

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 2570 OF 2018
IN
COMMERCIAL ARB. PETITION NO.1054 OF 2018**

Mumbai Metropolitan Region
Development Authority

... Applicant

In the matter between:-

Mumbai Metropolitan Region
Development Authority

... Petitioner

V/s.

Rashtriya Chemicals & Fertilizers Ltd.

... Respondent

Mr.D.J.Khambata, Senior Advocate with Mr.Piyush Raheja,
Mr.Nirav Shah, Mr.Anuj Jaiswal and Ms.Chandani Dewani
i/by Little & Co., Advocate for the Applicant/Petitioner.
Mr.N.Dave with Mr.Rushabh Sheth, Mr.M.S.Bodhanwalla,
Mr.Sheray Bodhanwalla and Mr.Sakshi Sharma i/by M/s
Bodhanwalla & Co., Advocate for the Respondent.

**CORAM : UJJAL BHUYAN, J.
DATE : JANUARY 15, 2020.**

P.C.:-

1. Heard Mr.D.J.Kambata, learned senior counsel
alongwith Mr.Piyush Raheja, learned counsel for the
petitioner; and Mr.N.Dave, learned counsel alongwith
Mr.Rushabh Sheth, learned counsel for the respondent.

2. This notice of motion is sought for by the petitioner for stay of award dated 23rd May, 2018, as corrected on 30th May, 2018.

3. Petitioner is a Government of Maharashtra undertaking and a statutory body constituted under the Mumbai Metropolitan Region Development Authority Act, 1974. It is mainly engaged in development of infrastructure including roads in the Mumbai Metropolitan Region.

4. Petitioner was entrusted the work relating to construction of Anik Panjarpol Link Road popularly called "The Eastern Freeway".

5. While preparing the project, it was found that alignment of the road was over a piece of land belonging to the respondent.

6. Be it stated that, respondent is also a Government of India undertaking incorporated under the Companies Act, 1956.

7. In so far the portion of land belonging to the respondent is concerned, it was found that a significant

portion of the same was under encroachment and actual physical possession was not with the respondent.

8. Be that as it may, petitioner approached the respondent for handing over the said land for the purpose of construction of the road. After several rounds of negotiations, an Agreement dated 21st April, 2011 was executed between the petitioner and the respondent. On the same day, there was an Undertaking and Indemnity by the petitioner. The Agreement provided for an arbitral clause though such clause was absent in the Undertaking and Indemnity.

9. Respondent as the claimant raised dispute with the petitioner seeking specific performances of the agreement. Subsequently, application under Section 11 of the Arbitration and Conciliation Act, 1996 was filed before this court and vide order dated 5th August, 2015, Arbitrator was appointed. Both the sides filed statement of claim and statement of defence before the learned Arbitrator. The matter was heard. Ultimately, award was passed on 23rd May, 2018 which was rectified on 30th May, 2018. As per the award, petitioner is required to

pay to the respondent a sum of Rs.75,16,64,700.00 in respect of 22,173 sq. meters of the land for which Transferable Development Rights (TDR) could not be issued. Besides the above, various other amounts were directed to be paid by the petitioner to the respondent.

10. This has been challenged by the petitioner by filing application under Section 34 of the Arbitration and Conciliation Act, 1996.

11. By a separate order passed today, the arbitration petition has been admitted for hearing.

12. Mr.Khambata, learned senior counsel for the petitioner has taken the court to various portions of the award and contends that as per the terms and conditions thereof, there was no absolute obligation fastened on the petitioner to obtain TDR certificates. At the most, it provided for a best endeavour obligation. It was not under the control of the petitioner for issuance of or obtaining TDR certificates, Municipal Corporation of Greater Mumbai being the authority competent to issue such certificates. Municipal Corporation had declined to issue TDR certificate in respect of the encroached land

on the basis of FSI of one in view of change in the Development Control Rules. This position was acknowledged by the Arbitral Tribunal, but acting completely contrary to it, Tribunal held that petitioner was liable to pay for any loss or damages caused to the claimant (respondent) as a result of being unable to obtain TDR certificates equal to FSI of one. He therefore submits that on a *prima facie* reading of the impugned award, the same cannot be sustained. In this connection, he has placed reliance on the decisions of the Supreme Court in the case of **MD, Army Welfare Housing Organisation Vs. Sumangal Services (P) Limited, (2004)9 Supreme Court Cases 619** and in the case of **Reliance Permanent Building Society vs. Harwood-Stamper, (1944)2 of All England Reporter (Ch.D) 75.**

13. His further submission is that the claim so made in terms of the Undertaking and Indemnity dated 21st April, 2011, which did not provide for an arbitration clause. Arbitration clause was provided in the agreement dated 21st April, 2011. There was nothing in the Undertaking or

the Indemnity dated 21st April, 2011 to suggest that the arbitration clause in the agreement dated 21st April, 2011 could be read into the Undertaking-cum-Indemnity.

