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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION (L) NO.15994 OF 2023
WITH
COMMERCIAL ARBITRATION PETITION NO.242 OF 2023

Joy and Sayla Realtors	]	..	Petitioner
vs.			
Charmi Nirman	]	..	Respondent

Mr.Bhavesh Parmar a/w Reshma Nair, Vijayprakash Yadav, Rajesh Sahani, Rahul Gaikwad, Vivekanand Akshali a/w Devmani Shukla for the Petitioner.
Mr.Rohan Savant a/w Atul Singh for the Respondent.

CORAM : BHARATI DANGRE, J

DATE : 19th July, 2023.

P.C. :

1] Two Petitions are filed by the Petitioner, a Partnership Firm challenging the two distinct orders passed by the Sole Arbitrator, being order dated 22.05.2023 and order dated 10.06.2022, on the ground that the orders are perverse, bad and illegal in law.

2] Both the orders are passed by the Arbitrator who came to be appointed by this Court, in an Application filed by the

Applicant seeking appointment of the Arbitrator for resolving the disputes arising out of registered Development Agreement dated 11.11.2011 and by order dated 17.08.2021, the sole Arbitrator was appointed and he entered the reference and two orders came to be passed when the Petitioner, claimant before the Tribunal filed an application under Section 17 of the Arbitration and Conciliation Act, 1996, seeking interim relief pending the arbitral proceedings.

3] Heard Advocate Mr.Bhaveshh Parmar for the Petitioner in both Petitions and Mr.Savant alongwith Advocate Mr.Atul Singh for the Respondent.

Before I appreciate the argument advanced on behalf of the Petitioner, it would be necessary to chronologically refer to certain facts which would give the backdrop in which the orders are passed and only then its justiciability can be appreciated..

M/s.Charmi Nirman, a sole proprietory concern, through its proprietors Salient Traders Private Limited, incorporated under the Companies Act, being the 'owner-developer' entered into an agreement for development on 11.11.2011 with M/s. Joy & Sayla Realtors, referred to as 'Co-developers'.

The Owner-developer who was seized and possessed of the property situated in Gundavli Hill, Andheri East, alongwth the structures standing thereon, categorically identified, in the first schedule of the Agreement and the said land being declared as a slum under the provision of the Maharashtra Slum Areas (I.C. & R. Act, 1971), was decided to be developed. The Owner developer had already constructed a wing of rehab building and provided flats to eligible slum dwellers and also provided transit accommodation to some of the members and was in the process of shifting the slum dwellers to transit camps.

The co-developer who was roped into the said project had paid to the owner/developer an amount of Rs. 14 Crores and agreed to pay the balance amount and this transaction was subject to various terms and conditions set out in the Agreement of Development. I need not embark in further details of the understanding reached between the parties.

4] Suffice it to note that Clause 28 provided for a mechanism for resolution of disputes arising between the parties in respect of carrying out erection of the intended building or the building/s and any dispute relating to or arising out of or touching the agreement being referred to arbitration under the provisions of Arbitration and Conciliation Act, 1996. It contemplate that the reference shall be made to one Arbitrator if the parties agree upon such appointment failing which each party shall appoint a presiding arbitrator prior to entering upon the reference.

Since the disputes arose, the Petitioner approached this Court through an application under Section 11 of the Act of 1996 seeking appointment of Sole Arbitrator, relying upon Clause 28 of the Development Agreement, and the Court exercised its power and by consent, appointed Mr.Justice Rajesh Ketkar a retired of this Judge to act as a Sole Arbitrator.

The Para 3 of the said order is of significance and therefore its reproduction is necessary :-

> " The learned counsel appearing on behalf of the Respondent initially opposed the Section 11 application on two grounds. The first ground was that the Arbitral Tribunal has no jurisdiction to decide the disputes and differences between the Applicant and the Respondent by virtue of the bar of Section 42 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. The second objection that was taken is that the defense of the Respondent depends upon the Memorandum of Understanding dated 29th August, 2011 and which is currently a escrow. Without there being any order passed regarding the MOU being released from escrow or atleast being produced before the Tribunal, the defense of the Respondent would be seriously prejudiced. However, despite

> these two objections, the learned counsel appearing on behalf of the Respondent fairly stated that if these objections are left open to be taken before the Arbitral Tribunal, then the Respondent has no objection to the constitution of the Arbitral Tribunal."

