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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1093 OF 2019.

NITESH HOUSING DEVELOPERS PVT. LTD.,THR. ITS AUT. REP., K. B. SWAMY AND ANR., ...Petitioners.

Versus

SHREE BALAJI CONCEPTS., ...Respondent.

Mr. S. Desai and Mr. J. Ramaiya, Advocates *for the petitioners.*
Mr. D. Pangam, Advocate with Mr. H. D. Naik and Mr. S. Priolkar, Advocates *for the respondent.*

CORAM: MANISH PITALE, J.
DATED: 21st September, 2021.

P.C:

1. By this Writ Petition, the petitioners have challenged order dated 21.12.2018 passed by the Court of District Judge, South Goa, whereby an appeal filed by the petitioner under Section 37 of the Arbitration and Conciliation Act, 1996, was rejected and an order passed by the learned Arbitral Tribunal under Section 17 of the said Act stood confirmed.

2. The petitioners and the respondent entered into a Joint Development Agreement in order to execute a residential project of villas in a property at Goa. The respondent is the owner of the property while the petitioners were to develop the same under said agreement. It appears that certain disputes arose between the parties as a consequence of which the arbitration clause in the said agreement was pressed into service and a sole arbitrator was appointed.

3. The respondent moved an application under Section 17 of the aforesaid Act, *inter alia,* praying for a direction to the petitioners to return the original title documents of the subject property and for restraining the petitioners from selling, assigning or transferring their rights under the Joint Development Agreement and Addendum.

4. It is relevant that after the Joint Development Agreement was signed, the parties executed an Addendum to the said agreement on 4.1.2013, specifically agreeing to certain aspects of the matter.

5. It is the clauses in the Joint Development Agreement and the aforesaid Addendum that had fallen for interpretation before the Arbitral Tribunal, while considering the aforesaid application moved by the respondent under Section 17 of the said Act.

6. The prayers made in the said application were opposed by the petitioners on the ground that proper interpretation of relevant clause of the Joint Development Agreement and clauses of the Addendum would show that the petitioners were entitled to raise finances from financial institutions and banks, if necessary, by mortgaging their rights in terms of the Joint Development Agreement. It was further claimed that proper interpretation of the clauses would show that the prayer for the return of title documents made on behalf of the respondent could not be granted and certainly not as an interim measure. It was contended before the learned Arbitral Tribunal that granting such a relief would amount to granting final relief at the interim stage.

7. The learned Arbitral Tribunal considered the contentions raised by the rival parties and by its order dated 24.10.2018, partly allowed the application of the respondent. On interpreting the documents available on record, including the aforesaid Joint Development Agreement, Addendum and communication sent by the concerned bank to the petitioners, the learned Arbitral Tribunal found that the respondent had made out a case for grant of direction to the petitioners to return the title documents. At the same time, to balance the interests of the rival parties, the learned Arbitral Tribunal directed the respondent i.e. original owner of the property in question that it shall not sell, mortgage or transfer the properties to anyone else or create third party rights or create any encumbrance over the property in any manner till the finalization of arbitration proceedings.

8. Aggrieved by the said order, the petitioners filed appeal before the District Court, South Goa, Margao. By the impugned order the District Court rejected the appeal and confirmed the order passed by the learned Arbitral Tribunal.

9. Mr. S. Desai, learned Counsel appearing for the petitioners invited attention of this Court to relevant clauses of the Joint Development Agreement and Addendum, in order to contend that learned Arbitral Tribunal as well as the District Court fell in error in granting the prayer of the respondent for return of title documents. It was submitted that the relevant clauses were not properly appreciated and that much emphasis was erroneously placed on the fact that although initially the loan facility was availed of by the petitioners from HDFC Bank, later re-financing was done by the Yes Bank and that this subsequent development was never communicated by the petitioners to the respondent. It was submitted that a specific letter dated 6.9.2018 issued by the YES bank to the petitioners was not appreciated in the proper perspective. It was submitted that the Joint Development Agreement as well as Addendum specifically authorized the petitioners to raise finances by mortgaging their rights in the said project, which was exactly what was done by the petitioners. Hence, there was no reason for the learned Arbitral Tribunal to have granted the aforesaid prayer of the respondent. It was further submitted that the learned Arbitral Tribunal wrongly placed emphasis on mention of bouquet of projects in the communication issued by the YES Bank while granting the relief sought by the respondent. According to the leaned Counsel appearing for the petitioners the District Court failed to appreciate the contentions raised on behalf of the petitioners.

