IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 29.11.2022

PRONOUNCED ON: 31.01.2023

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

C.M.A.No.2313 of 2022
and C.M.P.No.17973 of 2022

M/s. Lancor Holdings Limited,
VTN Square, 2nd Floor,
New No.58, Old No.104,
GN Chetty Road,
T.Nagar, Chennai 600 017,
Represented by its
Authorized Representative J.M.Chandrasekar ... Appellant

Vs

1. Evershine Garden City (P) Ltd.,
New No.791, (Old No.427),
Poonamallee High Road,
Arumbakkam,
Chennai 600 106,
Represented by its Directors,
Mr.N.Nallapan and Mr.P.Venkatesan

2. N. Nallappan
3. P. Venkatesan
4. N. Rajam
5. Saraswathi Venkatesan
6. K.S.Shanmugam ... Respondents

PRAYER : This Civil Miscellaneous Appeal is filed under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 to set aside the portion of the order dated 08.10.2022 passed by the Arbitral Tribunal in LANCOR-I-IA.No.1 of 2022 (Concerning O.A.No.387 of 2022) insofar as it relates restriction on the appellant to maintain status quo of the schedule mentioned property as to various developments and transactions as observed in para 73 clause (i) and (ii) alone of the impugned order.

For Appellant : Mr.P.R.Raman, Senior Counsel for M/s.Raman Associates

For Respondents : Mr.Ashokpathy for M/s.Pass Associates

J U D G M E N T

The Claimant / applicant before the Arbitral Tribunal has invoked the appellate jurisdiction of this Court under Section 37 of the Arbitration and Conciliation Act, hereinafter referred to as the "A & C Act".

2. The parties are referred to as the Claimant and Respondents for ease of understanding. The fact in brief which has culminated in the dispute being referred to the Arbitral Tribunal and for seeking the interim orders are herein below narrated.

3. Facts of the case:

(i) The Respondents, who are 6 in number, had in the year 2007 entered into a Joint Development Agreement (JDA) amongst themselves. However, they were unable to proceed with the development and it was decided that the 1st respondent, who had undertaken the development, would be replaced by another person so as to commercially develop the property. Prior to approaching the Claimant, the Respondents had sold only 14 Villas. Thereafter, since they were unable to proceed with the construction of the Villas, which were at different stages of construction, the entire project was handed over to the Claimant. The Respondents had chosen the Claimant for continuing the developmental activities, since the Claimant was a reputed name in the Real Estate /Building Sector.

(ii) After negotiations, the Claimant and Respondents had entered into 4 transactions containing identical terms. Two contracts were for the outright purchase of 35.84 acres of the property situate at Sriperumbudur Taluk, Kancheepuram District comprised in various survey numbers which properties were conveyed to the Claimant under two Sale Deeds dated 04.05.2011. The 3rd agreement was with reference to the development of 7,91,609 sq.ft or 18.17 acres in the same village and the 4th agreement was the joint development of 6,22,777 sq.ft or 14.30

acres once again in the same village. The issue on hand pertains to the development of 18.17 acres, i.e., 7.91,609 sq.ft. The sale consideration for the above was agreed as follows:-

> Rs,7,15,00,000/- and 20% of the sales realisation from out of the development of the schedule property by the Claimant.

In pursuance of this agreement, a sum of Rs.7,15,00,000/- was paid to the 1st Respondent for and behalf of the other Respondents, who had authorised the 1st Respondent to receive the amount. That apart, as and when the Claimant were to develop, market and deliver possession to a prospective buyer, 20% of the sales realisation arising out of such development shall also be paid to the 1st Respondent for and behalf of the other Respondents. The amount that is so realised was to be paid within a period of 2 weeks from the date of receipt of the money by the Claimant from the purchasers. The agreement further stipulated that in case of any delay in payment, interest at the rate of 12% per annum would be paid by the Claimant to the Respondents. Certain clauses of this agreement have been referred to by both the learned counsels in the course of their argument.

