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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 23rd November, 2021

+ **ARB. A. (COMM.) 44/2021 & I.As. 11280-283/2021**

M/S. KWALITY COLONISERS PVT. LTD. Petitioner

Through: Mr. Rajeev Virmani, Senior Advocate
with Mr. Raktim Gogoi, Mr. Kartikeya
Singh and Mr. Samarth Shandiliya,
Advocates.

versus

M/S. SHIVA S. S. STRIPS PVT. LTD. AND ORS. Respondents

Through: Mr. Saurabh Kirpal, Senior Advocate
with Ms. Smita Maan, Advocate for
R-1 to 7.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] impugns the order dated 19th August 2021 passed by the Ld. Sole Arbitrator, in an ongoing arbitration between Kwaliti Colonizers Pvt. Ltd. (being the Claimant therein) [*hereinafter referred to as 'Kwaliti'*] and Respondent No. 1 – M/s. Shiva S. S. Strips Pvt. Ltd. [*hereinafter referred to as 'Shiva'*] whereby an application under Section 17 of the Act, filed by Kwaliti,

seeking to secure the amount in dispute and/or *status quo* order *qua* the land owned by Shiva, stands rejected.

2. The events leading up to the present dispute are as follows:

Who are the parties?

- 2.1. Kquality is *inter alia* engaged in real estate activities.
- 2.2. Shiva is the owner of a parcel of land on which a shopping mall–cum–hotel was proposed to be built, admeasuring 10,600 sq. yds (approx.) situated in Khasra No. 7/14/2, 15,16 and 17 on the main highway in Zirakpur, (Dist. Mohali), Punjab, for which the *status quo* order was prayed for before the Arbitrator. Respondents No. 2 to 7 are its directors [*hereinafter referred to as the ‘Subject Land’*].
- 2.3. Respondent No. 8 - M/s. Royal A2Z Developers [*hereinafter referred to as ‘Royal’*] is a partnership firm, engaged in the business of development of properties, with R-9 & 10 as its partners.

What were the agreements?

- 2.4. On 17th September 2007, a Collaboration Agreement was executed between Kquality and Shiva, whereunder, the development of project, including obtaining of necessary sanctions and raising of construction was the responsibility of Kquality. As per profit sharing ratio of the total built-up area, Kquality was to get a share of 57.5% and Shiva was to get 42.5%.
- 2.5. On 31st March 2014, Royal came in as new developer and an MoU was executed between Kquality, Shiva and Royal to develop, construct and work on the subject land. [*hereinafter referred to as the ‘2014 MoU’*], and the earlier Agreement dated 17th September, 2007 was

terminated. Thereunder, in lieu of the cost of construction borne by Royal, it was to receive 42.5% of the built-up area, and out of the remaining area, Shiva was to retain 42.5% and Kwality was to receive 15%.

- 2.6. Next, on 18th January 2015, a fresh Tripartite Collaboration Agreement was entered into between Shiva (42.5% share), Royal (42.5% share) and Kwality (15% share) [*hereinafter referred to as '3rd Collaboration Agreement'*] for the same. All future permissions were to be taken by Kwality. Apart from its share of 15%, Kwality was also entitled to an additional area of 11701 sq. ft. proportionately on each floor, and was also allegedly entitled to an undivided share in the land underneath, in lieu of advances received from buyers which were retained by Shiva. The entire cost of construction was to be borne by Royal.

What are the events leading up to the present appeal?

- 2.7. Royal failed to carry out further construction, and handed over peaceful vacant possession of the land to Shiva on 31st March 2017. It also made an affidavit dated 12th July 2017 admitting its inability to develop the project.
- 2.8. Thus, on 24th October 2019, Shiva terminated the 3rd Collaboration Agreement and sought damages of Rs. 4 lakh per month from 17th January 2017 in terms of Clause 19 of the 3rd Collaboration Agreement.
- 2.9. Kwality filed a petition under Section 9 of the Act before this court, seeking restrain on the cancellation of the third Collaboration

Agreement. Status quo was granted in favour of Kwaliti on 21st November, 2019.