5] This Court in its order passed in Section 11 Petition kept the option open to the Respondent to make an application seeking appropriate relief in relation to the MoU and the relevant portion of the order read thus :

> "(f) The Respondent is at liberty to raise all questions of jurisdiction within the meaning of Section 16 of the Arbitration Act. All contentions in that regard are expressly kept open for both sides. Similarly, the Respondent is at liberty to make an application seeking appropriate reliefs in relation to the MOU dated 29th August, 2011. If such an application is made, the same shall be decided on its own merits and in accordance with law. All contentions of both sides are expressly kept open in that regard, as well."

6] In light of the liberty conferred, the Respondent preferred an application under Section 17 of the Act for the purpose of producing the documents kept in escrow as per letter dated

16.11.2011 alongwith MoU dated 29.08.2011 and as he intended to obtain copies of the same, since it was specific case of Respondent that this documents go to the root of the disputes, between the parties in the arbitration reference and the MoU was executed prior to the execution of Development Agreement i.e. on 11.11.2011.

7] The application under section 17 of the Act of 1996, gave the background facts in execution of the Development Agreement and the MoU, by specifically pleading as under :

> 6. After constructing one wing of Rehab Building and after providing 62 flats and 2 amenity units out of then approved 250 legible slum occupiers, the Respondent decided to transfer the development rights of the Sale Component in favour of the Claimant in respect of sale component of the scheme one and accordingly the claimant made a part payment on or before execution of MOU. The Respondent craves leave to refer to and rely upon the proof of said payment as when and produced. Accordingly, the parties entered into an MOU dated 29.08.2011 (hereinafter "the said MOU") for the agreed consideration and compliance of other terms. Under the said MOU the parties have predetermined consideration for the sale potential accrued as per said IOA dated 10.08.2010 being benefits arising out of LOI dated 20.02.2009. The parties have also agreed for an additional consideration to be paid for increase in sale component FSI due to revision of LOI or otherwise in respect

of sale component of Scheme one as described in Second Schedule of said MOU.

7. In furtherance to the said MOU, the parties hereto have executed a Development Agreement dated 11.11.2011 (Reg. BDR 15/12458/2012 dated 11.11.2011) (hereinafter "the said DA") in respect of the FSI which had accrued as on that date as per LOI dated 20.02.2009 bearing No. SRA / ENG /1010 /KE /PL/ LOL. The Respondent crave leave to refer to and rely upon the said MOU and the DA as and when produced.

8. The parties has mutually decided to keep the originals of the said Triveni DA; the Deed of Conveyances dated 26.05.2005, 20.01.2006 and 21.04.2006; the Deed of Release dated 14.01.2008 along with the original MOU dated 29.08.2011(hereinafter "the Escrow documents") with M.s. Sakhalkars Leimare Advocates (hereinafter "the Escrow Holder"). Accordingly, the Respondent vide Letter dated 16.11.2011 forwarded the originals of above said documents to the said Escrow Holder. Hereto annexed and marked as Exhibit-A is the copy of Respondent's Letter dated 16.11.2011 addressed to Escrow Holder.

8] The relief prayed in the application was, therefore, premised on a specific pleading that there is no dispute about the execution and existence of MoU, but the question that arose for determination is, whether the MoU stand superseded by the

Development Agreement dated 11.11.2011 or the DA has been executed in pursuance of the MoU dated 29.08.2011 and since the Respondent has not been provided with a copy of the MoU it is necessary to bring it on record.

The applicant, therefore, sought following relief :

> "a. This Hon'ble Tribunal be pleased to order and/or direct the said escrow holder i.e., M/s. Sakhalkars Leimare, Advocates to produce before this Hon'ble Tribunal the said MOU dated 29.08.2011 along with other original documents kept in escrow and thereafter this Hon'ble Tribunal be pleased to provide certified true copies of the same to the parties herein.
>
> In the alternative, this Hon'ble tribunal be pleased to direct the Claimant to issue its NOC in the name of the escrow holder i.e. M/s. Sakhalkars Leimare, Advocates thereby giving its consent to issue certified true copies of the said MOU dated 29.08.2011 to the parties herein."