iii) Clause 4 of the agreement reads that in consideration of the above payment, the Respondents would convey / transfer to the Claimant or their nominee(s) the suit property either in one or more sale deeds. The Claimant was entitled to retain 80% from and out of the sale realisation and the balance 20% was to be given to the Respondents. Clause 4(A) authorised the Claimant to construct residential complexes as per the sanctioned plan upon the property or deal with it in any manner that the Claimant would so desire. The Claimant was also permitted to sell at their discretion. Further, under Clause 5.2 of the agreement, the Claimant undertook to complete "*the construction of the premises within 7 years from the date of receipt of plaining permission from the authorities*". It was further agreed that in case, the development of the project got delayed beyond the period of 7 years, then the amounts payable to the owners would carry simple interest at the rate of 12% per annum or the sales realisation between the parties, namely, Claimant and Respondents would be enhanced to a ratio of 25:75 on the future realisations. As per Clause 10, on the date when the JDAs were executed, the Power of Attorney was executed in favour of the Claimant by the Respondents. The case of the Claimant is that as per terms of these agreements, time was never the essence of the contract, since there was every possibility of the project extending beyond the period of 7 years. It is their further contention that it is for this reason that Clause 5.2 had been introduced in the agreement. That apart, the terms of the contract further stipulated that the Power of Attorney executed in favour of the Claimant was irrevocable under any circumstances. It appears that the Claimant had not substantially progressed in the development activity and therefore, the Respondents had sent an e-mail dated 20.06.2022 attaching an un-signed notice dated 14.06.2022 informing the Claimant that they would be cancelling the JDA and also the Power of Attorney and that a signed copy of the notice would follow. On 29.06.2022, the Claimant had received a notice dated 13.06.2022, in which, the Respondents had alleged that the Claimant had not followed the JDA in letter and spirit though 11 years had passed and the Claimant had neither renewed the agreement nor had they proceeded to fulfil the terms and conditions of the contract. The Respondents had further contended that as per the terms of the contract, the construction had be completed within a period of 7 years and therefore, it is their contention that the agreement had become invalid. The Respondents had further contended that the Claimant had misused the Power of Attorney given to them for creating mortgages by borrowing money and utilising the said amount so realised to other projects of the Claimant without investing the same into the property in question. The Respondents also had a grievance that contrary to the terms of the contract, the Claimant is levying infrastructure charges from the prospective buyers, but however the amounts so realised have not been shared with the Respondents. That apart, they had not been given proper accounting for the amounts so received. The Respondents would further submit that after the serious objections raised by them, the Claimant had paid only 13% of the collections raised under the head of infrastructure charges.

iv) The Claimant would submit that even prior to the JDA, the Respondents had obtained the layout approval on 08.07.2009 from the Town and Country Planning Authority. The Claimant would submit that though the lay out plan approved was for the entire extent of schedule property, the building approval had to be obtained separately for each of the plots, where construction had to be put up to make it more commercially viable and on account of this, there was a delay. The Claimant would submit that they have spent extensively on marketing campaigns for the sale of the property where 2 layouts were being put up, one under the category "Town and Country" and the other under the category "Harmonia". Under the category "Town and Country", 46 Villas had been sold and under the category "Harmonia", in 2019 40 Villas had been sold. The Claimant would submit that they had paid nearly Rs.7,17,00,000/- to the Respondents being their share in the sales realisation from the category "Town and Country" and Rs.3,06,79,930/- under Harmonia. It is also the case of the Claimant that they had invested over a sum of Rs.78,77,00,000/- for the entire project and at this stage, if the Respondents were to terminate the contract, it would cause serious prejudice to the Claimant. Since the agreement contained an Arbitration Clause, the Claimant had filed an application under Section 9 before this Court in O.A.Nos.387 and 393 of 2002. This Court by orders dated 28.07.2022 was pleased to dispose of these applications by appointing a sole Arbitrator (which is the present Arbitral Tribunal) and directing the parties to move the interim application before the Sole Arbitrator and granted status-quo till the applications were moved before the Arbitral Tribunal. Therefore, the application under Section 17 was filed before the Arbitral Tribunal seeking an interim order restraining the Respondents from in any manner disturbing or interfering with the Claimant's developmental activity in the property by revoking the Power of Attorney and JDA dated 04.05.2011 pending disposal of the Arbitral proceedings. In the affidavit filed in support of the said interlocutory application, the Claimant had set out the above details.

