HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD

Delivered on: 09-04-2019

Coram :

The Honourable Mr. Justice V.RAMASUBRAMANIAN
and
The Honourable Mr. Justice P. KESHAVA RAO

<u>Civil Revision Petition No.6933 of 2018</u>

<u>Between</u>:

M/s. Raj Expedith Associates,
Plot No.78, Text Book Colony, Cantonment
Secunderabad. .. Petitioner

Vs.

1. M/s. Yadagirigutta Temple Development Authority
(YTDA), Tourism Plaza, 6-3-869, Greenlands,
Begumpet, Hyderabad, rep.by its Secretary
Sri P. Sairam.

2. Sri N. Rama Swamy, Sole Arbitrator,
401, Devi Apartments, Brundavan Colony,
A.S. Rao Nagar, Secunderabad. .. Respondents

For Petitioner : Mr. O. Manoher Reddy,

For Respondent No.1 : Mr. P. Badri Premnath

For Respondent No.2 : - -

HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HONOURABLE SRI JUSTICE P. KESHAVA RAO

CIVIL REVISION PETITION No.6933 OF 2018

ORDER: *(Per Hon'ble Sri Justice V. Ramasubramanian,)*

Aggrieved by an unconditional order of stay granted by the Judge, Commercial Court - cum - XXIV Additional Chief Judge, City Civil Court, Hyderabad, under Section 36 (2) of the Arbitration and Conciliation Act, 1996 (for short 'Act, 1996'), pending an application under Section 34 of the Act, 1996 to set aside the Arbitration Award, the Award Holder has come up with the above Civil Revision Petition.

2. Heard Mr. O. Manoher Reddy, learned counsel appearing for the petitioner and Mr. P. Badri Premnath, learned standing counsel appearing for the 1st respondent.

3. The 1st respondent herein is an authority constituted by the Government of Telangana as a Special Purpose Vehicle (SPV), for the development of an ancient famous temple of Sree Lakshmi Narasimha Swamy in the Town of Yadagirigutta. The said authority invited applications from reputed Architects and Planners for preparing the Master Plan. The petitioner herein was one among the applicants and they were selected and empanelled.

4. After the selection and appointment of the petitioner, an agreement, dated 06.08.2015, was entered into between the petitioner and the 1st respondent herein.

5. The agreement provided in detail, the scope of architectural services to be rendered by the petitioner, in Clause - 3 thereof. The remuneration payable to the petitioner for the services rendered by them were indicated in Clause - 5 of the agreement. As per Clause - 5 (a) of the agreement, the fee payable for the total services was fixed at 4% of the totally designed and executed cost of the project. Clause - 5 (b) of the agreement indicated the fee payable for repetitive projects. Clause - 6 provided for mode of payment at different stages.

6. Clause - 7.17 of the agreement contained a clause for arbitration. As per this clause, the arbitration was to be by the Council of Architecture.

7. After disputes arose between the petitioner and the 1st respondent, the matter was referred to arbitration by the Council of Architecture. The Council nominated an Architect, viz., Mr. N. Ramaswamy, as the Sole Arbitrator and the arbitration commenced in January, 2017.

8. The sole arbitrator passed an award on 24.05.2018. The operative portion of the award (which we may call as the decretal portion) reads as follows:

> "In consideration of facts of the matter under reference and after consideration of material papers and documents, written and oral submissions of Claimant and Respondent, the rules, regulations and guidelines of Council of Architecture, the Arbitrator in reference has concluded as aforestated in all the eight issues frames for the arbitration proceedings and makes the final and binding award as follows:
>
> 1. The Claimant is awarded the fees to be calculated as per Clause 6 up to Stage III of the Agreement for work submitted

in respect of the 850 acres comprising the land available for Yadagirigutta Temple Town development less the total amount already received from YTDA as part payment.

2. The Claimant is awarded interest on the amount due on account of fees as ascertained pursuant to Award 1 above at the rate of 6.5% per annum from 30.11.2015 until payment thereof.
3. The Cost of Arbitration has to be borne equally by the Claimant and the Respondent.
4. There is no award as to cost and expenses.
5. The Award is signed in four originals of which one copy will be retained by the Arbitrator in reference. The three remaining copies to be despatched to Registrar Council of Architecture, Claimant M/s Raj Expedith Associates and to the Respondent YTDA accordingly to be proceed as per the rules."

9. Challenging the arbitration award, the 1st respondent filed an application in C.O.P. No.83 of 2018 under Section 34 of the Act, 1996, on the file of the Commercial Court - cum - XXIV Additional Chief Judge, City Civil Court, Hyderabad. Along with the application, the 1st respondent also moved a petition for stay in I.A. No.460 of 2018, under Section 36 (2) of the Act, 1996. In the said petition, the Commercial Court passed an order, dated 31.10.2018, granting an absolute stay, without imposing any condition. Aggrieved by the same, the Award Holder has come up with the above Civil Revision Petition.

10. The main contention of Mr. O. Manoher Reddy, learned counsel appearing for the petitioner is that while considering the application for stay of execution of the award, the Commercial Court was obliged to follow the principles enumerated in Order XLI, Rule 5 of the Code of Civil Procedure, 1908 (for short 'CPC') and that unless there were exceptional reasons for the grant of an absolute stay, the

Court was obliged to impose conditions. It is further contended by the learned counsel for the petitioner that without even applying the parameters enunciated in Order XLI, Rule 5 (3) of CPC, the Commercial Court granted unconditional stay in a blind manner, merely because the 1st respondent is a Government Authority.