14. Last contention of Mr.Khambata is that the agreement was not stamped and therefore, such an agreement could not have been looked into by the Arbitral Tribunal. In support of this submission, he has placed reliance on a decision of the Supreme Court in **Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Limited, AIR 2019 Supreme Court Cases 2053.**

15. Summing up his submissions he submits that petitioner is Government undertaking and is engaged in various infrastructure works in the city of Mumbai. The amount covered by the award can very well be utilized in the infrastructure projects that have been undertaken by the petitioner and in the unlikely event of petitioner failing in the arbitration petition, the amount can always be paid by the petitioner.

16. Responding to the submissions of Mr.Khambata, learned counsel for the respondent submits that no

special favour can be shown to the petitioner on the ground that petitioner is a Government undertaking. The arbitral award being in the nature of a money decree, question of granting stay whether conditional or unconditional does not arise. Respondent is also a Government of India undertaking. He submits that Arbitral Tribunal had carefully examined and interpreted the clauses of the agreement and thereafter, has held that petitioner had agreed to make payment to the claimant (respondent) for any loss or damages suffered by it on account of non-compliance to the terms and conditions of the agreement as well as of the Undertaking-cum-Indemnity. Therefore, no interference in the impugned award is called for. He submits that a substantial portion of the land belonging to the respondent was taken over by the petitioner for construction of the eastern freeway for which there was a contractual obligation on the part of the petitioner to procure TDR certificates for the full FSI of one for the land of the respondent.

17. In so far question of stamp duty is concerned, he submits that the agreement was executed on stamp duty of Rs.100/- and admitted by parties in evidence. Therefore, this objection would not sustain.

18. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

19. A Single Bench of this court in **M/s PFS Shipping (India) Limited Vs. V.K.Gupta, 2016 SCC Online Bom 10048** was examining an application for stay of an arbitral award. On perusal of Section 36(3) of the Arbitration and the Conciliation Act, 1996, it was held that court has the discretion to consider security required to be furnished by the petitioner seeking stay or whether stay can be granted unconditionally or on furnishing such security so as to secure part of the claim depending upon the facts and circumstances of each case. It was held that in an appropriate case the court can grant stay on furnishing security to secure part of the awarded amount or may grant unconditional stay depending upon the facts and circumstances of each

case. If the court comes to a conclusion that the award is *prima facie* perverse and contrary to the provisions of law, court is not bound to direct the petitioner to deposit the entire amount covered by the arbitral award.

20. Adverting to the award in question, relevant clauses of the agreement may be looked into. These are as under :-

“5. The relevant clauses of the said agreement between the Claimant and the Respondent are as follows:

i) RCF shall hand over to MMRDA the said area aggregating to 47477 sq.mtrs. proposed to be acquired by MMRDA for the purpose of construction of the said Anik Panjarapole Link Road by handing over to MMRDA physical possession of the said portion admeasuring approximately 39212 sq.mtrs. which is encroached upon by slums and giving physical possession to MMRDA of the said area admeasuring 8265 sq.mtrs.

ii) In consideration of RCF handing over to MMRDA the said area admeasuring 47,477 sq.mtrs. proposed to be acquired, MMRDA shall ensure the release of TDR certificates from appropriate authority for RCF Transferable Development Rights aggregating to 47,477 sq.mtrs. Presently, the FSI available in Chembur as per Development Control Regulations is FSI of 1 i.e. to the extent of the area handed over by RCF and consequently, TDR to the extent of 47,477 sq.mtrs. will be given to RCF. However, in the event of any change in Government Regulations or

Development Control Regulations resulting in additional TDR being available, before the said TDR certificates are obtained for the said land proposed to be acquired, such additional TDR will also be ensured by MMRDA to release of TDR certificates from appropriate authority for RCF.