- 2.10. On 30th January 2020, Kwaliti sent a notice to Shiva, invoking arbitration in terms of Clause 30(g) of the 3rd Collaboration Agreement.
- 2.11. On 19th June, 2020, Shiva and Royal signed an MoU – to which Kwaliti was not made a party – *inter alia* settling their disputes, terminating the 3rd Collaboration Agreement, and deciding the new sharing of built-up land as 57.5% (Royal) and 42.5% (Shiva).
- 2.12. On 15th March, 2021, the arbitral tribunal was constituted. Kwaliti moved the Tribunal under section 17 of the Act to secure the amount in dispute of Rs. 27.69 crores by interim measure of *status quo* of the subject land. It brought the Tribunal's attention to some demolition work on the land in question for the creation of 3rd party interests, and thus, *status quo* order was granted on 19th April, 2021.
- 2.13. *Vide* the impugned order, the *status quo* order was vacated, holding that Shiva is the undisputed owner of the land in question; in terms of the agreements between the parties, Kwaliti was given a share in the built-up spaces after development, and not a share of the land itself, thus, Kwaliti did not have a right over the subject land.

3. Mr. Rajeev Virmani, senior counsel for Kwaliti, makes the following submissions:

3.1. **On Jurisdiction**

- (i) Under Section 37 (2)(b) of the Act, read with Section 5, this Court has appellate powers against orders rendered under Section 17, which

includes the power to intervene and modify the same. In this regard, reference was made to the judgment in *Edelweiss Asset Reconstruction Company Limited vs. GTL Infrastructure Limited & Anr.*¹

- (ii) It is settled law, as held in *Associate Builders v. DDA*,² that where:
- (a) a finding is based on no evidence, or (b) an Arbitral Tribunal takes into account something which is irrelevant to the decision arrived at, or (c) ignores vital evidence, such a decision would necessarily be perverse. Reliance was placed on *Raghuvir Buildcon Pvt. Ltd. v. Ircon International Ltd.*,³ where this Court has held that while exercising jurisdiction under Section 37, the Court has to examine whether the order of the Arbitrator suffers from ‘perversity’. This test is satisfied in the instant case.

3.2. **On merits:**

- (i) The monetary claims in arbitration are based on liability and obligations admitted and acknowledged in the 3rd Collaboration Agreement. Under this Agreement, the previous agreements were novated and the liability towards Kwaliti was admitted. Shiva has no assets except the land in question. Its revenue in the last financial year was nil. Now, if Shiva is allowed to carve out plots and sell them to 3rd parties, then any award passed in the future will be rendered unenforceable. Hence interim protection is required.
- (ii) The Tribunal’s ground for vacation of *status quo* – that since Kwaliti had not claimed any right in the land, it is not entitled to *status quo*

¹ ARB. A (COMM) 13/2020

² 2015 3 SCC 49.

(noted in para 25 of the impugned order) – is *ex facie* perverse. In fact, Kquality is not seeking enforcement of any right in the land pursuant to the collaboration agreements, but only seeking *status quo* to avoid creation of third-party rights.

- (iii) Kquality had sought the reliefs of securing the amount in dispute, which has been confused by the Tribunal for a claim for security of costs, which is not its intention. Its monetary claim in arbitration is not for speculative damages. It is the ‘*amount in dispute in the arbitration*’ under Section 17(ii)(b), and thus, capable of being secured. In this regard reliance is placed upon ***Baker Hughes Singapore Pte v. Shiv Vani Oil and Gas Exploration Services Ltd.***⁴ Consideration is valid, paid and admitted under the agreements made between the parties.
- (iv) The figure of Rs. 27.68 crores is arrived at in the following manner: Kquality was admittedly entitled to 32, 227.50 sq. ft. (15% of 2,14,850 sq. ft.) + 11701 sq. ft. of built-up area with proportionate rights in the land + 15% of remaining area to be developed = total 49,830.50 sq. ft. @ Rs. 5555 per sq. ft. as admitted rate in the 2014 MoU.
- (v) Shiva and Royal have collusively terminated the 3rd Collaboration Agreement and settled their claims behind Kquality's back by entering into the MOU dated 19th June, 2021 without recognizing Kquality's admitted rights under the 3rd Collaboration Agreement. In fact, the judgment of ***Sasan Power v. North American Coal Corporation***,⁵

³ 2021 SCC Online Del 2491.