4. Counter affidavit:

(i) The Respondents had filed a counter *inter-alia* at the outset taking exception to the fact that the Claimant had not filed the claim statement by reason of which, the Respondents were at loss to comprehend the relief that the Claimant was seeking in the claim petition. It is their case that the Respondents had jointly purchased 91.54 **a**cres in Sriperumbudur and decided to develop 55.74 acres. On 21.12.2007, the 1st respondent and the other Respondents had entered into a JDA. The 1st respondent had undertaken to do the developmental activities over an extent of 55.74 acres. They had spent huge amounts towards developing the property by doing earth filling works, pot holes, plantations etc. and had also sold 14 villas that were proposed to be constructed in the said property. They were unable to proceed further on account of the paucity of funds and the lack of technical know-how. At this juncture, the Claimant had agreed to complete the project as they had sufficient means and experience. They had agreed to the outright purchase of an extent of 35.84 acres and had undertaken to finish the construction at a fast pace. The Respondents would further submit that as per the agreement, the Claimant was to pay a sum of Rs.18,15,00,000/- towards the sale consideration for the outright purchased the extent of 35.84 acres and towards the cost of development for the approved layout of 55.74 acres. On 04.05.2011, the Claimant had paid a sum of Rs.4,00,95,000/-. With reference to the balance sale consideration, the same was included in the 2 JDAs as Rs.6 Crores and Rs.7,15,00,000/-.

(ii) The Respondents would further submit that between 04.05.2011 and 20.11.2013, the Claimant could sell only 23 villas, after which the sale had come down and there was a total non performance of their JDA. A total extent of Rs.14,34,713 sq.ft had been handed over for development, of which within the span of 11 years only 1,94,870 sq.ft had been sold out.

(iii) The Respondents would further submit that the Claimant had collected Rs.225/- per sq.ft towards infrastructure charges which has not been shared with them. The factum of this collection came to the knowledge of the Respondents only when the statement of sales was furnished. This was questioned by the Respondents and ultimately, the Claimant had given a lesser percentage towards the share of the Respondents. That apart, the Claimant had not provided any accounts with reference to the project undertaken vis-a-vis number of units sold, the amounts so realised etc., The Respondents would submit that the main source of worry for the Respondents was the fact that the Claimant had been mortgaging the property and that the mortgage was at one point of time over and above a sum of Rs.145 crores. That apart, the amounts borrowed by mortgaging the Respondents' property was not being utilised for the development of their property but was being diverted for other business interest of the Respondents. In the mortgage deeds, the Claimant had given out that they were the owners of the property. The Respondents would contend that Clause 3(b) of the Agreement directed that the Claimant should pay the share of the Respondents on a monthly basis on or before the 10th of the following month. The Respondents would contend that the contract has become frustrated on account of the non-performance by the Claimant. Though the guideline value was higher, the Claimant had marketed the developed plots at a lower price, which is once again detrimental to the interest of the parties. Therefore, the Respondents were constrained to terminate both the contracts and they would submit that no exception can be taken to the cancellation.

