In the High Court of Punjab and Haryana, at Chandigarh

F.A.O. No. CARB-67 of 2024 (O&M)

Reserved On: 16.12.2024
Pronounced On: 09.01.2025

Bestech India Private Limited
... Appellant(s)

Versus

Brahma Centre Development Private Limited
... Respondent(s)

CORAM: Hon'ble Mr. Justice Sheel Nagu, Chief Justice.
Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Aashish Chopra, Senior Advocate
with Ms. Rupa Pathania, Advocate
for the appellant(s).

Mr. R.S.Rai, Senior Advocate
with Ms. Sanyat Lodha, Mr. Tejas Karia, Mr. Vipul Joshi,
and Mr. Prakhar Deep, Advocates, for the Caveator.

Anil Kshetarpal, J.

1. Factual Background

1.1 Through this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") and Section 13 of the Commercial Courts Act, 2015 (hereinafter referred to as "the 2015 Act"), the appellant (respondent in pending petition filed under Section 9 of the 1996 Act) assails the correctness of the interlocutory order passed on 22.11.2024, restraining the appellant from creating any third party rights in favour of any person including transferring and handing over of possession of any unit to any buyer or allottee in any manner whatsoever in commercial tower till handing over/taking over is completed to the maintenance agencies complete in all respects as required under Clause 6.6 of the Supplementary Agreement.

1.2 Though for the purpose of decision of this case, the detailed facts are not required to be noticed, however, the necessary and relevant facts, in brief, are as under:-

I) The respondent-Brahma Center Development Private Limited (for brevity "Brahma") being owner of the plot No. 2, Sector 16, Gurugram, after having been allotted by the Haryana State Industrial and Infrastructure Development Corporation (hereinafter referred to as "HSIIDC") entered into collaboration agreement on 16.04.2011 with the appellant. It was agreed that the appellant (Bestech) being the developer would construct a commercial/office complex on the said land at its own cost and expense. In consideration of cost of construction, the Bestech would get 35% rights in the built-up as well as the land of the commercial complex whereas the remaining will fall in the share of Brahma. In case of increase in the covered area for construction, the cost of additional area shall be borne by the parties proportionately.

II) Two separate buildings namely commercial tower consisting of office spaces on the ground floor and 19^{th} floor have been constructed/completed and a separate building known as Retail Complex with ground floor plus four floors including cinema screens, anchor retail stores, food courts, restaurants, entertainment centers, four level basements has also been constructed. The construction commenced somewhere in the year 2012 and from time to time the revised layout plans were submitted.

III) The dispute between the parties led to invocation of the arbitration clause by Brahma. Subsequently, a petition under Section 11 of the 1996 Act was filed but the same was withdrawn in May, 2016. In 2017, the Haryana Building Code, 2016, was revised providing for the benefit of additional FAR for the project certified from Green Rating for Integrated Habitat Assessment (GRIHA) Council.

IV) In the year 2015, Haryana State Industrial and Infrastructure Development Corporation Limited (HSIIDC) granted extension of two years subject to condition that Brahma would have to comply with the GRIHA guidelines. Ultimately, the GRIHA layout plans were approved.

V) Brahma filed an application under Section 9 of the 1996 Act on 25.09.2018, whereas the Bestech filed a similar petition on 03.01.2019 for directions to Brahma to contribute pro-rata funds. Justice V.N.Khare, former Chief Justice of India, was nominated as a Sole

Arbitrator. Ultimately, a settlement agreement was entered into between Brahma and Bestech on 07.11.2019 which resulted in consent award passed on 17.11.2019. Pending appeals before the High Court were also disposed of on 29.11.2019 in terms of the settlement.

VI) With respect to Commercial Tower, an occupation certificate was received by the Bestech. In the meantime, Haryana Real Estate Regulatory Authority (HRERA) directed Brahma to give interest to the allottees @ 10.25% for delay in offering possession. In April 2023, an application for Occupation Certificate of retail area was filed which was also granted.

VII) Once again, Brahma filed an application under Section 9 of the 1996 Act on 20.08.2023 in which an *ex parte* order was passed restraining the Bestech from creating the third party rights. Brahma also filed an execution petition under Section 36 of the 1996 Act for enforcement of the consent award dated 17.11.2019.

VIII) On 19.03.2024, a supplementary agreement was executed between Brahma and Bestech to amicably settle and resolve a part of the dispute between the parties qua Commercial Tower which led to filing of application for modification of *ex parte* interim order. Ultimately, on 18.05.2024, the *ex parte* interim order dated 21.09.2023 was modified and Commercial Tower was excluded from the scope of the aforesaid interim orders. It is evident from the supplementary agreement dated 19.03.2024 that both the parties were conscious of the fact that there were snags which had to be rectified by the developer (Bestech).

