IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.A. 10/2013

AIR FORCE NAVAL HOUSING BOARD ..... Appellant

Through: Mr. Vivekanand, Advocate

versus

DARYAO SINGH ..... Respondent

Through: Mr. P.K. Agrawal, Ms. Mercy Hussain and Mr. Jafar, Advocates

CORAM: HON'BLE MR. JUSTICE VIPIN SANGHI ORDER 10.01.2014

1. The present appeal under section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (the Act) has been preferred to assail the order dated 13.04.2013 passed by the arbitral tribunal whereby the appellants application dated 26.11.2012 under section 17 of the Act has been dismissed.

2. The parties entered into an agreement. The respondent was granted the contract to develop 300 farm houses for the members of the appellant society, which is a society of serving and retired officers of Air Force and Navy Force. Disputes arose between the parties. The respondent contractor raised monetary claims against the appellant. The possession of the farm houses were with the respondent. The appellant desired to take over possession of the said project. O.M.P. No. 79/2005 was preferred before this court on 20.05.2005. The court passed the followingorder:

In the course of arguments, learned counsel for the parties have agreed that in case the petitioner Society files an undertaking before this Court that the suit land shall remain first charge of the respondent in respect of its claims against the petitioner till the Award is passed by the learned Arbitrator and neither the petitioner society nor the allottees will create any third party interest in the suit land till the disputes are adjudicated upon by the Arbitrator.

Learned counsel for the petitioner prays for time for filing an

undertaking on behalf of the Society on the aforesaid lines. Upon filing of this undertaking by the petitioner Society, the respondent, its officers, servants, employees and all others through him, shall remove themselves from the suit land.
List this matter again on 24th May, 2005?.

3. On 24.05.2005, the court was informed that the appellant had passed a resolution on 20.05.2005 authorising the Assistant Director (Finance) of the appellant Sh. P.D. Bhatt to file an undertaking. The said undertaking was accepted by the court. The court directed that the appellant board as well as the prospective allottees of land shall remain bound by the undertaking. Consequently, the respondent was directed to remove himself from the suit land within 10 days. The undertaking as furnished by the appellant, insofar as it is relevant, reads as follows:

?1. That I am working as Assistant Director (Finance) of the petitioner Board and I have been authorized by the petitioner Board vide resolution dated 20 May 05 passed by Management of the Board in its emergent meeting by circulation dated 20 May 05 to swear this affidavit and give solemn undertaking to the Hon?ble Court. The true certified copy of the resolution dated 20 May 05 is annexed herewith as Annexure P1.

2. That I on behalf of the petitioner board do hereby solemnly declare and undertake that the petitioner Board or any of its allottees/members will not sell, assigned, mortgage, transfer and create any third party right or interest in the land comprising of 281 Farm Units including common areas etc. of Y site till arbitration award is made and published by the Arbitrator.

3. That the petitioner Board hereby undertakes that before giving possession of the completed Farm Unit to the individual allottee / member, the petitioner Board will take similar undertaking from the allottee/member.

4. That the respondent/contractor, Sri Daryeo Singh will have first charge over the Y site Farm Unit for realisation of his dues if any found due and payable by and under the arbitral award by the arbitrator, in case his such claim as found due and payable by the arbitrator, is not paid and settled by the petitioner Board?.

4. The arbitrator was appointed and arbitration proceedings commenced in December 2003. Since the arbitration proceedings had gone on for a substantial length of time, the appellant moved an application before this court being I.A. No.6387/2006 in O.M.P. No. 79/2005. By this application, the appellant sought recall of the orders dated 20.05.2005 and 24.05.2005, as aforesaid, and discharge of the undertaking dated 24.05.2005 given by the appellant. In the alternative, the appellant also sought substitution of the undertaking with suitable security of bank guarantee for a reasonable amount as this court considers proper.

5. This application was heard by the court on 16.07.2008 and thereafter again on 29.08.2008 in the presence of the parties. On 29.08.2008, after some arguments, the appellant sought liberty to move an application on similar lines before the learned arbitrator under section 17 of the Act and, therefore, withdrew the application. The court granted liberty to the appellant to move such an application, which was required to be considered on its own merits by the learned arbitrator.

6. The appellant then moved the application in question before the learned arbitrator on 26.11.2012. The prayer made in this application readsasfollows:

?9. It is therefore humbly requested that the Ld. Arbitrator be pleased to remove the ?First Charge? on the land granted to the claimant by the Hon?ble High Court of Delhi in O.M.P. No. 79/2005 either by recalling the undertaking dated 24 May 04 given by the respondent Board or modifying it for suitable Bank Guarantee of the claimed amount so that the Farm Unit could be handed over to the allottees who have paid their hard earned money for it. Or the Hon?ble Court may pass any such other order(s) in the interest of justice in present circumstances.?

