ODC-3

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

APO/88/2021
IA No. GA/1/2021

BCT INFRASTRUCTURE LLP
Versus
KUBER DUTT CONSTRUCTION PRIVATE LIMITED

BEFORE:
The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date : 30^{th} July, 2021.

Appearance :
Mr. S. N. Mookherjee, Sr. Adv.
Mr. Joy Saha, Sr. Adv.
Mr. Snehashis Sen, Adv.
Mr. Avishek Banerjee, Adv.

Mr. Ratnanko Banerji, Sr. Adv.
Mr. Pramit Roy, Sr. Adv.
Mr. D. N. Sharma, Adv.
Mr. Anirban Ray, Adv.
Mr. Ratnesh Rai, Adv.
Mr. Ankan Rai, Adv.
Mr. Arjun Gooptu, Adv.

The Court: The present appeal has been filed under Section 37(2)(b) of The Arbitration and Conciliation Act, 1996. The appellant is the claimant in the arbitration. The appeal arises out of an order passed in an application filed by the respondent under Section 17 of the Act whereby the learned Arbitral Tribunal restrained the petitioner from transferring or giving possession of any unsold or unregistered flats as mentioned in an annexure to the application in relation to the contract which was executed between the parties without prior written permission of the Arbitral Tribunal and after giving 15 days notice to the respondent.

According to learned counsel appearing for the petitioner/appellant, the respondent could not establish any *prima facie* case for an order of injunction on the petitioner. Counsel submits that the claim of the petitioner in the arbitration was to the tune of Rs.15 crores and that the respondent filed a counter-claim of Rs.30 crores late into the arbitration and after evidence had commenced. According to counsel, the respondent filed its application for interim relief eight months after the counter-claim and that the impugned order has virtually resulted in stopping of the petitioner's business. Counsel submits that while the Arbitral Tribunal recorded his satisfaction of the merits of the claim to the extent of Rs.1,28,30,672/- crores, the impugned order translates to a value in excess of Rs. 8 crores as would appear from the relevant annexure to the application.

Learned counsel appearing for the respondent relies on a Minutes of the Meeting held on 19th July, 2021 which records the evidence of the petitioner's witness to Q-1171 to the effect that all the flats of the petitioner's project have been sold. According to counsel, this is at variance with the petitioner's position in April 2021 with regard to the status of the flats. Counsel places the reasons contained in the Section

17 application for seeking interim reliefs against the petitioner including the eroding net worth of the petitioner.

Counsel submits that the petitioner has not provided any answers to the allegations with any particulars which reinforced the need for interim protection.

A point of maintainability has also been raised by the respondent on the ground that the respondent does not carry on business within the jurisdiction of this court and that there are other Commercial Courts within “Kolkata jurisdiction” as provided under the arbitration clause in the contract between the parties.

I have heard learned Counsel appearing for the parties and seen the material on record. An application under Section 17 of the Act can be made by a party at any point of time in the course of the arbitration. Section 17 of the Act permits a party to apply to the Tribunal for a wide spectrum of interim measures including securing the amount in dispute in the arbitration: Section 17 (1)(b). The respondent was hence within its rights to pray for restraint orders on the petitioner in the Section 17 application before the Arbitral Tribunal.

The second issue is whether the impugned order could have been passed on the respondent’s application. The impugned order must be assessed on the principles for grant of an interlocutory order of injunction and whether the case made out by the respondent warranted passing of such an order. In the instant case, the respondent filed for a counter claim for unpaid bills and damages in excess of Rs.30 Crores. The anxiety of the respondent in filing the Section 17 application will be clear from the factual concerns expressed therein. The respondent was engaged as the contractor for construction of a housing complex at Sonarpur, Kolkata. The dispute between the parties arose out of the alleged delay on the part of the respondent to complete the project within the agreed time frame and the petitioner withholding payment of the invoiced amounts which were raised by the respondent. In the application for interim relief, the respondent raised certain specific apprehensions which were substantiated from the documents therein with regard to the depleting net worth of the petitioner, a continuing decrease in the revenues of the petitioner from 2018 to 2019, investment in excess of Rs.5 Crores being made by the petitioner in one Papillon Developers LLP and the sale of the petitioner's flats not resulting in a corresponding increase in the revenue of the petitioner. The respondent has relied on the Master Data of Papillon showing the same registered address as that of the petitioner. The commonality of Directors and Partners between the petitioner and Papillon has also been shown in the Section 17 application. The application further states that the petitioner has invested in the capital of Papillon to the extent of 50% and has also given an unsecured loan to Papillon in excess of Rs.5 crores. Balance Sheets of the petitioner for the relevant periods show that the inventories of the petitioner are depleting every year.

Upon perusing the Reply of the petitioner to such allegations, it is evident that no material has been disclosed therein to allay the concerns of the respondent. The response of the petitioner is expressed in bare denials without any corroborating materials. There is no assertion that the petitioner's current assets are sufficient to satisfy the counter claim of the respondent if required. Annexure 'J' to the application pertains to the value of the unsold flats amounting to about 8.5 crores which, according to counsel for the petitioner far exceeds Rs. 1.28 crores which was found to be justified by the Arbitral Tribunal. This objection is found to be unsustainable for the following reason. The Minutes of Meeting held on 19th July, 2021 records the evidence of Mr. Sanjoy Chowdhuri, who is one of the partners of the petitioner, that all the flats of the petitioner's project have been sold. The witness did not give any further particulars with regard to the date of sale of such flats. The petitioner's reply to the Section 17 application, affirmed on 30th April, 2021, contains a statement that the flats were still in the process of being constructed. It may be presumed therefore that the flats were sold between April and July, 2021. The impugned order is of 18th June, 2021. The inconsistencies in the petitioner's stand and the sudden change thereof would thus lend further credence to the apprehension of the respondent that the petitioner is in financial stress and may not be in a position to satisfy the counter-claim of Rs. 30 crores. The point of the injunction pertaining to much more in monetary terms than found due is negated by the statement of the petitioner's witness that all flats were sold by July 2021.

The order impugned takes all these facts into consideration and the basis of the amounts claimed by the respondent in its counter claim. The detailed enquiry would be evident from the Arbitral Tribunal justifying only the claim of Rs. 8.98 crores on account of unpaid bills which was further reduced to Rs.1.28 crores on the basis of credit given. The order also notes that the factual conspectus calling for interlocutory orders outweighs the delay in making the application. The order of injunction on the petitioner from transferring any unsold flats as mentioned in the particular annexure of the application was passed upon considering the prima facie case made out and the balance of convenience for passing an interim order. The restraint on the petitioner is on reasonable terms since the restraint has been made subject to prior written permission from the Tribunal and upon giving fifteen days notice to the respondent. The terms are fair and reasonable and cannot be said to be drastic or capable of causing any irreparable prejudice to the petitioner.

Having failed to dispute the specific concerns raised and grounds made out by the respondent for interim protection, the petitioner cannot complain of the restraint particularly where the restraint is of a moderate nature. It should however be clarified that the point taken with regard to jurisdiction is considered and rejected on the ground of monetary transactions being made within the jurisdiction of this Court.

APO No. 88 of 2021 is accordingly dismissed for the above reasons.

IA No. GA/1/2021 which has been filed for stay of the operation of the order passed by the Arbitral Tribunal on 18th June, 2021 in respect of a public notice issued by the respondent in relation to such order, is disposed of by permitting the petitioner to apply for appropriate orders before the learned Arbitral Tribunal in respect of the prayers contained in the application.

(MOUSHUMI BHATTACHARYA, J.)

mg/snn.