⁴ 2014 SCC OnLine Bom 1663.

⁵ 2016 10 SCC 813.

- (vi) The reasoning of the Arbitrator to deny the relief to Kwaliti is perverse and contrary to the admitted position emerging from admitted documents on record.

4. Mr. Saurabh Kirpal, senior counsel for Shiva, controverts the above submissions on the following grounds:

4.1. **On Jurisdiction**

- (i) This Court, in May 2021 in the judgment of *Raghuvir Buildcon (supra)* observed that the parameters under Section 37 cannot be wider than that under Section 34. Thus, when exercising jurisdiction under Section 37, principles of Section 34 will apply and this Court would be required to only scrutinize for any patent illegality in the arbitral order, but it cannot re-hear the application. Reliance was also placed upon the judgment of this Court in *Dinesh Gupta v. Anand Gupta*.⁶
- (ii) In view of Section 5 of the Act, which calls for minimal judicial intervention, appeal lies only in a supervisory jurisdiction, and even there, the Courts have a hands-off approach.
- (iii) The reliance placed by Kwaliti upon *Edelweiss (supra)* is misconceived and inapplicable. The issue before the Court in the said decision was not regarding the scope of interference u/s 37(2)(b) but as to whether the directions issued by the Arbitral Tribunal can be interfered with, once a case for interference is made out. The said judgment is further completely distinguishable on facts, wherein this Court had to intervene with the impugned arbitral order because it

⁶ Arb. A. Comm. 4/2020.

affected the rights of a third/non-party who had a prior charge over the monies which were directed to be paid by respondent to the claimant therein. The findings of Edelweiss, rendered in this context, too, are therefore wholly inapplicable to the present case. [See: Paras 3,40,41,50-53 of *Edelweiss (supra)*].

- (iv) Kquality has failed to establish any patent illegality or perversity in the impugned order. Since Kquality does not satisfy the Court on existence of a *prima facie* case, the Court cannot go to the next stage of examining whether Kquality's interest should be protected by securing the subject land.
- (v) In support of these contentions, Reliance is also placed upon the judgments in:
 - a. *Intertoll ICS Cecons O&M Co. Pvt. Ltd. v. National Highways Authority of India*.⁷
 - b. *Natrip Implementation Society v. IVRCL Ltd.*⁸
 - c. *Lanco Infratech Ltd. v. Hindustan Construction Company Ltd.*⁹
 - d. *Prajita Developers Pvt. Ltd. v. Yusuf Khan alias Dilip Kumar & Anr.*¹⁰

4.2. **On merits:**

- (i) There is no infirmity in the impugned order. The plea of any alleged liability based upon the 3rd Collaboration Agreement, for seeking the value of any alleged share conferred in the said agreement, is

⁷ 2013 (135) DRJ 160.

⁸ 2016 SCC Online Del 5023.

⁹ 2016 SCC Online Del 5365.

meritless and misconceived. Kquality has not sought relief of specific performance of the aforesaid agreement, thus, the only remedy available to Kquality can be in nature of claim for damages or compensation, if any. Its claim for seeking value of alleged built-up shares from Shiva is contrary to the subject contract, whereunder, it was never the obligation of Shiva to build up the area. Kquality along with Royal were required to develop the project jointly and mutually. Lastly, on both the aspects of: (a) accrual of any alleged share (in the absence of the project coming into existence at all on account of failure of Kquality and Royal) as well as, (b) alleged value thereof; no question arises with regard to any admitted liability of Shiva.