7. I may note that during the pendency of the arbitration proceedings, the respondent/claimant sought to make an amendment in the claim by including an alternative prayer. The amendment application was allowed on 02.01.2009 and the alternate prayer sought by the respondent reads as follows:

In the alternative, it is prayed that the Learned Arbitrator may

pass an award directing the Respondents to return the total land to the Claimant and the Claimant would refund all the money received from the Respondents towards the cost of the land and its development along with interest at 9% or as may be determined by the Learned Arbitrator or double the amount of the cost of the land?.

8. The learned arbitrator by the impugned order has rejected the appellants application, primarily, by placing reliance on the said alternative prayer made by the respondent/claimant. As would be seen, by the alternative prayer, the respondent sought return of the total land to the respondent/claimant on the condition that the claimant would refund all the monies received from the appellant towards cost of the land and its development along with 9% interest or as may be determined by learned arbitrator or double the amount of the cost of the land. The relevant part of the impugned order passed by learned arbitrator reads as follows:

Undoubtedly the worst sufferers in this whole rigmarole are the allottees who have invested money and yet stand deprived of the fruit. Years have passed by and yet there seems to be no end to the tunnel. I may, for a moment, revert back to the latest application of the claimant for additional evidence to which reference has been made by me above. What needs to be stated is that by that application the claimant seeks to produce in evidence hundreds of new documents running into eight volumes. Obviously, the taking of those documents in evidence would cause further delay.

A few things thus clearly emerge out. There are allottees who are waiting for possession and likelihood of the proceedings taking more time. Should I then treat the undertaking referred to above as a closed chapter and pass an order allowing the respondent to allot and deliver possession of the Farm Units to the allottees? Mr. Vivekanand wants me to precisely do that. Can I? If yes? Should I?

Before I venture to answer those questions I need to refer to claim no.16 which has been set up in the alternative by the claimant. This alternate claim was sought by way of an amendment application which was allowed on January 2, 2009. It runs as under:

In the alternative, it is prayed that the Learned Arbitrator may

pass an award directing the Respondents to return the total land to the Claimant and the Claimant would refund all the money received from the Respondents towards the cost of the land and its development along with interest at 9% or as may be determined by the Learned Arbitrator or double the amount of the cost of the land?.

What does this claim in the alternative show? It shows that the claimant, though in the alternative, seeks to get back the land in question the possession of which is with the respondent and it is this land which the respondent seeks to transfer to the allottees by way of this application under section 17. Supposing, the respondent is allowed to transfer the Farm Units to the allottees, what would happen to the above referred alternative claim? In the face of the counter claim can the respondent be permitted to create third party interests? Would it not create more complications? Once the farm units are transferred to the allottees and thereby third party interest is created and that too in favour of such persons who are not a privy to the arbitration agreement, what relief under the aforesaid counter claim can be granted? Section 17 of the Act speaks of interim measure of protection and that interim measure has to preserve situation prevailing and to keep property available to answer final adjudication as and when final award is passed. What the respondent is seeking would defeat the very object of section 17.

For the reasons delineated above, the application of the respondent under section 17 stands rejected. However, nothing said in this decision shall be taken as expression of opinion on the merits of the case.? (emphasissupplied)

9. The submission of learned counsel for the appellant is that the initial claim of the respondent did not include any relief for return of the total land to the claimant. He submits that such a claim could possibly not have been raised as it is well beyond the contract between the parties. The respondent was merely engaged as the contractor to arrange, develop and deliver the farm houses on a turn-key basis. The arbitrator-being a creature of the agreement between the parties, cannot travel beyond the same. He cannot grant any relief beyond the contractual terms. Learned counsel submits that the learned arbitrator did not even consider the alternate security offered by the appellant in

respect of the monetary claim of the respondent. The appellant had offered to furnish a bank guarantee for sufficient amount as may be determined by the learned arbitrator.

10. On the other hand, learned counsel for the respondent submits that such an application under section 17 did not lie before the arbitral tribunal at all. He submits that the initial order requiring the furnishing of an undertaking was passed with the consent of parties by this court. The said order could not be modified, merely because the appellant desired to be relieved of its undertaking. He submits that the power of the learned arbitrator under section 17 is limited to pass orders on the subject matter, and he submits that third parties cannot be addressed by any orders passed by the arbitral tribunal. He submits that by seeking the relief qua the undertaking furnished by the appellant-third parties, namely, its members, who are not parties to the arbitration, would be affected.

11. In support of his submission, he has placed reliance on the judgment of the Supreme Court in MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619 and in particular, on the following observations of the Supreme Court:

43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.? xxxx xxxxxxxxx xxxxxxxxxx xxxxxx

58. A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to

enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, therefore, being coram non judice was wholly without jurisdiction and, thus, was a nullity. [See Kiran Singh v. Chaman Paswan [AIR 1954 SC 340] , Kaushalya Devi v. K.L. Bansal [(1969) 1 SCC 59] , Union of India v. Tarachand Gupta and Bros. [(1971) 1 SCC 486] (SCC at p. 496), Sushil Kumar Mehta v. Gobind Ram Bohra [(1990) 1 SCC 193] and Kanak v. U.P. Avas Evam Vikas Parishad [(2003) 7 SCC 693 : (2003) 7 Scale 157] ?.