11. In response to the above submissions, it is contended by Mr. P. Badri Premnath, learned standing counsel for the 1st respondent that what became the subject matter of the dispute before the Arbitrator was beyond the terms of the contract, dated 06.08.2014; that as per the agreement, Phase - I of the Project was taken up initially and the same was restricted only to 190 acres; and that the petitioner made a claim for a total amount of more than Rs.18.00 Crores in relation to the land of an extent of 1296 acres and that without looking into the same, the Arbitrator passed the Award. In any case, according to the learned standing counsel, the actual amount payable to the petitioner was not quantified by the Arbitrator, so as to enable the Court below to impose any conditions.

12. We have carefully considered the above submissions.

13. Until the advent of the amendment to the Arbitration Act in the year 2015, a mere filing of an application under Section 34 to set aside the arbitration award, was considered to operate as an automatic stay. This anomaly was removed by Section 36 (2) of the Act, 1996, after its amendment.

14. It is too late in the day to dispute that the scope of jurisdiction of the Court under Section 34 is extremely circumscribed. Even in a first

appeal arising out of a money decree, the normal rule is to impose conditions for the grant of stay. In fact, in a first appeal under Section 96 of CPC, the jurisdiction of the Court is as wide as that of the Original Court. Even then, Order XLI, Rule 5 (3) of CPC makes it clear that an order for stay of execution shall not be made unless the Court is satisfied:

i) that substantial loss may result to the party applying for stay unless the stay is granted;

ii) that the application for stay was made without unreasonable delay; and

iii) that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him.

Therefore, a Court dealing with an application for stay pending a petition to set aside an arbitration award should exercise more caution and diligence than even a first appellate Court dealing with an application for stay pending a first appeal. Hence, the contention of Mr. O. Manoher Reddy, learned counsel for the petitioner, with regard to the grant of unconditional order of stay, is fairly well-founded and justified.

15. But, unfortunately for the petitioner, there is an element of dispute with regard to the quantum of money payable under the Arbitration Award. We have already extracted the operative portion (decretal portion) of the Award in one of the previous paragraphs. As per Clause - 1 of the operative of the Award, the petitioner is held entitled to the fees to be calculated as per Clause - 6 of Stage - III of the

Agreement for the work submitted in respect of 850 acres (minus the amount already received by the petitioner). Clause - 6 of the Agreement contains a table indicating six (06) different stages at which payments are to be made. After the completion of the first stage, the petitioner will be entitled to 5% of the total fee payable. After the completion of the second stage, they will be entitled to 10%, and after the completion of the third stage, they will be entitled to 15%. Therefore, it is clear from Clause -1 of the operative portion of the Award that the petitioner is held entitled to 30% of the total fee payable in respect of 850 acres.

16. Under Clause - 5 of the agreement, the total fee payable to the petitioner is fixed at 4% of the totally designed and executed cost of the Project. Clause - 5 of the Agreement reads as follows:

> ***"5. PAYMENT OR REMUNERATION:***
> *The Employer agrees to pay the Architect for the professional services to be rendered by him as herein described the following fees as remuneration.*
>
> *(a) Total Services: Total Services include preparation of preliminary/conceptual drawings, preparation of preliminary estimate, preparation of detailed architectural, structural, services planning, detail estimate and tender specifications for Architectural works only, periodical visits to the site. The total fee payable for all the above work and the work included in Clause 3 shall be 4% of the totally designed and executed cost of the project.*
>
> *(b) Repetitive Projects: The term repetitive projects refer to any construction where more than one building or one block is constructed based on the same design and drawings at the designated given site. The fee payable in this case shall be:*
>
> *(i) For the first building full fees to be paid as mentioned in (a) above.*
>
> *(ii) For the subsequent buildings the fee payable shall be 50% of what is mentioned in (a) above. The repetition of the same building at a different site shall be 4% on the cost of the works assigned."*

17. It is not clear from Clause - 5 of the agreement as to what would be "**the totally designed and executed cost of the project**". Unless this is known, the rate per acre cannot be arrived at. Unless the rate per acre is arrived, the rate for 850 acres cannot be arrived at. The Arbitrator would have done well, if he had quantified the amount payable. He could have at least arrived at the cost of the project per acre. He had not done either.

18. In the course of hearing, the learned counsel for the petitioner and the learned standing counsel for the 1st respondent filed memos of calculations. They are naturally at variance with each other. Therefore, if the Court below had to put the 1st respondent on terms for the grant of stay, the Court below should have resorted to some guess work, which is not possible unless the main case had been taken up. Therefore, we do not think that the order of the Court below can be interfered with unless we have concrete material.

19. But, one thing is clear. Even according to the 1st respondent, an amount of Rs.61,70,421/- (Rupees sixty one lakhs seventy thousand four hundred and twenty one only) is still due and payable by the 1st respondent to the petitioner, for the work already done. At least this amount should have been directed by the Court below to be paid to the petitioner.

20. Therefore, the present Civil Revision Petition is allowed, modifying the order of the Commercial Court and granting stay of execution of the Award subject to the condition that the 1st respondent pays to the petitioner, at least the admitted amount of Rs.61,70,421/-

(Rupees sixty one lakhs seventy thousand four hundred and twenty one only) within a period of two (02) weeks from the date of receipt of a copy of this order. If the 1st respondent fails to comply with this condition, the stay will stand automatically vacated enabling the petitioner to execute the Award. However, in the circumstances of the case, there shall be no order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the revision shall stand closed.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

April 09, 2019
Mgr