- (ii) Alleged monetary claims are purely speculative and highly disputed questions of fact which are yet to be proved, ascertained and quantified.
- (iii) The findings in the impugned order are neither perverse nor amenable to challenge.
- (iv) Kquality seeks securitization for Rs. 27.68 crore, i.e., value of its alleged share in the proposed project, which itself is a non-existing right. The alleged share of Kquality was to accrue only upon and subject to development and completion of the proposed project, which admittedly has not taken place. In *Raman Tech v. Solanki Traders*,¹¹ it was held that the purpose of Order XXXVIII Rule 5 is not to cover and convert an unsecured debt into a secured debt.

¹⁰ 2016 (4) Mh.L.J 781.

¹¹ 2008 2 SCC 302.

- (v) Merely because the subject land is the sole asset of Shiva, cannot be a ground for grant of extraordinary relief of securing an indeterminate and unadjudicated claim of Kwaliti which is in nature of damages, that too, when the first requisite for injunction is establishing prima facie, which in this case remains unsatisfied.
 - (vi) Other contentions on merits advanced by Mr. Kirpal are not being recorded for the purpose of brevity, and as the Court cannot examine the same under the ambit of Section 37 appeal anyway.
5. In rejoinder submissions, Mr. Virmani counters the above arguments as follows:

5.1. **On jurisdiction:**

Even under Section 9 of the Act the Court is not stopped from intervening. Similarly, an appeal under Section 37(2) is not tethered to Section 34. Reasoning of the Tribunal to deny relief is perverse and contrary to the admitted position emerging from admitted documents as well as judicial precedents. In *National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd., Mumbai*,¹² powers and jurisdiction under this Section have been held to be wider than those of the Courts under Order XXVIII Rule 5 CPC, and are not controlled by the said provision. Thus, this Court has the requisite jurisdiction to adjudicate the present petition.

5.2. **On merits:**

- (i) The monetary claim is not speculative, as it relies upon clauses 17 and 18 of the 3rd Collaboration Agreement. This agreement does not lay any blame on Kwaliti for non-payment etc. but only accrues benefit. If there was indeed a past non-performance of obligations (i.e., obtaining

approvals), then Respondents would not have entered into further agreements with Kquality, which is not the case.

- (ii) None of the four ways to discharge a contract have either been agitated or occurred here. [i.e., (i) performance, (ii) impossibility, (iii) by agreement including novation, (iv) breach.]

Analysis

6. The scope of jurisdiction under Section 37(2)(b) of the Act, has been considered by a coordinate bench of this court in *Edelweiss (supra)*, while examining the proposition as to whether the Court can modify the directions issued by the learned Arbitral Tribunal. Answering this question in the affirmative, the court held that, *inter alia*, the legislature has consciously conferred appellate powers to the High Court, against orders rendered under Section 17 of the Act by Arbitral Tribunals, which implies that its appellate jurisdiction is in full play and effect. At the same time, the court has also observed that there is no reason or doubt that even as an appellate court under Section 37, the High Court would be required to maintain the discipline of the Act, which requires minimal interference with the decision of the learned Tribunal. On the aspect of scope of jurisdiction, Mr. Kirpal has cited another recent judgement of *Raghuvir Buildcon (supra)* of the same bench wherein the court delved into the question of whether the jurisdiction of the Court under Section 37(2)(a) is wider than that under Section 34. Referring to section 5 of the Act and the UNCITRAL Model Law and Rules, the court held that the scope is only limited to the

¹² 2004 (2) Mh.L.J. 696.

examination of whether the impugned order suffers from any patent illegality, perversity, or is otherwise unconscionable in law. The Court does not, therefore, “re-arbitrate” the Section 17 application decided by the learned Arbitrator. If the interpretation of the learned Arbitrator is plausible, the court would not interfere, especially at an interlocutory stage of the arbitral proceedings.