9] This application was extensively heard, and the learned Arbitrator arrived at a conclusion that the production of MoU in any case will not cause any harm/loss or prejudice to the opponents, but both parties will get opportunity to deal with it, once it is produced and arguments can be advanced revolving around the said document. .

Recording that the Applicant had made a prima face case for

for production of MoU dated 29.08.2011, but since escrow holder was not a party to the Tribunal, a notice came to be issued to the escrow holder namely M/s.Sakhalkars Leimare to ascertain from the escrow holder whether, they have any objection in producing the said document or to issue certified copies of the same and extend the period of escrow for further period of 6 months.

The learned Arbitrator, however, clarified that the observations and findings recorded in order dated 02.12.2021 were limited to passing of the order under Section 17 of the Act.

10] In furtherance of the said order, partner of the escrow holder appeared before the Tribunal alongwith original documents kept by the parties in escrow account and submitted its say, on the basis of which the Tribunal recorded as under :

> "In the Say filed by the Escrow Holder it is stated that the parties in the above arbitration proceedings have kept with joint consent the Memorandum of Understanding dated 29th August 2011 in duplicate along with letter dated 29th August 2011 among other original documents with the Escrow Holder on 29 August 2011. The other documents which were kept along with the MOU dated 29th August 2011 were recorded in a letter dated 16th November 2011 which is at Exhibit "A" pages 15-16 of

> the Application made by the Applicant under section 17 of the Arbitration and Conciliation Act 1996 (for short "Act")."

11] On consideration of the objection of the escrow holder to produce the documents without the consent of both the parties, the escrow holder was requested to submit certified copies (2) in sealed envelope before the Tribunal, subject to payment of charges and fees and this included the covering letter dated 29.08.2011, addressed by Salient Trades Private Limited, proprietor of the Applicant, to the Opponent and MoU dated 29.08.2011 alongwith its exhibits in a sealed envelope.

12] With this direction, the Application filed by the Respondent for production of the MoU came to be disposed off leaving the documents to be considered on its own merits i.e. to test the contention of the parties as to whether the Development Agreement superseded the MoU or the Development Agreement was executed in furtherance of the MoU.

13] The Claimant before the Tribunal took out an application under Section 17 for impounding the MoU dated 29.08.2011, which was brought before the Arbitrator. The Claimant also sought temporary injunction against the Respondent from interfering in any manner whatsoever which would defeat the object of the Development Agreement dated 11.11.2011 alongwith any consequential agreements/documents.

The Claimant denied existence and execution of the MoU and specifically contended that the disputes arose out of the Development Agreement alongwith consequential documents and since the MoU already stood superseded by execution and registration of the Development Agreement, the Application should be dismissed.

14] Upon the MoU being brought before the Tribunal, the Applicant sought it to be impounded and prayer that it shall be send to the authorities under the Stamp Act by contending that it is an un-stamped and unregistered instrument and if it is to be acted upon, the lacunae must be cured, or else it shall not be referred to and relied upon.

Since impounding of the MoU was sought at an interim stage and in particular in the wake of the earlier stand of the Applicant that no such MoU existed, the Respondent contended that the MoU had recorded the agreement/understanding between the parties and the transaction was to be completed by execution of documents and on payment of stamp duty and registration charges and, therefore, when the Development Agreement was executed on 11.11.2011, the stamp duty has been paid upon the same and ultimately the rights of the parties flow from Development Agreement which comprised of an arbitration clause. The Respondents specifically argued that there is no Arbitration clause in the MoU and therefore the law laid down as regards stamping of the document and its impounding in order to ensure that the stamp duty is payable on the same, cannot be invoked.