12. He has also referred to the judgment of this court following the aforesaid decision in BPL Limited v. Morgan Securities and Credits Pvt. Ltd. and Ors., 2008 (1) ArbLR 325 (Del).

13. Having heard learned counsels for the parties, I am of the view that the impugned order cannot be sustained and is liable to be set aside. The prayer made by the appellant to substitute the undertaking should have been favourably considered by the learned arbitrator. The respondent only acted as the contractor to carry out the work on a turn key basis. The only claim that the respondent could possibly make against the appellant was a monetary claim, as initially made by the respondent. The claim sought to be incorporated as an alternative claim/prayer for return of the total land to the claimant against refund of money received from the appellant towards cost of land, cost of development along with interest, or double the amount of the cost of land could not have been made, since this relief was even are beyond the contract between the parties. The arbitrator has no jurisdiction to even consider such a claim. The said claim, at the highest, could be considered as an offer made by the respondent. Merely because such a claim was permitted to be raised by amendment allowed on 02.01.2009, the learned arbitrator need not have felt compelled to reject the appellants application. Pertinently, the said amendment came to be incorporated only after the appellant had preferred an application before this court- being I.A. No.6387/2006 seeking similar relief, and after is disposal on 29.08.2008. It is obvious that the respondent sought to placate the appellant?s endeavour in seeking release of the said undertaking, by substituting the same with sufficient bank guarantee, by moving the arbitrator for amendment of the claim and incorporation of an alternative relief. The learned arbitrator should have seen through this strategy of the respondent. I wonder how such a relief could have been incorporated,

even by amendment, after the pendency of the claims for nearly six years.

14. The submission of learned counsel for the respondent founded upon the aforesaid observation made in MD, Army Welfare Housing Organisation (supra) followed in BPL Limited (supra) are of no avail. This is so for multiple reasons. Firstly, section 17 of the Act authorises the arbitral tribunal to, at the request of a party, order a party to take any interim measure of protection as the tribunal considers necessary in respect of the subject matter of dispute. The arbitral tribunal is empowered to require a party to provide appropriate security in connection with a measure ordered under sub section (1). The claim of the respondent is a monetary claim. The respondent being the claimant is entitled to security of its monetary claim, considering the fact that the appellant is a society and after development, allotment, and transfer of the individual farm houses to the members of the appellant, the appellant may not be left with sufficient assets to meet the award that may eventually be passed against it and in favour of the respondent.

15. It was in the aforesaid background that the court passed the order dated 20.05.2005 accepting the proposal of the appellant to create a first charge in favour of the respondent so as to satisfy the respondents claims in case the award is passed in his favour, and accepted the proposal of the appellant to furnish its undertaking and undertaking of its members not to create any third party interest in the land till the disputes are adjudicated by learned arbitrator.

16. The learned arbitrator was certainly empowered to consider the aspect of substitution of the security by another appropriate security so as to secure the respondents claim under section 17 of the Act. Pertinently, when the appellants application being I.A. No.6387/2006 was being heard and was disposed of on 29.08.2008 in the presence of the respondent, the respondent does not appear to have raised the issue that the arbitral tribunal was not empowered to permit substitution of the security by the appellant. The order does not show that the respondent raised any objection to the maintainability of the application under section 17 before the learned arbitrator. In any event, as aforesaid, I am of the view that the learned arbitrator was sufficiently empowered by section 17 of the Act to consider the aspect of substitution of the security. The members of the appellant society are being represented through the

appellant and are, therefore, represented before the learned Arbitrator. Moreover, the substitution of the security has been sought obviously, by the appellant at the behest of its members. There was no question of their interest being adversely affected by the arbitral tribunal if the appellant's application were to be allowed.

17. For the aforesaid reasons, the appeal is allowed. The monetary claim of the respondent is to the tune of about Rs.20 crores. Even if one were to factor in the element of interest, in my view, it would suffice if the appellant furnishes a bank guarantee for an amount of Rs.25 crores. Subject to a bank guarantee being furnished in favour of the Registrar General of this Court for an amount of Rs.25 crores within four weeks, the undertaking given by the appellant on 24.05.2005 shall stand discharged. The undertaking shall continue till the verification and acceptance of the bank guarantee. The bank guarantee shall be kept alive uptill the making of the award and for thirty days thereafter.

I.A.408/2014

Since the appeal itself is disposed of, this application does not survive. The same is dismissed as such.

VIPIN SANGHI, J

JANUARY 10, 2014