IX) However, on 16.07.2024, Brahma again filed an application for modification of order dated 18.05.2024 and restoration of the order dated 21.09.2023. By impugned order, the Court has restrained Bestech from creating third party rights in favour of any person with respect to Commercial Tower.

2. Arguments put forth by the learned Counsel

2.1 The appellant's senior counsel contends that on 18.05.2024, the supplementary agreement dated 19.03.2024 was given effect to. He submits that Commercial Tower stood excluded from the proceedings under Section 9 of the 1996 Act. Hence, the impugned order is not sustainable.

2.2 Per contra, the respondent's senior counsel has contended that final hearing in the application under Section 9 has already begun and it has been specifically found by the Trial Court that the appellant has failed to comply with its obligations under the supplementary agreement despite passing of the period of more than 8 months from the date of execution of the supplementary agreement and the snags pointed out by the maintenance agency jointly engaged by the parties have not been removed, forcing the Court to pass the impugned order.

3. Analysis and Discussion

3.1 It is evident from the reading of the impugned order that the Court has failed to apply three well known and settled tests before grant of injunction, namely (i) *prima facie* case, (ii) balance of convenience in favour of the parties seeking injunction and (iii) irreparable loss and injury which cannot be subsequently compensated. The Court is mandatorily required to apply the aforesaid three well known tests which are *sine qua non* before granting injunction.

3.2 In commercial contracts, the Court is required to apply the aforesaid three tests more vigorously/cautiously particularly test No. (ii) and (iii) failing which it would lead to an irreparable loss and injury to the party against whom the injunction has been issued. It is expected from the Courts to grant injunction only after coming to a conclusion that the restitutionary relief shall not be sufficient to compensate. More often than not the injunctions are granted in commercial disputes like the present one without applying those three tests.

3.3 The Court has also overlooked that by virtue of joint request made by the parties, Commercial Tower was excluded from the scope of petition under Section 9. There was no fresh/separate application filed under Section 9 by Brahma. By filing an application for modification of the order dated 21.09.2023, the scope of petition under Section 9 of the 1996 Act could not be expanded/restored so as to once again include Commercial Tower, particularly when both the parties jointly got the same excluded.

3.4 The Court below has also failed to examine that the injunction order was modified on the joint request of the parties in May 2024. In other words, both the parties were entitled to alienate their respective share of Commercial Tower without any hindrance. In the meantime, the parties may have entered into the agreements creating the third party rights in which the time is the essence of contract. Such order without analyzing its consequences is likely to result in irreparable loss and injury to the party against whom injunction order has been passed.

3.5 It is evident from the reading of the supplementary agreement dated 19.03.2024 that Brahma was aware of the snags and the provision was made for rectification in the building. In such circumstances, Brahma consciously/knowingly agreed for modification of interim order dated 21.09.2023 allowing both the parties to alienate their respective share. In such circumstances, damage caused due to delay in removal of the snags/defects in the construction could be ensured by various other means including damages, permitting the appellant to get the same removed from another contractor at the cost of the Bestech etc. The Bestech could have been directed to furnish security to ensure removal of the snags in a time bound manner. However, the Trial Court overlooked the same.

3.6 Furthermore, the Court, before granting injunction, has failed to notice that a detailed reply to the application for grant of injunction was filed by the Bestech alleging that for the purpose of execution and registration of the agreement as well as the conveyance deed in favour of the purchasers/allottees of commercial units in the project, the challans were required to be generated by Brahma after incurring funds. The municipal taxes/dues were also required to be paid by Brahma so as to facilitate the registration of transactions. The property identification number of the commercial project would be generated by the Municipal Corporation only when all the municipal dues are cleared. The Bestech also alleged that the said defaults on the part of Brahma created hindrance and obstructions in ability of the respondent to deliver possession and execute the conveyance deed in favour of the allottees and to fulfill its legal and contractual obligations. It was also alleged that the maintenance agency has limited manpower and resources as admitted in its email dated 29.07.2024. Hence, there was delay in the process of handing over, taking over, identification of the snags and consequent checking of the same pursuant to their rectification/removal. Thus, it is evident that the Court has totally overlooked the detailed reply submitted by the appellant before granting injunction.

4. Decision

4.1 For the foregoing reasons, the present appeal is allowed and the impugned order passed on 22.11.2024, being unsustainable, is set aside. However, it shall be open to Brahma to file a fresh petition under Section 9 of the 1996 Act.

4.2 The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

(Sheel Nagu)
Chief Justice

January 9th, 2025
"DK"

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No