10. On the other hand, Mr. D. Pangam, learned Counsel appearing for the respondent submitted that the learned Arbitral Tribunal properly interpreted the relevant clauses to come to the prima facie conclusion in favour of the respondent. It was submitted that in the facts and circumstances of the present case, the direction given by learned Arbitral Tribunal was justified and that the interest of the petitioners was duly taken care of by restraining the respondent from creating any third party rights in the property in question till the finalization of the arbitration proceedings. The learned Counsel further invited attention of this Court to contents of the reply filed on behalf of the petitioners in a proceeding initiated by the aforesaid bank i.e. YES bank before the Debts Recovery Tribunal wherein the petitioners had boldly stated that there was no registered mortgage or exclusive charge by way of registered mortgage created in the property in question. On this basis, it was submitted that the contention raised on behalf of the petitioners that they will have to discharge the entire liability before the bank to return the title documents was absolutely baseless. It was further submitted that clause 8 of the Addendum specifically provided that in the event the bank threatens to initiate legal action in respect of the schedule property, the petitioners would ensure that they would replace any other property with the said property to secure the rights of the respondent. Apart from this, the learned counsel appearing for the respondent relied on judgment of the Hon'ble Supreme Court in the case of ***Deep Industries Vs. Oil and Natural Gas Corporation Limited and another (2020) 15 SCC 706,*** particularly paragraph 17 of the said judgment to highlight the narrow scope of exercising power in this petition filed under Article 227 of the Constitution of India, to interfere with the order passed in the appeal under Section 37 of the said Act. On this basis it was submitted that Writ Petition deserved to be dismissed.

11. In order to appreciate the contentions raised on behalf of the rival parties, it would be appropriate to advert to the relevant clauses of the Joint Development Agreement and Addendum. Clause 12.1 of the Joint Development Agreement reads as follows: -

> *In the event, of the DEVELOPER requiring to borrow any funds to finance the costs of the construction against is interest under this Agreement, the DEVELOPER shall make a written request to the OWNER in this regard, and the OWNER shall not unreasonably withhold its consent thereto.*

12. Clauses 4 to 8 of the Addendum to the Joint Development Agreement executed on 4.1.2013 read as follows:-

> *"4. The Developer shall be entitled to raise finance from banks and/or financial institutions against any charge/hypothecation over the proportionate undivided rights of the Developer in terms of the said JDA without requiring any further no-objection certificate or confirmation from the Owner. Provided that all such finances shall be utilized by the Developer only for meeting the implementation of the project in the Schedule Property and shall not be utilized for any other purposes related to any other Project(s) undertaken by the Developer or otherwise. However, Developer shall not be entitled to create any charge on any rights/receivables exceeding its share in the Schedule Property/project.*
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> *5. The repayment all such borrowings and liabilities shall be the sole responsibility of Developer and the Owner shall not be responsible or liable for consequences of any default and such debts, the recovery shall be enforced only against the Developer.*
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> *6. Owners hereby consent to the execution and delivery of required deeds, letters, certificates, and/or security documents, if so required by any bank and/or financial institution in connection with any such financing / borrowing. Provided further that such delivery shall not mean or be deemed to be or to be construed to be any personal guarantee by Owner or by any of its Partners, jointly or severally. At no-point of time Owner's share*

in the said project shall be made liable for recovery or any such borrowing by Developer.

7. *The Developer shall provide a forth nightly statement of utilization of such borrowed funds to the Owner and in the event of Owner is of the opinion that the Developer has misused and diverted such borrowed funds for any purposes other than relating tot he project, the Owner shall be entitled to appoint and engage the services of the Chartered Accountant at its cost for auditing the said statement of utilization, & current account and escrow account transactions relating to the project under development in the Schedule Property.*
8. *In the unlikely event of any default by the Developer in the repayment of any debts raised against the security of its rights in respect of the Schedule Property, and in the event of any bank and/or financial institution threatening to initiate any legal action in respect of the Schedule Property, the Developer shall ensure that the Schedule Property 18, promptly, replaced with any other immovable property belonging to either Developer or Confirming party or any third party as security of the repayment of any debt and that the Schedule property shall not be subject to any attachment or enforcement of any security rights."*

13. The learned Arbitral Tribunal specifically referred to clauses 4, 6 and 7 to render findings against the petitioners. A reference was also made to a letter dated 6.9.2018 issued by the YES bank to the Petitioners. A perusal of the order passed by the learned Arbitral Tribunal would show that after reference to the aforesaid clauses and letter issued by the YES Bank, the tribunal found that the petitioners had suppressed the fact that YES Bank was financing the project and in the proceeding initiated under Section 9 of the aforesaid Act, it was for the first time conceded that the loan facility was actually no longer taken from HDFC Bank but that the YES Bank was now in picture. It was also found that the petitioners had failed to comply with the obligation under clause 7 of the Addendum of providing fortnightly statements of utilization of borrowed funds to the respondent, thereby depriving the respondent of an opportunity to examine as to whether the petitioners had misused or diverted the funds. The learned Arbitral Tribunal found substance in the apprehension raised on behalf of the respondent and found that the direction for return of title documents was warranted on the basis of *prima facie* findings rendered against the petitioners. In order to balance the interests of the parties the aforesaid direction was also issued, restraining the respondent from creating any third party rights in the suit property.