7. Mr. Virmani, by referring to the observations made in the afore-noted judgments, argued that the two views are inconsistent and irreconcilable. However, this court does not find any contradiction in the above-noted two decisions. They deal with two different aspects of the scope of jurisdiction. The observations and the holding of the court are based on the minimal intervention principle, in harmony with the statutory scheme of the Act. This should indeed be the approach, considering the decision of the Supreme Court in ***Wander Ltd. v. Antox India Private Limited***,¹³ which lays down a very limited scope of interference of the appellate court while deciding an appeal against an interlocutory order.

8. Keeping in mind the above position in law *qua* jurisdiction, the Court proceeds to examine the contentions of the parties. Kwaliti has prayed for an order directing Shiva to furnish appropriate security to the tune of 27.68 crores - which is its monetary claim before the Tribunal. This is sought by way of a direction to Shiva to furnish a Bank Guarantee or such other appropriate mode, and on that premise, it is prayed the *status quo* on the land should be maintained, pending the adjudication of disputes in arbitration.

9. The learned arbitrator has declined the prayer, *inter-alia* holding that as follows:

9.1. The claim of Kquality is for monetary damages and there is no challenge to the termination of the 3rd Collaboration Agreement.

9.2. Shiva and its directors are undisputed owners of the property in question. Kquality's share under the 2015 Agreement would arise only after the subject land was to be developed into a shopping mall-cum-hotel complex. Admittedly, the land has not been developed. Consequently, Kquality cannot claim any right in the same.

9.3. The project has not taken off the ground since 2007. The dispute *qua* the extent of construction cannot be decided at an interim stage. As per Shiva, the non-utilization of the land has caused monetary loss. Since the development of the project has not taken place, it would be unjustified to grant *status quo*.

9.4. The party seeking drastic measures under Order 38 Rule 5 of CPC, must demonstrate a strong *prima facie* case and satisfy the court of the ingredients of the provision, which has not been done in the present case.

9.5. Kquality did not seek any declaration or relief of specific performance of the 3rd Collaboration Agreement or cancellation of termination notice.

¹³ 1990 Supp SCC 727.

9.6. Kwality failed to establish a *prima facie* case for security of costs at an interim stage.

10. Bearing in mind the scope of jurisdiction of the statute invoked, the court finds no fault in the afore-noted reasoning. These findings are certainly not perverse or arbitrary or contrary to principles of law, so as to warrant interference. The discretion exercised by the learned Arbitrator is based on the facts and material placed on record. Some of the findings, as noted above, are based on admitted factual position, such as – the scope of the claim of Kwality in arbitration; ownership of the land in question; and Kwality having no stake therein in view of the claims being restricted to monetary reliefs.

11. There can also be no doubt that at the interim stage, in order to secure an interim measure of the nature as prayed for by Kwality, it was imperative for it to establish the three-pronged test of existence of: (a) *prima facie* case, (b) balance of convenience is in its favour, and (c) demonstration that it will suffer irreparable injury if relief is not granted.

12. Pertinently, while granting or refusing an injunction, judicial discretion has to be exercised to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the other side if the injunction is granted [See: ***Dalpat Kumar & Anr. v. Prahlad Singh & Ors.***¹⁴]. The Tribunal noted the probabilities of likelihood of injury: with the land in question not being utilized or developed for years together;

¹⁴ 1992) 1 SCC 719.

competing possibilities of inter-se claims premised on allegations of loss sustained due to defaults against each other, and did not find a *prima facie* case in favour of Kquality. The court is unable to perceive any illegality in the above conclusion, which is evident from the facts on record.

13. There can also be no quarrel on the legal position that all the requisite conditions of Order XXXVIII Rule 5 of the CPC are required to be satisfied for considering the prayer of securing the amount and the Court should exercise its discretion very carefully. [See: ***BMW India Private Limited v. Libra Automotives Private Ltd.***¹⁵] No exceptional circumstances were noticed by the arbitrator, nor shown to the court, for invocation of the said provision for securing the amount in dispute.