5. Arbitral Tribunal :

The Arbitral Tribunal on considering the documents had passed the following order:

> *(i) It is held that the Claimant-Applicant is not entitled to the interim injunction as prayed for in the Application and the interim injunction prayed for by the Claimant-Applicant seeking to restrain the Respondents from in any manner disturbing with the Applicant's development activities in the Schedule Property is declined;*
>
> *(ii) The Claimant is directed to maintain status quo of the Schedule mentioned Property as to various developments and transactions namely: - (i) sale of villas both in Town and Country Planning and Harmonia (ii) sale agreements entered into third parties asto sale of villas, villas meant for old age people and the status quo as to the other details furnished by the Claimant*

as stated in para (41). The Applicant-Claimant is directed to maintain the status quo till the disposal of the Present Arbitration proceedings. The Applicant-Claimant is further directed not to enter into any fresh Agreements for sale of villas/ villas for old-age people till the disposal of the present Arbitral proceedings;

(iii) The Respondents are restrained from revoking the Joint Development Agreements dated 04.05.2011 and Powers of Attorney dated 04.05.2011, registered as Documents No. 868 of 2011 and 869 of 2011 till the disposal of the present Arbitration proceedings;

(iv) However, the order of status quo shall not affect the ongoing construction of ten (10) villas in Harmonia and four (4) villas in Town and Country Planning of which third parties buyers have already purchased the plots and entered into Agreements with the

Claimant for construction of villas for which the construction is said to be ongoing. Notwithstanding the order of status quo construction in those ten (10) villas in Harmonia and four (4) villas in Town and Country Planning shall be continued. The order of status quo shall not be an impediment in so far as the said ten (10) Villas in Harmonia and four (4) Villas in Town and Country Planning for which the third party- buyers have entered into the Agreements with the Claimant for construction;

(v) The Claimant is further directed to maintain status qua in not creating any further mortgages on the Scheduled Property. This order of status quo, however, will not be an impediment for the Claimant for clearing the loans availed from "Sundaram Alternative Funds" and LICHFL releasing the Scheduled Property, which has

been offered as collateral security/security for the said loan availed by the Claimant.

Challenging the same, the Claimant is before this Court.

6. Submissions of the learned counsel for the Claimant:

Extensive arguments were made by Mr.P.R.Raman, the learned senior counsel appearing on behalf of the Claimant. The crux of the arguments are herein below as set out concisely.

a)The contract is an indeterminable one, as there is no clause for termination.

b) The period of 7 years is provided from the date of receipt of planning permission from the authorities and planning permission has to be obtained for every construction that is to be put up on the various plots of lands. Therefore, the agreement did not contemplate time being the essence of the contract.

c) If the Claimant was unable to complete the construction within a period of 7 years from the date of planning permission, then the Respondents under Clause 5.2 was entitled to an extra 5% on the sales realisation.

d) The Power of Attorney is one coupled with the consideration and therefore, the Respondents cannot terminate the same.

e) The project that was contemplated by the parties was the creation of a township.

f) The Claimant had outright purchased an extent of 35.84 acres and the instant project was only an addition of the same and was required for obtaining the optimum profit for both parties.

g) The Claimant was given the flexibility to put up any construction on the property or to sell *the same as land itself. Therefore, this would itself clearly show that each housing plot contemplated a different planning permission.*

h) The Respondents have taken 2 different stands in their notices dated 13.06.2022 and 14.06.2022.

i) The mortgages have been made only as per the agreement between the parties. The Power of Attorney clearly provides authority to the power agent to mortgage the property.

j) The reference to the Claimant as owner in the mortgage deeds is nothing but an oversight and not a deliberate attempt to usurp ownership.

k) The Respondents, who are also owners of the certain plots of land and building of schedule property, have not paid maintenance charges and *huge amounts are due to the arrears of maintenance.*

l) The Claimant has spent huge sums of money to develop the property.