15] The MoU came to be executed on a Rs.100/- stamp paper, whereas the Development Agreement is registered by paying stamp duty of Rs.2,25,00,000/-. The MoU did not create any rights in favour of the Applicant and since it is executed on contemplation of further documents, it was not the document which created the rights, as has been rightly held by the Tribunal to be not levied with the stamp duty. Sub Section (1) of Section 4 of the Stamp Act, clearly stipulate that in case of any Development Agreement, sale, lease mortgage or settlement, several instruments are involved for completing the transaction, in that case only the principal instrument is exigible to stamp duty as it amounts to a conveyance which can be in form of a conveyance. The understanding of the parties in the present case and even that of the Applicant when it claims right flowing from the Development Agreement, it is this document which must be affixed with the appropriate stamp duty and it has been so.

16] The Tribunal by its exhaustive order referred to some of the admitted facts before deciding the application of the Applicant that, it was necessary to impound the document i.e. MoU dated 29.08.2011. The Arbitrator enlisted the admitted and established facts as under :

i. MOU is in existence and was executed by the parties on 29.08.2011.
ii. On the MOU stamp duty of Rs.100/- was paid.
iii. MOU does not contain arbitration clause.
iv. On the registered DA stamp duty of Rs.2,25,00,000/- was paid.
v. DA was executed in pursuance of/ furtherance of the MOU
vi. DA does not have any clause superseding/cancelling the MOU.
vii. This Tribunal is constituted to decide upon the disputes and differences between the parties arising out of and/or in connection with and/or in relation to the DA.

17] The impounding of the document was sought by the Applicant at the stage of grant of interim relief/measures under Section 17. Admittedly, the Applicant was not relying upon the MoU, but it is at the instance of the Respondent that the MoU was directed to be produced by the escrow holder and the Respondent was desirous of relying upon the MoU to submit that the MoU resulted in execution of further documents which include the Development Agreement.

The tribunal took upon itself to determine whether the document is adequately stamped and whether in its absence it require to be impounded.

By referring to its earlier order when a direction was given to produce the MoU, the Tribunal record that the MoU was perused for the limited purpose of ascertaining its existence and execution and was never taken on record and even the copy of the MoU is not on record of the tribunal and the documents in sealed envelopes were handed over to the escrow agent and presently the MoU is in his custody. While undertaking this exercise, the other aspects, of the MOU as to what effect it would have upon the Development Agreement or how it will benefit the Respondent and act to the detriment to the Applicant was left open for being adjudicated at appropriate stage.

18] In this background, when the Arbitrator perused the Development Agreement and arrived at a conclusion that the development rights have been transferred by the Respondent to the Applicant as the subject plot was delivered to the Applicant upon execution of the Development Agreement and prima facie it is held that the MoU did not transfer the development rights in favour of the Applicant as the possession of the plot was handed over upon execution of Development Agreement and not upon execution of MoU. Moreover, there was no arbitration clause in the MoU, which was sought to be invoked by either party.

While deciding whether power with the Arbitrator under Section 17 would be exercised to impound the document, the Tribunal has rightly held that the MoU is not required to be impounded and application was dismissed.

19] The reasoning adopted by the Arbitrator in passing the impugned order is perfectly in tune with the facts placed before him and also the law as regards impounding of document to ensure that adequate stamp duty is affixed to an instrument, before the document is read in evidence, or is to be acted upon. Recording that the stage had not arisen and under Section 17 of the Arbitration Act, where the Tribunal is empowered to grant interim measures, which would be necessary for protection in respect of the matter prescribed under Section 9(1)(ii)(a) to (d) as such other measures of protection to be just and convenient, the tribunal has rightly rejected the request as the MoU was not before the Tribunal for the purposes of it being acted upon or to be read in evidence.

The impugned order passed by the Tribunal on 10.06.2022 do not warrant any interference and by upholding the same, CARBP No.242/2023 is dismissed.

20] In Arbitration Petition No.15994/2023, the applicant has raised the challenge to the order dated 22.05.2023 passed by the Tribunal, granting ad interim relief in favour of the Respondent who had opposed the claim of the Applicant.

By the impugned order the tribunal granted ad interim relief in terms of prayer clause (a) to (c) of the application filed under Section 17, as it was recorded that prima face case is made out for grant of ad interim relief and the balance of convenience was in its favour.

It is pertinent to note that while granting prayer clause (c), the Claimant was directed to disclose on affidavit, the extent of FSI already consumed by it and depending upon the Affidavit the Tribunal expressed that it shall keep the question of direction being given to the Applicant claiming, deposit of the amount to the extent of extra FSI consumed at a rate agreed in the MoU, open.