14. Mr. Virmani has strongly urged that irrespective of the rigour provided under Order XXXVIII Rule 5 of CPC, Kquality is entitled to relief of restrain or *status quo* on the land under Rule 1 (b) of Order XXXIX of CPC, which deals with threatening removal or disposal from the property with a view to defraud his creditors. On this issue, he has firstly stressed that the land in question is the only asset owned by Shiva, and secondly, the claims are not speculative but based on obligations admitted and acknowledged in the documents on record. Thirdly, he claims that there is collision between Shiva and Royal leading to the termination of the 3rd Collaboration Agreement, failing to recognize Kquality's rights. To support the monetary claim, Mr. Virmani has referred to documents and explained the basis of computation of damages (as recorded in his contentions at para 3(v) above). This has been strongly countered by Mr. Kirpal and the court

finds merit in the submissions advanced by him, to the extent that these are highly disputed questions of fact, which are yet to be proved/ascertained. Further, accepting the claim of damages to be cogent would also call for interpretation of the clauses. Therefore, in the opinion of the court, Kwality's version cannot be accepted at this stage and would need to be proved with evidence before the appropriate forum.

15. Nevertheless, the court has *prima facie* reflected on the submissions made on merits of the dispute. In fact, both the senior counsel have meticulously taken the court through various clauses of various agreements. It can, *prima facie*, be noticed that there has been no development of the project at all, which has led to the termination of various agreements executed at various points in time.

16. Under the 3rd Collaboration Agreement, Kwality assumed the obligation of applying for and obtaining necessary approvals, sanctions, permissions, etc. All fees, expenses, deposits for the above were to be borne by Kwality. Shiva's obligation under the agreement was only to provide the land. Kwality's share was to crystalize only in the built-up area, upon completion of the obligations and development of the project. *Prima facie* it appears that no payment has been made by Kwality to Shiva for allotment of its share in the proposed project. Kwality's claims, based on the share that would have accrued in the future, can certainly not be held to be certified, crystalized, due or payable *in praesenti*. The claim of damages is indeterminate and would require adjudication and quantification.

¹⁵ Judgment of the High court of Delhi dated 9 July 2019 in O.M.P. (I) (COMM.) 25/2019.

17. Further, *prima facie*, the MoU dated 19th June 2020, between Shiva and Royal, cannot be construed as creating or vesting a right in favour of Kquality. Thus, even if the court were to consider the relief under Order XXXIX Rule 1 of the CPC, the court does not find the element of existence of a *prima facie* case in favour of Kquality. There is no foundation to show that Shiva, as the owner of the land, is attempting to defraud Kquality. Moreover, *prima facie*, there is no debt so as to construe Kquality to be a ‘creditor’, which the afore-noted provision requires for grant of this extraordinary relief.

18. The balance of convenience also lies in favour of Shiva, the owner of the land. Monetary claim before the tribunal, which remains highly disputed, does not merit relief under section 17(1)(ii)(b) of the Act. No doubt, interim reliefs are to be assessed in aid of final reliefs, and the provisions under Sections 9 and 17 of the Act are meant for the purpose of protecting the subject matter of the dispute till the arbitration proceeding culminates into an award. However, grant of any relief largely and fundamentally depends upon whether a party has made out a *prima facie* case that he would succeed finally in the arbitration proceedings. As observed in ***Dalpat Kumar*** (*supra*) the phrases “*prima facie* case”; “balance of convenience” and “irreparable loss” are not to be understood as rhetoric phrases. These words have to be given their due meaning in given facts and circumstances, with sound exercise of judicial discretion. The width and elasticity of discretion under section 17(1)(ii)(b) has to be used prudently in conformity with the afore-noted principles.

19. The judgments relied upon by Mr. Virmani lay down the correct

propositions, but are wholly inapplicable in the facts of the case.

20. With the above view, the Court does not find any infirmity in the impugned order. The present appeal is dismissed. Pending applications also stand disposed of.

21. It is clarified that the Court has only examined the contentions of the parties on a *prima facie* basis. The learned Arbitral Tribunal is free to take a final view on the matter, in accordance with law and materials placed on record, uninfluenced by the observation expressed herein.

SANJEEV NARULA, J

NOVEMBER 23, 2021

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