

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

I.A No. G.A 1 of 2023

In

APO 65 of 2023

Concrete Developers LLP

vs

Gaurav Churiwal and Ors.

For the petitioner : Mr. Abhrajit Mitra, Sr. Adv.
Mr. Sarvapriya Mukherjee, Adv.
Mr. Snehashis Sen, Adv.
Mr. Shounak Mukherjee, Adv.
Mr. Sourav Ghosh, Adv.

For the respondent : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Kumarjit Banerjee, Adv.
Ms. Sanchari Chakraborty, Adv.
Ms. Tanishka Khandelwal, Adv.
Mr. Aadil Naushad, Adv.

Last heard on : 19.10.2023

Delivered on : 24.11.2023

Moushumi Bhattacharya, J.

1. The present appeal, filed under section 37 of The Arbitration and Conciliation Act, 1996, is from an order passed by a learned sole arbitrator on 17.4.2023. The impugned order is an interim order and was passed in an application filed by the respondent no. 1/claimant under section 17(1) of the 1996 Act whereby the appellant was directed to deposit Rs. 6 crores in a separate interest - bearing account in the name of the Limited Liability Partnership (LLP) namely Concrete Developers LLP.

A brief background

2. The LLP was constituted pursuant to an Agreement dated 24.11.2015 for the purpose of developing a high-end real-estate project - “Raghu Estates” in Alipore, Kolkata. The project had a developer’s allocation of 16 flats of the total number of flats constructed for the project. The Certificate of Completion in respect of the project was granted on 19.1.2019.

3. The respondent no. 1 (claimant in the arbitration) is the son of one Pawan Kumar Churiwal, who was the single - largest share-holder and one of the three designated partners of the LLP holding 33.40% share in the LLP. Pawan Kumar Churiwal passed away on 12.1.2021. The respondent no. 1 sought to be inducted in the LLP pursuant to clause 22(v) of the LLP Agreement after the demise of Pawan Kumar Churiwal. The other partners (appellants before this Court) refused to induct the respondent no. 1 / Gaurav Churiwal as the partner in the LLP. Gaurav Churiwal filed the statement of claim for an

award including a direction on the respondents (appellants here) to induct Gaurav Churiwal in the LLP. The respondent no. 1 / claimant also prayed for the financial statements which were unilaterally prepared by the appellants and for drawing up of a fresh account of profit and loss of the LLP after taking into account the sale proceeds of the inventories including the flats of the project of the LLP.

4. The respondent no. 1 / claimant Gaurav Churiwal also filed an application under section 17 of the 1996 Act seeking a direction on the appellants to produce all books of accounts and financial statements for the three Financial Years beginning 2019 – 2022 and the details of sale consideration received in respect of a flat in the Raghu Estates project. Gaurav Churiwal also sought for appointment of a receiver for preserving the sale proceeds received by the appellant no. 1 LLP.

The impugned order :

5. Upon considering the submissions made on behalf of the respondent no. 1 / claimant and the appellants in context of the claimant's prayer for directing the appellants to set apart Rs. 6,41,73,413.00/- being the total balance pertaining to Pawan Kumar Churiwal's shares (the father of the claimant) as on 12.1.2021, the learned arbitrator was of the view that the claimant and / or the other legal heirs of the deceased partner, Pawan Kumar Churiwal are entitled to accounts and a share in the profits in the LLP. The appellants were accordingly directed to keep a sum of Rs. 6 crores apart in a separate interest

bearing account in the name of the LLP. The appellants were also directed to furnish the particulars of accounts to the claimant and to maintain the accounts till disposal of the arbitration.

Arguments of the appellant / LLP and the remaining partners :

6. The appellant is Concrete Developers LLP, within the meaning of the Limited Liability Partnership Act, 2008 and was the respondent no. 1 in the arbitration. Learned counsel appearing for the appellant seeks to challenge the impugned interim order on several grounds, the first of which is that the impugned order is contrary to several sections of The Arbitration and Conciliation Act, 1996, including 28(3), 28(1)(a) as well as section 17(1)(ii)(b) thereof.
7. Counsel submits that an order for securing a particular amount of money can only be made with regard to an “amount in dispute” whereas the impugned order is apparently based on equitable considerations which cannot be done under the provisions of the 1996 Act. Counsel submits that the claimant’s section 17 application did not contain any prayer for securing any particular amount and that the impugned order is also contrary to section 24(5) of the LLP Act, 2008 which restricts the entitlement of a person to the share of a deceased partner to the capital contribution of the former partner and the former partner’s share in the accumulated profits of the LLP. Counsel further submits that the impugned order suffers from absence of reasons as to the basis of the direction on the appellant to set Rs. 6 crores apart and is also contrary to the arbitrator’s findings in the 10th sitting. Counsel further submits

that the claimant's conduct in the arbitration was inequitable and that the impugned order is patently illegal and perverse.