By the impugned order the tribunal has also taken the statement of defence and counterclaim on record from the date of its respective filing and permitted the Claimant to file the detail affidavit within 4 weeks, so that the Application under Section 17 filed by the claimant and the Respondent can be heard. Admittedly, the Application under Section 17 filed by the Respondent has not attained finality.

21] Mr. Parmar, the learned counsel for the claimant/applicant, would invite my attention to the sequence of events and he would submit that the arbitrator came to be appointed by order dated 17.08.2021 and the first meeting of the Tribunal was held on 11.09.2021. He would submit that in the wake of the order passed by this Court, appointing the arbitrator, liberty was given to the Respondent, who intended to rely upon the MoU, entered between the parties prior to the execution of Development Agreement, to file statement of claim alongwith the documents as well as application under Section 17, seeking production of MoU. In the meeting of the tribunal held on 11.09.2021, time schedule for filing of statement of claim and Section 17 applications and reply to the said applications was specifically set out.

Para 9 of the order of the Tribunal refer to filing of Statement of Claim (SoC) by the claimant as well as application under Section 17. The Respondent undertook to file reply to the Application under Section 17 and also sought permission to take out his own application for production of the MoU before the Tribunal. The claimant was permitted to file rejoinder to the reply of the Respondent, if required, and also to the proposed application of the Respondent which was likely to be taken up for production of the MoU.

The minutes of meeting held by the Sole Arbitrator would reflect upon the Section 17 Application being filed by the Respondent as well as the claimant.

Worth it to note that there was no direction issued to file reply to the statement of claim and no fixed timeline prescribed for filing reply to the claim. The statement of claim was filed on 09.10.2021. The respondent filed an application for bringing the MoU on record on 23.10.2021 and claimant filed reply to the said application on 29.10.2021 and on 10.06.2022 the said application was rejected.

The statement of defence was filed by the Respondent on 21.12.2022, whereas the counter-claim was filed on 30.11.2022.

No objection was raised about delay when the Statement of defence was filed and in the preliminary reply the claimant raised an objection about the delay for the first time, to which the rejoinder was filed by the Respondent.

22] Mr. Parmar the learned counsel for the Applicant/claimant would lay his emphasis on sub section (4) of Section 23, which pertain to statement of claim and defence. His submission is, sub section (4) came to be inserted in the statute by amending Act No.33/2019, w.e.f. 30.08.2019, after insertion of Section 29A with effect from 23.10.2015. Section 29A prescribe the time limit for the arbitral award and by the same Act of 2019 which introduced sub section (4) to Section 23, sub section (1) prescribe that Award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of 12 months from the date of completion of pleadings under subsection (4) of Section 23.

He would thus submit that there is a direct connect between sub section (4) of 23 and sub section (20A) and when once the period within which the tribunal is empowered to pass award if fixed, then sub section (4) which prescribe that that the stage of filing of statement claim and defence shall be completed within 6 months from the arbitrator or arbitrators, as the case may be, has received the notice in writing of their appointment.

According to Mr.Parmar, the decision of the tribunal to condone the delay in filing statement of defence (SOD) and counter claim which ought to have been filed within a period of 6 months from the date of arbitrator being appointed /informed about his appointment i.e. 11.09.2021, the statement of defence and counter claim being filed beyond a period of 6 months, do not deserve any acceptance.

Per contra the learned Counsel Mr. Savant would submit that he has shown sufficient reason to permit the statement of defence being brought on record beyond the period of 6 months through his rejoinder and since Section 43 of the Arbitration Act clearly provide that the limitation act 1963 shall apply to arbitration as it applies to the proceedings in the Court and for the purposes of Limitation, the arbitration shall be deemed to have commenced on the date referred to in section 21 and there is a power vested in the tribunal to condone the delay when it is sought to be condoned.

23] I find sufficient substance in the argument of Mr. Savant since the provisions of limitation act are specifically made applicable to the arbitration proceedings, except in cases where the statute has carved out and excluded its applicability like for instance sub section (5) of Section 34. The Limitation Act, apply with full force to arbitral proceeding.

