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

COMMERCIAL ARBITRATION PETITION NO. 876 OF 2019

Ashoka Developers & Ors. .. Petitioners
Vs.
Nalawad Infrastructure .. Respondent

Mr. Aseem Naphade i/b. Ajit Rajgole for the petitioners.
Mr. Vikramjeet Garewal a/w. Ms. Heena Vora, Ms. Meghna Khatri i/b. E.A. Sasi for the respondent.

CORAM : G.S. KULKARNI, J.
DATE : JUNE 10, 2022.

P.C.:

1. This is a petition filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Act") wherein the petitioner assails an order dated 7 January, 2019 passed by the arbitral tribunal under section 17 of the Act. By the impugned order, the arbitral tribunal has partly allowed the respondent's Section 17 application and has directed the petitioners to secure the respondent's claim to an extent of 2,16,45,250/- either through a bank guarantee or any collateral security or by depositing the said amount with an escrow agent mutually selected by the parties.

2. Petitioner no. 1 and the respondent had entered into a contract/ agreement dated 3 November, 2012 whereunder petitioner no. 1/developer appointed the respondent as its contractor. A supplementary agreement dated 29 April, 2013 and 18 June, 2014 were

entered between the parties which novated the contract dated 3 November, 2012 to some extent. The petitioner no. 1 vide its letter dated 5 August, 2015 terminated the agreements as entered with the respondent on the ground that the respondent failed and neglected to complete the work under the project on or before the stipulated date. The petitioner no. 1 thereafter appointed one M/s. Raichuri Constructions to complete the balance work. The respondent, being aggrieved by the termination of the contract by petitioner no. 1, approached this Court by filing Commercial Suit No. 378 of 2016 which was instituted on 17 August, 2015. On 21 August, 2015 this Court passed an order restraining petitioner no. 1 from creating third party rights in respect of 15 flats in the project as set out in the petitioner's letter dated 5 August, 2015. Thereafter, by consent of the parties, by an order dated 7 May, 2018 passed in the said suit, the disputes between the parties were referred for adjudication by an arbitral tribunal.

3. Mr. Naphade, learned counsel for the petitioners in assailing the impugned order would submit that no case whatsoever was made out by the respondent on the Section 17 application for the arbitral tribunal to pass the impugned order to furnish a security of Rs. 2,16,45,250/-. It is his submission that such an order could not have been passed, more particularly, considering that a substantial security of about 15 flats was available in favour of the respondent in pursuance of a direction of this

Court as contained in the order dated 21 August, 2015 passed in the said suit and which has continued to operate even today and certainly in operation when the impugned order was passed by the arbitral tribunal. It is next submitted by Mr. Naphade that the approach of the arbitral tribunal is quite peculiar inasmuch as the arbitral tribunal itself, at such interim stage of the arbitral proceedings has undertaken an exercise of calculating the said amount without the parties leading any evidence in that regard. He submits that the learned arbitrator himself undertaking such exercise of calculation was also not correct and was contrary to the record. It is his submission that such exercise if at all can only be done after the parties lead evidence and/or when the rights of the parties are to be finally decided and only after considering the rival contentions on such issues at the final hearing. It is next submitted by Mr. Naphade that the impugned order has continued to operate since 2019 and as on date, the arbitral proceedings are at the final stage and hence even considered from such perspective, the impugned order ought not to operate and the arbitral tribunal ought to proceed with the arbitral proceedings. Mr. Naphade would also submit that no case was made out by the respondent for a relief, in the nature falling under Order 38 Rule 5 of the Code of Civil Procedure can be granted and more particularly when only a relief of injunction was sought.

4. On the other hand, learned counsel for the respondent has

justified the impugned order. He submits that the arbitral tribunal has taken into consideration all material facts and after examining the documents on record and the respective contentions of the parties has come to a considered conclusion that the impugned order ought to be passed, so as to protect the arbitral interest of the respondent.