iii) MMRDA will arrange for the joint survey of the said land proposed to be acquired, at which joint survey their representatives of MMRDA, the City Survey office and RCF will be present. The joint survey will be conducted at the cost of MMRDA.

iv) It is expressly agreed by and between the parties hereto that MMRDA will ensure that all necessary permissions including permissions from MCGM and from all such other authorities as may be required will be obtained and MMRDA, will ensure that the TDR certificates for the said area of 47,477 sq.mtrs. (and for such additional area as may become available in the event of any change in Government Regulations or Development Control Regulations), are handed over to RCF without any cost, charges or expenses being incurred by RCF, within a period of 12 months from the date of RCF handing over to MMRDA the possession of the said area aggregating to 47,477 sq.mtrs. proposed to be acquired in the manner set out in Clause 1 hereinabove.

v) Simultaneously, with the execution of this agreement MMRDA will also furnish a separate solemn undertaking to RCF undertaking to ensure that the TDR certificates to the extent of 47,477 sq.mtrs. as also for such additional area as may become available are handed over to RCF within the stipulated period of 12 months.

vii) All stamp duty and registration charges and all other out of pocket expenses that may be required to be incurred for granting the said Transferable Development Rights to the extent of 47,477 sq.mtrs. to RCF will be incurred by MMRDA alone.

21. Similarly, relevant clauses of the indemnity are as under :-

“G) MMRDA hereby agrees and solemnly declares and undertakes to ensure that all necessary permissions including permission from MCGM and all other authorities as may be required will be obtained and MMRDA will ensure that TDR certificates for the land which is in the name of RCF to the extent of 47477 sq.mtrs. approximately and such additional TDR that may become available for the said land proposed to be acquired are handed over to RCF without any costs, charges or expenses being incurred by RCF within a period of 12 months from the date of RCF handing over to MMRDA the possession of the said land proposed to be acquired from RCF.

ii) MMRDA agrees to make payment to RCF for any loss and damages caused on account of non-compliance by MMRDA of the terms and conditions of the said agreement dated 21st April 2011 as also the terms and conditions of this undertaking and indemnity.”

22. From the above, it is evident that in consideration of the respondent handing over to the petitioner the area ad-measuring 47,477 sq.meters proposed to be

acquired, petitioner was required to ensure release of TDR certificates from the appropriate authority for the said area on the basis of FSI of one.

23. However, as would be evident from the award, municipal corporation declined to issue the TDR certificates in respect of the encroached area on the basis of FSI of 1 because of change in the Development Control Rules. It was in that context Arbitral Tribunal examined the nature of obligation undertaken by the petitioner. In paragraph No.23 of the award, it was observed that there was no question of any specific performance being granted against the petitioner since grant of TDR certificate was in the hands of the municipal corporation and not in the hands of the respondent. Respondent could not be compelled to procure TDR certificate for the full FSI of 1 for the entire land surrendered by the claimant i.e., respondent. However, notwithstanding such observations in paragraph No.23, Arbitral Tribunal came to the abrupt conclusion in paragraph 25 that in the event of petitioner not being able to obtain TDR certificate equal to FSI of 1 for the

entire land handed over by the respondent to the petitioner, petitioner is liable to pay for the loss or damage caused to the claimant i.e., the respondent as a result.

24. Thus, what is discernible is that there is *prima facie* inconsistency in the reasoning and conclusion of the Arbitral Tribunal. In such circumstances and without going into the other facet of the arguments advanced on behalf of the petitioner, court is of the view that an interim order is called for.

25. Ofcourse this is only a *prima-facie* view for the purpose of deciding the notice of motion.

26. Both petitioner and respondent are Government bodies.

27. In such circumstances and balancing the interest of the parties, the following orders are called for and are accordingly passed:-

(1) Impugned award dated 23rd May, 2018 rectified on 30th May, 2018 is stayed on condition that petitioner deposits 25% of the awarded amount in the registry of this court within a period of eight weeks from today.

(2) If the said amount is not deposited by the petitioner within the prescribed period, the stay granted today would automatically stand vacated.

(3) On deposit of the aforesaid amount by the petitioner, respondent would be at liberty to file application for withdrawal of the same and in the event of such application being made, the same would be considered on its own merit.

28. Notice of Motion is accordingly disposed of.

(UJJAL BHUYAN, J.)

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