Upon the applicability of the Limitation Act, the Arbitrator definitely is empowered to condone the delay as per section 5 and as the law is well settled on the said aspect that on “sufficient cause” being shown, the delay deserve to be condoned by applying and construing the term “sufficient cause” liberally and unless and until the delay is shown to be malafide or deliberate as a delaying tactic, the Court shall normally condone the delay and once the Court condone the delay, in positive exercise of its power, the superior court should not normally disturb the same.

Even if the condonation of dlay is refused, it is open to the superior Court to come to its own finding on the basis of the explanation for the delay given by the party.

24] In the peculiar facts of the case before the arbitrator where right from the order of the High Court nominating the Arbitrator, the Respondent was held entitled to take out an application under Section 17 for production of MoU, since right from inception i.e. while opposing the application for appointment of arbitrator, the specific stand was taken that the defence of the Respondent would depend upon the MoU dated 29.08.2011, which was currently in escrow and without the MoU being produced before the Tribunal his defence would be seriously prejudiced, this Court conferred a liberty in him, to take out an application seeking relief in relation to the MoU and the arbitrator was directed that if such an application is made, the same shall be decided on its own merits and in accordance with law. Therefore, upon the applicant staking his claim before the Arbitrator through his statement of claim filed on 09.10.2021, the respondent filed application under Section 17 seeking production of MoU on 23.10.2021. The tribunal consumed time in deciding this application and on 11.12.2021 the application for production of MoU was allowed.

On 10.01.2022 the parties received certified copies of the MoU and Respondent got an opportunity to note about its contents so that it could file its statement of defence since the MoU formed pivotal point for his defence. In the meantime, the applicant filed application under Section 17 seeking impounding of the MoU which was also rejected on 10.06.2022 and thereafter the Statement of defence thus came to be filed on 21.12.2022.

25] When the Respondent filed his Section 17 application alongwith statement of defence, it was objected by pressing into service the timeline contemplated under Sub section (4) of Section 23. In the rejoinder the respondent submitted explanation for the delay by stating that the arbitration proceedings are still at interim stage where the application filed by the claimant is pending and the respondent could not file the proceedings earlier in point of time as the hearing of the Interim Application was ongoing and since there was no specific time limit given by the Tribunal to file statement of defence, when Section 17 applications filed by the Applicant and Respondent were being heard, the Tribunal came to a conclusion that there is delay in filing Statement of Defence and the same deserve to be condoned.

26] The Tribunal gave a thoughtful consideration to the rejoinder and it also juxtaposed Sub Section (4) of 23 against Section 27A, considered the statement of objections and reasons in introducing sub section (4) in Section 23. Dealing with the argument that there is no scope in the Tribunal to condone delay in accepting the statement of claim and statement of defence within a period of 6 months from the date of receipt of the arbitral notice, the learned Arbitrator referred to the factual background and the manner in which the proceedings unfolded before it, revolving around the MoU and he arrived at a conclusion that the MoU is a vital document from the point of view of the defendant and order dated 10.06.2022 passed by the Arbitrator rejecting the prayer of impounding of the said document is assailed before the High Court and it was recorded that there was sufficient cause for not filing counter claim and the statement of defence.

In the wake of above, the Tribunal accepted the counter claim and statement of defence.

27] In any case as far as counter claim is concerned, definitely Sub Section (4) of section 23 cannot limit its filing and in any case upon sufficient cause being shown, even filing of the Statement of Defence belatedly is accepted by the arbitrator.

Coming to the reliefs granted by the Arbitrator, the relief (a) and (b) are granted by way of ad interim relief and the Applicant is afforded an opportunity to file reply and Tribunal has indicated that upon the reply being filed, hearing of application under section 17 shall commence.

It is open for the claimant to contest the said reliefs on merits as they are only granted in form of ad interim measures.

28] For the above reasons, I do not find any illegality or impropriety in the impugned order passed by the learned Arbitrator and by upholding the same, even the second petition filed by the petitioner deserve rejection.

In the wake of above, CARBPL No.15994/2023 and CARBP No.242/2023 stands dismissed.

[BHARATI DANGRE, J]