Arguments of the respondent no. 1 :

8. Learned counsel appearing for the respondent no. 1 Gaurav Churiwal, who was the claimant in the arbitration and had applied for interim relief in the application filed under section 17(1), submits that the claimant's prayer in the arbitration was for induction as the partner in the LLP in place and stead of his father, Pawan Kumar Churiwal and that the section 17 application was hence for preserving the value of the claimant's share at the time of demise of his father / deceased partner of the LLP.
9. Counsel submits that the object and purpose of section 17 is to preserve the value of the share of the deceased partner at the time of his demise so that the claimant's share is not frittered away by the other partners who are in control of the appellant LLP. It is submitted that the appellant and the other partners were siphoning away profits from sale of flats during the arbitration.
10. Counsel further urges that the scope of interference in an appeal under section 37 is restricted where the impugned order has been passed under an application under section 17 thereto. Counsel argues that the appellant and the other partners of the Sureka Group are guilty of diminution of the estate of the LLP and that the impugned order aims to preserve the value of the share of the deceased partner.

Decision

11. The entire factual matrix of the appeal revolves around an interim order passed by the learned sole arbitrator in the application filed by the respondent no. 1 / claimant under section 17(1) of the 1996 Act. The facts leading to the claim filed by the respondent no. 1 have been briefly stated in the first part of this judgment and are not being repeated. The respondent no. 1's prayer in the arbitration was for drawing up of the accounts of the partnership business in which the respondent no. 1's deceased father, Pawan Kumar Churiwal, was the single-largest share-holder and one of the three designated partners of the LLP.
12. Pawan Kumar Churiwal held 33.40% shares in the LLP at the time of his demise on 12.1.2021. The claimant prayed for his induction in the LLP under clause 22(v) of the LLP Agreement. The appellant and the remaining partners (the Sureka Group) refused to induct the respondent no. 1 as a partner in place of his father. The respondent no. 1 accordingly filed the statement of claim as well as the application for interim relief in the circumstances.
13. Before the Court proceeds to deal with the competing contentions of the appellant and the respondent no. 1, it is important to clarify at the very outset that the primary relief which the respondent no. 1 / claimant was the induction of the claimant as a partner in the LLP as opposed to exit from the LLP. Therefore, the principal argument of the appellant under section 24(5) of the Limited Liability Partnership Act, 2008, premised on the alleged negative balance in the share of the respondent no. 1's father / deceased partner, is misplaced and is not relevant.

14. Section 24(5) of the LLP Act proceeds on the basis of “Cessation of Partnership Interest” and the recovery / consolidation of the outgoing partner’s share - or the person entitled to his share in the LLP - in consequence of the death or insolvency of the former partner.

15. It is relevant to note that section 24(5) also requires taking into account the share of the value of the immovable assets of the LLP at the date of demise of the deceased partner particularly where the deceased partner was conferred right, title and interest over such asset under clause 22(i) of the LLP Agreement. The relevant portion of section 24(5) of the LLP Act, 2008 is set out below :

“24(5). The fees to be paid to the Registrar in pursuance of sub-section (3) of Section 34 for filing the Statement of Account and Solvency shall be as mentioned in Annexure ‘A’.”

16. The above extract would show that section 24(5) does not have any manner of application to the present facts since respondent no. 1 was not seeking to exit the LLP under any circumstances but to continue in place of his deceased father under clause 22(v) of the LLP Agreement. The respondent no. 1 hence sought for re-drawing of the accounts of the LLP business on the accrual of revenue from the project to the LLP on and from 12.1.2021. The respondent no. 1’s father passed away on 12.1.2021.

17. The impugned order reflects that the provisional balance sheet as on 12.1.2021 prepared by the appellant and the surviving partners reflected unsold flats of the project being valued at Rs. 23.05 crores. The deceased

partner's share in the said amount would hence work out to be Rs. 7.70 crores. The impugned order contains a statement to this effect. The accounts would further show that even if the deceased partner's share in the accumulated loss aggregated to a sum of Rs. 1.28 crores is adjusted against Rs. 7.70 crores, a sum of Rs. 6.41 crores would still stand to the credit of the deceased partner (the father of the respondent no. 1). The impugned order also reflects the figure of Rs. 6,41,73,413.00/-.

