedure, 1908, which is purely a procedural law. While dealing with a substantial special law such as the Act of 1996, which specifically and separately provides for two remedies, viz., stay of operation of the arbitral Award under Section 36(2) and (3) of the Act of 1996 and interim measures of protection after passing of the arbitral Award under Section 9 thereof, the party approaching the Court must be careful in filing an application for relief under one or the other of the above provisions or both of them. If interim relief is sought only by way of an application filed under Section 36(2) of the Act of 1996, it would not be open to the Court to exercise power under Section 9(1)(ii) thereof, even if the party presses for such relief by including a prayer in the application filed under Section 36(2)

of the Act of 1996. Therefore, the petitioners could not have sought interim relief by way of suspension of the termination notice dated 23.07.2016.

This being one aspect of the matter, it is also pertinent to note that the issue of possession over the property in question did not even form part of the claims raised before the Arbitral Tribunal by the petitioners and the first respondent. Only the termination notice dated 23.07.2016 was subjected to challenge by the petitioners and they sought consequential restoration and specific performance of their agreements. The first respondent also did not seek any relief in relation to delivery of possession of the property in its counter-claims and merely restricted itself to payment of monies. No doubt, setting aside of the termination notice dated 23.07.2016 may have an impact on the issue of possession but as that event did not come to pass and the Arbitral Tribunal refused to declare the said termination notice dated 23.07.2016 as illegal and unsustainable in law, the Arbitral Tribunal did not deal with the issue of possession at all. In consequence, the Commercial Court, while dealing with the application filed under Section 34 of the Act of 1996 to set aside the said arbitral Award, also cannot go into the issue of possession and more so, the alleged taking over of possession by the first respondent under the panchanama dated 19.12.2018. This was an independent post-Award development and would therefore not fall for consideration before the Commercial Court in the petition filed under Section 34 of the Act of 1996.

Sri D.Prakash Reddy, learned senior counsel, would however contend that the panchanama dated 19.12.2018, whereby the first respondent claims to have been put in possession of the property, is a self-serving document and cannot be accepted. On the other hand, Sri A.Sudershan Reddy, learned senior counsel appearing for Sri N.Praveen Reddy, learned counsel on caveat

for the first respondent, would assert that the first respondent is in possession as on date and that, in any event, the petitioners are not entitled to seek interim relief as prayed for under Section 36(2) of the Act of 1996.

Though Sri D.Prakash Reddy, learned senior counsel, would rely upon STATE OF UTTAR PRADESH V/ s. MAHARAJA DHARMANDER SINGH¹, MEGHMALA V/ s. G.NARASIMHA REDDY² and SUNDER SINGH V/ s. MUNICIPAL CORPORATION OF HYDERABAD³ in support of his contention that the alleged dispossession under the panchanama dated 19.12.2018 cannot be recognized in the eye of law, we do not propose to deal with this case law as we have already held that the issue of possession and the alleged taking over of possession after the arbitral Award dated 06.12.2018 does not fall for consideration at all in these proceedings.

It may also be noted that the application filed before the Court below under Section 36(2) of the Act of 1996 related to suspension of the arbitral Award dated 06.12.2018 and a further prayer was made therein to suspend the termination notice dated 23.07.2016. As already pointed out *supra*, the later part of the prayer was alien to the power of the Court under Section 36(2) and therefore could not be accepted or acted upon. Dismissal of the said IA would therefore have to be construed only as a refusal by the Commercial Court to suspend the said arbitral Award pending the main petition filed under Section 34 of the Act of 1996. In consequence, this civil revision petition filed against the dismissal of the said IA must also be limited only to that aspect. This Court is not at liberty to take into account the independent post-Award development in the form of the panchanama dated 19.12.2018, while dealing with the dismissal of I.A.No.140 of 2019 in COP No.14 of 2019, or go into the issue as to which of the parties is in possession

¹ (1989) 2 SCC 505

² (2010) 8 SCC 383

³ 1998 (6) ALD 112 (DB)

as on date and whether such possession can be held to be valid in the eye of law.

Viewed in the aforestated context, the only issue that falls for consideration before this Court is whether the Commercial Court was justified in refusing to suspend the arbitral Award dated 06.12.2018.

As already pointed out *supra*, the said Award was a 'nil' Award and suspension thereof has no consequence whatsoever. Therefore, denial of the said interim relief by the Commercial Court was justified and no cause is made out for interference therewith.

The civil revision petition is devoid of merit and is accordingly dismissed.



SANJAY KUMAR, J

P.KESHAVA RAO, J

16th JULY, 2019

PGS