7. The learned senior counsel would rely upon the following judgments in support of his arguments.

S. No	Judgments
1	***2020 SCC Online Mad 61 : (2020) 2 Arb LR 276*** (Jumbo World Holdings Limited and Another Versus Embassy Property Developments Private Limited and others)
2	***(2019) 2 SCC 241*** (Sushil Kumar Agarwal versus Meenakshi Sadhu and ors)
3	***(2022) 2 SCC 382*** (Welspun Speciality Solutions Limited and ors Versus Oil and Natural Gas Corporation Ltd and Ors)
4	***2000 (55) DRJ (DB)*** (Rajasthan Breweries Limited Versus The Stroh Brewery Company)

8. Submissions of the learned counsel for the Respondents:

(i) Per contra, Mr.Ashokapathy, learned counsel appearing on behalf of the Respondents would submit that even on the date of handing over the project to the Claimant, 14 villas had neared completion, as it was put up by the 1st respondent. Apart from that, the Claimant ought to have put up the construction of 101 villas in the schedule of property, which is the subject matter of the agreement. He would further submit that the sale consideration has been split into 2 portions, (i) a portion towards initial payment and (ii) the remaining in the form of 20% of sales realisation.

(ii) It is the contention of the Respondents that this 20% was not paid, though the Claimant had received money. He would also refer to Clause 6 of the agreement to state that the infrastructure charges cannot be fastened on the purchasers / owners, as it is the responsibility of the Claimant/developer. He would further submit that though 11 years had lapsed from the date of the agreement, no progress whatsoever has been made on the part of the Claimant. A mere perusal of the counter statement and the chart provided therein would clearly show the number of villas that have been constructed by the Claimant between the period 2011 to 2016. In November 2013, 26 Villas had been completed of which credit would go to the Respondents in respect of 14 villas and it was only the remaining villas that were put up by the Claimant. Thereafter, for each year, the Claimant has only sold 1 or 2 villas and optimum development has not taken place. Further, though the Claimant had borrowed money from the Banks by mortgaging the schedule property, this amount was not being infused into this project, which is clearly evident on a mere comparison of the date of borrowing and the date of the construction. In all, the Claimant had to develop 159 residential plots, 5 shops, 3 clubs and 4 schools. However, the Claimant has not achieved this figure at all. Only 37 plots had been sold on or before 30.08.2016. While mortgaging the properties, the Claimant, who is only a developer had described themselves as owner of the property. He would further submit that if an interim order is granted, then the Claimant would sell away the property as lands without developing them, thereby depriving the Claimant of their profits. He would submit that the learned Arbitrator had balanced the equities and passed the interim order and the same does not require any interference. In support of his contention, he would rely upon the judgment of this Court reported in ***CDJ 2020 MHC [Austin Distributors Pvt.Ltd Vs.Hyundai Motor India Limited],*** where the Division Bench had observed as follows:

> *"47......Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is*

private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination".

9. Heard the learned counsel on either side and perused the materials available on record.

10. Discussions:

(i) The crux of the dispute is whether the contract which on the face of its terms is indeterminable can be terminated and whether the action of the learned Arbitrator in passing the interim orders would be one outside the scope of the agreement between the parties.

(ii) Under the agreement, the Respondents had handed over the development work to the Claimant to complete the project at the earliest, taking into account the expertise and resources of the Claimant who is in the business of developing and marketing the properties. A reading of the entire contract would clearly bring out the fact that it is a contract, which has been entered into taking into account the commercial interest not only of the Claimant but also the Respondents. It is no doubt true that Clause 5.2 at a glance would give out that the time for completion was 7 years from the date of receipt of the planning permission and since planning permission has to be obtained for each and every plot, the period of 7 years would vary from plot to plot. While taking into account the above clause, the eyes of the Court cannot be shut to the fact that the Claimant has not given out any details of the development that they had undertaken for each of these plots or the reasons why the development could not be proceeded with. In addition to this, an argument was made on the side of the Claimant that as per the agreement, they were also given the liberty to sell the property as vacant plots as well. In such a case, Clause 5.2 cannot be invoked by the Claimant. The agreement between the parties does not contemplate that the Claimant would commence the development only when they had received an offer to purchase from a prospective purchaser. On the contrary, the terms of the contract would imply that the Claimant would develop the property and then sell it. Therefore, it becomes necessary to consider the phase of the development. In their counter statement, the Respondents have enclosed a table showing the number of units that have been sold and the same is re-produced herein below. This has not been refuted by the Claimant.