18. Clause 22(v) read with clause 22(i) of the LLP Agreement shows that the deceased partner had right, title and interest in the existing inventory and assets of the LLP. Hence 1/3rd of the share of assets of the deceased partner at the time of demise would work out to be Rs. 7.70 crores. Moreover, Rs. 6.4 crores would be the value of the share of the deceased partner at the time of his demise upon adjustment of the negative balance. This would be the case even if the argument of negative balance made by the appellant and the other partners is accepted to be correct.

19. The learned arbitrator has taken the amount of Rs. 6.41 crores as the rightful entitlement of the respondent no. 1 being the legal heir of the deceased partner. The arbitrator accordingly directed a sum of Rs. 6 crores to be kept in a separate interest bearing account of the LLP as a measure of protection to the respondent no. 1 until his induction as a partner in the LLP.

20. The interim measure sought for is essentially one for preservation of the value of the shares of the deceased partner until the arbitration culminates in an award. The interim order cannot be seen as prejudicial to the appellant or

the other surviving partners as the money would continue to lie in the account of the LLP. The reverse situation, on the other hand, is of the claimant / respondent no. 1 suffering irreparable injury and the claim being rendered infructuous if the money is not deposited in a separate account.

21. Besides the factual aspect, the impugned order is wholly within the domain of the learned arbitrator and the powers conferred on the arbitrator under section 17(1)(ii)(a) to (e) of the Act. The pleadings disclosed as well as the Minutes of the Meeting justify moulding of the reliefs in view of the subsequent disclosures made by the appellant and the surviving partners with regard to alienation of assets / funds of the LLP. The disclosures admittedly came in dribblets and not at one go. The arbitrator was hence fully justified in passing the impugned order to preserve and protect what was left of the LLP until the claim of the respondent no. 1 was finally decided.

22. A few instances which may have prompted passing of the impugned order are listed below :

- i) An order of disclosure on sale of flats after the demise of Pawan Kumar Churiwal was directed to be furnished by the appellant and the surviving partners in the third sitting on 10.3.2022. The affidavit-in-opposition (AO) to the section 17 application disclosed two flats post-demise of Pawan Kumar Churiwal. The respondent no. 1 / claimant controverted this disclosure as being insufficient and incorrect.

- ii) The appellant and the surviving partners filed a supplementary affidavit admitting that the disclosure made in the AO was incomplete through “inadvertence” and that one additional flat had been sold after the demise of Pawan Kumar Churiwal.
- iii) The respondent no. 1 / claimant filed an exception to the appellant’s supplementary affidavit furnishing particulars of creation of third party rights on the remaining 8 flats after the demise of Pawan Kumar Churiwal, as opposed to the three flats which were disclosed by the appellant and surviving partners in the supplementary affidavit.
- iv) The appellant confirmed the claimant’s disclosures in the statement of defence.
- v) There was sufficient evidence before the learned arbitrator of creation of revenue amounting to almost Rs. 38 crores during the pendency of the arbitration on account of sale of the 8 remaining flats after the death of the claimant’s father, Pawan Kumar Churiwal in the project which was being developed by the partnership firm.
- vi) The affidavit-in-reply of the claimant also carried the evidence of the proceeds from the sale of flats being transferred and accredited to the transfer accounts. The appellant and the surviving partners sought to explain the aforesaid as repayment of short-term loans from partners.

23. The above instances further buttress the basis of the order for preserving whatever assets of the LLP remained as on 17.4.2023 till conclusion of the

arbitration. It is of significance that the impugned order is an interim order without having any finality attached to it.

24. The above facts within which the impugned order was passed would hence dislodge the grounds taken by the appellant and the surviving partners for challenging the impugned order. The appellant says that the impugned order is contrary to section 28(3) and other provisions of the 1996 Act since there was no “amount in dispute” in the arbitration which was capable of being secured. This contention should be rejected in view of the statements contained in the impugned order on the accretion in revenue of the LLP and arriving to a figure of Rs. 6,41,73,413.00/-.

25. The appellant’s further objection that the learned arbitrator could not have passed the order on equitable considerations without a specific sum being admitted by the parties is also not acceptable for the same reason, namely, that the impugned order contains a specific calculation for arriving at the figure of Rs. 6,41,73,413.00/- leading to the direction for keeping that amount aside as interim protection.