5. In my opinion, there is much substance in the contentions as urged by Mr. Naphade. At the outset, it needs to be observed that this is not a case that the respondent is without any security. Fifteen flats of substantial value comprising of an area of about 9000 sq.ft. have been kept reserved/blocked right from the year 2015 so as to secure the claim of the respondent in the arbitral proceedings. Such order has continued to operate. Thus, the question before the arbitral tribunal was whether a strong prima facie case of any likelihood of the petitioners defeating the arbitral award if passed was made out. As rightly pointed out by Mr. Naphade, it certainly appears that such a case falling under the parameters of Order 38 Rule 5 was not made out. This apart, it appears from the prayers as made in Notice of Motion No. 215 of 2016 and Notice of Motion (L) No. 1140 of 2018 which were converted into an application under section 17 of the Act, that the prayers as made in such application are not the prayers on which the impugned relief could be granted, namely of directing the petitioners to furnish the security, as directed by the impugned order. It appears that the learned sole

arbitrator has completely overlooked the nature of the prayers.

6. This apart, as rightly contended by Mr. Naphade, what is surprising is that the learned arbitrator has himself undertaken an exercise of calculation of the area and thereafter has converted such area and has valued the same in monetary terms, at the interim stage before the parties could lead any evidence on all the relevant aspects, on the basis of which the impugned order directing the petitioners to deposit the amount has been made. Following observations of the learned arbitrator in the impugned order would demonstrate such exercise being undertaken at the interim stage:

> "31.(g) Though the claimant was to be paid money and subsequently flats/office spaces, for the purposes of this application, the claimant has calculated the monetary value of the work claimed to be done by it and divided the same by a rate per square foot to arrive at the number of flats it claims to be entitled to over and above the said 15 flats.
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> (h) Prima facie, applying the above principle, the total area constructed by the claimant would stand at 1,08,850 square feet (i.e., 70% of 1,55,500 square feet);
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> (i) The consideration payable as originally stipulated under the Contractors Agreement would stand at Rs.11,04,82,750/- (i.e. 1,08,850 square feet X Rs.1,015);
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> (j) The net amount due under the Contractors Agreement along with the incentives agreed to be given (which are not in dispute) would stand at Rs.12,13,32,750 (i.e. Rs.11,04,82,750 + Rs.43,50,000/- + Rs.65,00,000);
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> (k) After adjusting the incentives admittedly paid by respondent no. 1 to the claimant (as admitted in Exhibit TTT to the Statement of Claim) and the value of the said 15 Flats, the amount to the extent of which the Claimant ought to be secured would stand at Rs.2,16,45,250/- (i.e. Rs.12,13,32,750 – Rs.59,10,000 (being incentives admittedly paid to the claimant as per Exhibit TTT Statement of Claim) – Rs.93,777,500 (being the value of the said 15 flats as per Exhibit TTT Statement of Claim)].

7. In my opinion, it is difficult to countenance such finding being recorded at the interim stage and in the absence of any prayer and a case for furnishing of any additional security being made out by the respondent.

8. Another aspect of the matter is required to be borne in mind is in relation to what was agreed between the parties, namely, the initial agreement that the respondent/claimant would be allowed 12 residential flats and 10 office space, was novated and the obligation to construct office spaces no more existed, which was sufficiently to the knowledge of the respondent and also brought on record of the arbitral tribunal as recorded in paragraph 13(e) of the impugned order. Despite such clear factual position, a plea as made on the basis of the original entitlement as to the office space, has been accepted by the learned sole arbitrator.

9. In the above circumstances, in my opinion, on more than one count, the impugned order goes contrary to the record. It also appears to be the present position that the arbitral proceedings have progressed and they are at the fag end and soon the arbitral tribunal would be proceeding to publish an award after the arguments of the parties are concluded. Also as an interim measure, the security of 15 flats being kept vacant by the petitioners have continued to operate since 2015, which by any standard in today's circumstances needs to be accepted as

a sufficient security as rightly submitted by Mr. Naphade. Mr. Naphade confirms that the petitioners have kept 15 flats vacant and no third party rights whatsoever have been created. He states that the petitioners are certainly bound to maintain the said position which has been maintained by the petitioners since the year 2015. In my opinion, this is hence not a case that no security is available to the respondent.

10. For the above reasons, the impugned order passed by the arbitral tribunal cannot be sustained and would be required to be set aside. Hence, the following order:

ORDER

(i) The impugned order dated 7 January, 2019 passed by the arbitral tribunal is quashed and set aside;

(ii) All contentions of the parties on merits till final adjudication of the arbitral proceedings are expressly kept open.

(iii) Injunction in respect of 15 flats as directed by this Court in the order dated 17 August, 2015 and in terms of the letter dated 5 August, 2015 shall continue to operate till the final disposal of the arbitral proceedings.

11. Disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]