S.No.	***Period / date of statement***	***No of Villas sold***	***Total Villas***	***Gross land area (in Sq.ft)***
1	May 2011 to December 2011	-		
2	January 2012 to December 2012	-		
3	20.11.2013	23 villas	23	80,461
4	31.12.2013	3 Villa	26	92,790
5	28.02.2014	1 Villa	27	95,672
6	30.03.2014	2 Villa	29	1,03,006
7	30.04.2014	-	29	1,03,486
8	31.05.2014	2 villa	31	1,08,328
9	July 2014 to August 2014	1 Villa	32	1,12,338
10	30.09.2014	1 villa	33	1,13,880
11	31.10.2014	1 villa	34	1,17,837
12	30.11.2014	1 villa	35	1,20,722
13	31.12.2014	1 villa	36	1,22,282
14	31.03.2016	-	36	1,23,900
15	30.08.2016	1 villa	37	1,30,107
	Total			**1,30,107**
16	01.05.2019 to 31.05.2022	Harmonia Phase I and Phase II	32 units 7 units	64,763
	Grand Total			**1,94,870**

(iii) A mere perusal of this statement would clearly show that in the year 2013, 26 Villas had been sold and in the year 2014, only 9 villas had been sold and in the year 2015, not a single Villa had been sold under the Town and Country village project and thereafter, only 1 or 2 Villas per year had been sold upto 2016 and from 2016 till the date of the invocation of the Arbitration Clause, not a single Villa had been sold under the Town and Country village project, which is the subject matter of the arbitral proceedings. If the provisions contained in clause 5.2 were to be interpreted in the manner contended by the Claimant then the contract could take forever to be concluded. A perusal of the statement of the mortgages that have been made by the Claimant, which is set out in the counter would show that though there has been a borrowal of nearly Rs.50 crores in the year 2017 and Rs.46 crores in 2019, Rs.6,49,00,000 in the year 2021. However, correspondingly, no development work that had been taken place during this period in the schedule of property which clearly goes to show that the amounts borrowed have not been pumped into the project. Therefore, the Claimant cannot fall back on the argument that time was never the essence of the contract as contemplated under Clause 5.2 of the Agreement. The Claimant has not been able to give reasons as to why no developmental activities had taken place from the year 2016 and prior to that from 2014 to 2016, why the development activities were few and far apart. The learned Arbitrator has taken into consideration the fact that where there is no exit clause, the Claimant cannot be allowed to contend that they can take their own time to complete the project, particularly, when the entire project has been contemplated to enable the parties to achieve the maximum profit. The agreement between the parties is purely commercial in nature with profit being the object. The Hon'ble Supreme Court in the judgment in ***Saradamani Kandappan Vs. S. Rajalakshmi and Others*** reported in ***(2011) 12 SCC 18,*** the Hon'ble Supreme Court had observed as follows:

“36........The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance *which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist.*

Even in the instant case, the Claimant is permitted to enter into the sale agreements with third parties in respect of those properties that have not been developed and if they continue to mortgage the properties, it would cause irreparable hardship and loss to the Respondents and balance of convenience is therefore in favour of the Respondents. If an interim injunction is granted, it would be prejudicial to the Respondents.

(iv) The learned Arbitrator has rightly refused to grant the injunction as prayed for and restricted the injunction only to the on-going projects. By the impugned order, the interests of both parties are protected. I see no reason to interfere with the said order of the Tribunal. It is well open to the Claimant to justify the delay in the main claim petition, however considering the interest of both parties, the order passed by the learned Arbitrator does not warrant any interference. In the light of the above, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

31.01.2023

Index: Yes / No
Speaking order : Yes / No
srn

P.T.ASHA.J
srn

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and C.M.P.No.17973 of 2022

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