26. The third objection of absence of pleadings / prayer for securing the amount has been dealt above. An order passed under section 17(1) is not curtailed by the regime of The Code of Civil Procedure, 1908 and is in the nature of a residuary power for grant of interim measures of protection as may seem just and proper to the arbitrator. It is also not imperative to wait for actual diminution of the assets for passing of such orders since that may frustrate the arbitration altogether. Reliefs must hence be moulded in

accordance with the facts and circumstances presented by the parties. The moulding of reliefs in this case was found to be necessary in view of the gradual (and forced) disclosure of alienation of assets and the funds of the LLP by the appellant and the surviving partners.

27. This Court is also not inclined to accept the argument that the impugned order does not contain reasons. The direction on the appellant and the other partners to set Rs. 6 crores apart is fully backed by evidence of the learned arbitrator having applied his mind to the facts before him. The insistence of the appellant and the surviving partners to unravel the factual layers of the assets and liabilities of the LLP including Note 18 of the Balance Sheet of the LLP as on 12.1.2021 is not required to be gone into in the appeal.

28. The order is completely interim in nature and the *lis* between the parties in the arbitration has not come to an end. The appellant and the surviving partners will not face any prejudice from the impugned direction. On the other hand there is every likelihood of the claimant / respondent no. 1 not being left with any rightful share in the LLP before conclusion of the arbitration if the order is interfered with.

29. Further, a section 37 Court is required to be less noseey on facts and less willing to interfere with interim orders for the asking also for the reason which follows.

The court must be circumspect in an appeal under Section 37(2)(b) of the 1996 Act :

30. The discussion on this aspect requires Section 37(2)(b) to be set out.

*“37. Appealable orders.- (2) Appeal shall also lie to a court from an order of the arbitral tribunal –
(b) granting or refusing to grant an interim measure under section 17.”*

31. An appeal challenging an order passed by the arbitral tribunal granting/refusing an interim measure of protection under Section 17 of the 1996 Act is not in the nature of a first appeal. The court will hence be bound within the embargo under Section 5 of the 1996 Act which contains a general bar on judicial intervention in matters governed by Part I of the Act. Apart from Section 5, the court must also bear in mind that an order passed by the arbitral tribunal under Section 17(1) is essentially an order on exercise of discretion.

32. Section 17(1) confers power on an arbitral tribunal to grant interim measures of protection in equal measure as that to a court under Section 9(1) of the Act. If one discounts the minor differences in the two sections, there is little doubt that the statute has conferred wide discretionary powers on the arbitral tribunal to grant interim relief which is similar to that of a court under Section 9(1) of the Act. The stated statutory object is that the arbitral tribunal should not be hemmed-in either by the statute or by dint of it being a judicial authority and must feel free to pass orders for preserving the subject matter of dispute in the arbitration. The construction given to Section 17(1) would be underscored by the last part thereof which is reproduced below:-

*“.....and the arbitral tribunal shall have the same power for making orders, as the **court** for the purpose of, and in relation to, any proceeding before it”. (“Emboldened”)*

33. The object is reinforced in Section 17(2) which declares that any order issued by the arbitral tribunal under Section 17 shall be deemed to be an order of the court for all purposes and shall be enforceable under The Code of Civil Procedure, 1908 in the same manner as if it were an order of the court.

34. Therefore, the Act places the arbitral tribunal and the court at par in terms of the power to pass interim measures of protection. If this be the case, the Act does not envisage a party knocking at the doors of the Court at every turn of the arbitration proceeding. One of the salutary aims of the 1996 Act is to prevent multiplicity of disputes and stretching of the *lis* beyond reasonable limits. The Act contemplates giving unfettered power to the arbitral tribunal not only to pass interim orders but also to see the end of the *lis* before it. The section 37 court in appeal must therefore see an interim order passed by the arbitral tribunal within the prismatic efficacy of the statutory purpose in that the court would only intervene where the exercise of discretion is palpably perverse and the order is patently unconscionable.

35. The test employed would somewhat be similar to that of an intra-court appeal, (as opposed to an appeal from a decree for instance), where the appeal court would essentially test the challenge on the plank of perversity and jurisdictional infirmity. The limited – interference view is also by reason of the fact that section 37(2)(b) is at an ongoing stage of the arbitration. A party can

seek recourse against the final decision / award under section 34 of the Act. The norm should be surface-scratching and not deep-drilling into the factual well of the matter.