14. The question is whether the order of the learned Arbitral Tribunal partly allowing the application of the respondent can be said to be suffering from such a glaring error that this Court is required to exercise jurisdiction under Article 227 of the Constitution of India. As regards the scope of the power that can be exercised by this Court in such a situation, there cannot be any dispute about the position of law highlighted on behalf of the respondent, as stated in the following paragraph by the Hon'ble Supreme Court in the case of ***Deep Industries*** (Supra):

> *17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.*

15. Keeping in mind the narrow scope of the power being exercised by this Court while examining the correctness or otherwise of the judgment and order passed by the District Court under Section 37 of the aforesaid Act, while confirming the order of the learned Arbitral Tribunal, this Court is of the opinion that no case for interference is made out by the petitioners.

16. Perusal of the above quoted clause no. 12.1 of the Joint Development Agreement read with clauses 4 to 8 of the Addendum would show that although the petitioners were entitled to raise finances from banks and financial institutions by creating a charge or hypothecation over the proportionate undivided rights of the petitioners in terms of the Joint

Development Agreement, without requiring any further No objection certificate or confirmation from the respondent, the rider was that finances were to be utilized by the petitioner only for implementation of the said project in the property in question. There is no doubt about the fact that as per the letter issued by the YES bank, which has been quoted in the order of the learned Arbitral Tribunal, the petitioners have created a charge only to the extent of their rights in the Joint Development Agreement, but the said letter does refer to finances being made available for a bouquet of project. Apart from this, the learned Tribunal is justified in referring to clause 7 of the addendum, which mandates that the petitioners would have to provide fortnightly statements of the utilization of borrowed funds to the respondent so that the respondent could examine as to whether the funds have been misused or diverted. It is found on the basis of the material on record, that the said mandate was not followed by the petitioners and the said findings rendered by the Tribunal cannot be said to be erroneous.

17. Thus, it becomes clear that the petitioners have prima facie violated the mandate specified in clauses 4 to 7 of the Addendum to the Joint Development Agreement and this led to the Tribunal rendering findings in favour of the respondent.

18. In so far as the apprehension expressed on behalf of the petitioner that they would have to discharge entire liability concerning YES Bank for collecting the title documents to return them to the respondent, the same is belied by their own stand before the Debt Recovery Tribunal, where YES Bank has initiated proceedings against the petitioner. As rightly pointed out by the learned counsel appearing for the respondent, the petitioners themselves have boldly stated before the Debts Recovery Tribunal that no registered mortgage or exclusive charge by way of registered mortgage has been created in respect of the subject property before the YES Bank. If that be so, the said argument made on behalf of the petitioners is found to be without any substance.

19. Apart from this, clause 8 of the addendum makes it very clear that if the bank or financial institution threatens to take any legal action against the petitioners in respect of the property in question, the petitioners shall ensure that the said property is replaced with another immovable property. This aspect also indicates that there is absolutely no substance in the contention raised on behalf of the petitioner that the nature of the relief granted by the Tribunal amounts to grant of final relief at interim stage. This Court is of the opinion that the learned Tribunal was conscious of the fact that when direction was given to the petitioners to return the title documents, equally the respondent being the owner of the property ought to have been restrained from creating any third party interest in respect of the property in question till the arbitration proceedings are finalized. It is for this reason that the learned Tribunal has indeed granted such direction restraining the respondent.

20. The Order passed by the learned Tribunal is balanced, and it is justified in the facts and circumstance of the present case. The learned Tribunal has also specifically stated that observations made in the Order dated 24.10.2018, are only for the limited purpose of deciding the application filed under Section 17 of the said Act and that no opinion one way or other has been expressed by the learned Tribunal on the merits of the matter. The said observations sufficiently take care of the apprehension raised on behalf of the petitioners. The District Court took into consideration all these factors while dismissing the appeal and confirming the order of the learned Arbitral Tribunal.

21. In view of the above, this Court is of the opinion that no case for interference is made out by the petitioners in the present petition filed under Article 227 of the Constitution of India and hence it is found to be without any merits. Accordingly, the petition is dismissed.

MANISH PITALE, J.

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