36. A comparison in this regard may be made to a section 34 Court where the Court would similarly be confined to the grounds of patent illegality or perversity for setting aside of an award. It would also be important to bear in mind that an interim order of protection fits snugly into Section 17(1)(ii)(a) to (d) within the almost limit-less powers conferred on the arbitral tribunal to grant “ *such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient*” [17(1)(ii)(e)]. Therefore, the appeal court should take a hands-off approach to any jurisdictional objection to an interim order passed by the arbitral tribunal.

37. This would be the advisory, with a statutory high-five, where the effect of the interim order is clearly of a temporary nature. The Court would have to assess whether the interim order would cause irrevocable prejudice to the appellant so as to frustrate the appellant’s claim/defence altogether and render the arbitration inconsequential. There are several decisions including that of *Dinesh Gupta vs. Anand Gupta*; 2020 SCC Online Del 2099, *L & T Finance Limited vs. DM South India Hospitality Private Limited*; (2021) SCC Online Del 5571 and *GSL Foils Products Pvt. Ltd. vs. FWS Turnit Logistic Park LLP*; 2023 SCC Online Del 3904 reiterating the limited scope of interference in a Section 37 appeal particularly where the appeal arises out of an interlocutory

order of the arbitral tribunal. In other words, discretionary orders merit a measure of respect unless found to be unconscionable and contrary to law.

Is circumspection called for in the present case?

38. The impugned order of the learned arbitrator is supported by the reasons stated therein. In other words, the direction on the appellants to keep Rs.6 crores aside in a separate interest-bearing account can be traced to the reasons indicated by the learned arbitrator that the tribunal is only concerned with protecting the interest of the deceased (the father of the claimant/respondent no.1) and persons claiming under him. The arbitrator was of the view that there is a likelihood that the legal heirs of the claimant (the respondent no.1 herein) would remain embroiled in litigation and that the claimant is entitled to accounts and to share in the profits in the LLP in accordance with the LLP Agreement. The arbitrator also expressed concern of the claimant being left without a remedy in the event the right of the deceased partner in a running business is not protected considering the substantial profits made by the LLP after the demise of the deceased partner.

39. Most important, the respondents have only been directed to set apart a sum of Rs.6 crore in an interest-bearing account as opposed to making over this amount to the claimant. Leaving everything else aside, the appellants cannot complain of any prejudice caused to them by this direction.

40. *Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited*; 2022 SCC Online SC 1219 actually helps the respondent no.1 since the Supreme Court reiterated the wide power conferred on the Court to pass orders securing the amount in dispute in arbitration and proceeded to hold that the Court exercising such power should not withhold relief if a strong prima facie case is made out and the balance of convenience is in favour of an interim order. A similar dictum can be found in *Sanghi Industries Limited vs. Ravin Cables Ltd.*; 2022 SCC Online SC 1329 but makes such orders subject to Order XXXVIII Rule 5 of the CPC. Apart from the fact that this position has substantially been diluted by later decisions of the Supreme Court, the present matter does not involve any order of attachment. *Shiv Kumar Sharma vs. Santosh Kumari*; (2007) 8 SCC 600 held that a court of law cannot exercise its discretionary jurisdiction *de hors* the statutory law. *Jai Balaji Industries Ltd. vs. Hyquip Systems Pvt. Ltd.*; (2010) 4 CHN 87(Cal) was a case of unliquidated damages which is totally distinguishable from the present case. *Secretary and Curator, Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity*; (2010) 3 SCC 732 is an exposition on reasons being the hallmark of an order and fundamental to the administration of the justice-delivery system. The impugned order in the present case is replete with reasons.

41. The facts and circumstances which were presented before the learned arbitrator or were disclosed in fits and spurts by the appellant / surviving partners fully justify the impugned interim order dated 17.4.2023. There can be no jurisdictional objection to the impugned order as the Act of 1996 grants

the arbitral tribunal plenary powers to pass such orders for preserving the dispute in the arbitration. The order also does not suffer from any factual or legal infirmity and is certainly not arbitrary or perverse. The Court's view is supported by the reasons given above.

42. Taking into account the legal position, the case law on the subject and the particular facts in the present matter, the Court is accordingly of the view that the impugned order does not call for any interference.

43. APO No. 65 of 2023 along with GA 1 of 2023 are accordingly dismissed. There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)