IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

APO 108 of 2022

IA NO. GA 1 of 2022

JAGRATI TRADE SERVICES PRIVATE LIMITED

VS.

DEEPAK BHARGAVA & ORS.

For the Petitioner	:	Mr. Ratnanko Banerjee, Sr. Adv. Mr. Anirban Ray, Adv. Mr. Rudrajit Sarkar, Adv. Mr. Debangshu Dinda, Adv. Mr. Jai Kumar Surana, Adv. Mr. Arundhuti Roy, Adv.
For the Respondent Nos. 1-13	:	Mr. Jishnu Saha, Sr. Adv. Mr. Arindam Banerjee, Adv.
For the Respondent No. 14	:	Mr. Zeeshan Haque, Adv. Mr. Saket Chaudhury, Adv.

Last Heard on : January 05, 2023

Judgement on : January 31, 2023

Shekhar B. Saraf, J.:

1. Jagrati Trade Services Private Limited being represented by one of its directors, Jagdish Sarda [hereinafter referred to as 'the petitioner'], is a company incorporated under the Companies Act, 1956 having its registered office at premises No. 3A, Shakespeare Sarani, Kolkata – 700071.

2. The instant application [being A.P.O. No. 108 of 2022] is filed under section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] by the petitioner against the order dated November 6, 2022 [hereinafter referred to as the 'Impugned Order'], passed by the arbitrator in an application filed by the petitioner under section 17 of the Act.

3. Deepak Bhargava, Rajni Bhargava, Deepak Bhargava (HUF), Vaibhav Bhargava, Monisha Bhargava, Smriti Raina, Megha Saigal, Gayatri Bhargava along with: -

   a. Box and Carton Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at 12/478, McRobertganj Kanpur – 208001, Uttar Pradesh,

   b. CSP Exim Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at 7/48, Tilak Nagar, Kanpur – 208002, Uttar Pradesh,

c. The Calcutta Phototype Company Limited, a company incorporated under the Companies Act, 1913 having its registered office at Unit-III, 1st Floor, Central Plaza, 41, B.B. Ganguly Street Kolkata 700012, and

d. CSP Investment & Financial Services Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at Unit-III, 1st Floor, Central Plaza, 41, B.B. Ganguly Street Kolkata 700012

are hereinafter collectively referred to as 'respondent nos. 1-12'.

4. James Glendye & Company Private Limited [hereinafter referred to as respondent no. 13] is a company incorporated under the Companies Act, 1913 having its registered office at 6, Jawarahlal Nehru Road, Kolkata – 700013.

5. Orbit Towers Private Limited is a company incorporated under the Companies Act, 1956 having its registered office at 3B, Camac Street, Kolkata – 700106 and Damani Infracon Private Limited [hereinafter collectively referred to as 'respondent nos. 14 and 15'] is a company incorporated under the Companies Act, 1956 having its registered office at P-32, Kasba Industrial Estate, Phase-I, Kolkata – 700107.

6. The petitioner has filed the current application praying for stay of the order and grant of interim reliefs, namely in the form of: -

   a. An order of injunction restraining the company from dealing with and/ or alienating and/or creating any third-party rights over and in respect of the owners' allocation in the premises being No. 6, Jawahar Lal Nehru Road.

   b. A fit and proper person be appointed as Receiver to visit and to make an inventory as to what third party liabilities have been prayed by the respondent no. 13 is the said premises.

   c. An order be passed directing the respondent no. 13 to disclose the particulars of the third-party rights created on the owner's allocation in the premises being 6, Jawaharlal Nehru Road, Kolkata – 700013.

Relevant Facts

7. The petitioner and respondent nos. 14 and 15 entered into a Share Purchase Agreement [hereinafter referred to as 'the SPA'] with respondent nos. 1-12 who had 100% shareholding of respondent no. 13 company [hereinafter referred to as 'the company/respondent no.13'].

8. The SPA was complemented by an Escrow Agreement signed by the same parties and on the same day, laying down conditions to be

fulfilled by the petitioner and respondent nos. 14 and 15 after which the designated Escrow Agent would transfer the shares to them.

9. In October 2016, shares of the company were transferred to respondent nos. 14 and 15 and no shares were transferred to the petitioner because of which the present arbitral proceedings were initiated.

10. The company is the owner of immovable properties in Kanpur and is the holder of leasehold rights in respect of premises No. 6, Jawahar Lal Nehru Road, measuring 2 Bighas 13 Cootahs, 11 Chittacks and 23 square feet [hereinafter referred to as 'the property'] for an approximate period of 98 years by virtue of a lease deed. The property is one of the reasons behind the current dispute.

11. The company entered into a Development Agreement on September 8, 2014 [hereinafter referred to as the 'development agreement'] with one Siddha Real Estate Private Limited to develop the property and construct a new building.

12. The construction was initiated in the year 2014 and advertisements for the same began circulating from November 2017 and continue till the current date.

13. The petitioner sought to resist the execution of the development agreement through:

a. An application under section 9 of the Act [being A.P. No. 122 of 2018] for specific performance of the SPA was made prior to the commencement of the arbitral proceedings. The same was refused vide order dated June 18, 2018 [being A.P. No. 122] as passed by the Hon'ble Justice Ashish Kumar Chakraborty, as construction of the new building began in 2013 and the petitioner was unable to demonstrate that they had paid the consideration as per the SPA.

b. An application under section 17 of the Act before the arbitrator was filed by the petitioner in the year 2022. The petitioner claimed that third party rights are being created by sale of commercial and office spaces in the property, that is, over the assets of the company which were being sold to third parties. During the arbitral proceedings, the arbitrator had passed an order at the ad-interim stage on September 22, 2022, restricting any transactions to occur up to the 9th floor of the new building in the property. However, in the light of the application under section 17 the arbitrator refused to grant further reliefs vide order the Impugned Order.

14. Since no reliefs were provided to the petitioner in the Impugned Order, the petitioner has filed the current appeal.

Submissions

15. Mr. Ratnanko Banerjee, senior counsel appearing on behalf on the petitioner propounded the following arguments: -

a. The SPA was to sell shares of the company to the petitioner and respondent nos. 14 and 15, comprising of (i) 5000 equity shares of Rs. 100 each [carrying voting rights] and (ii) 31278 equity shares of Rs. 100 each [not carrying voting rights]. The petitioner had fulfilled their obligations in the SPA through (i) payment of a sum of Rs. 3.6 crores and (ii) providing a loan of Rs. 16,22,262,966/- to the company. However, no shares were transferred and it was only after repeated correspondences sent by the petitioner that a direction to transfer shares were made on August 28, 2017, to the Escrow Agent by respondent nos. 1-12. The direction was forwarded to petitioner on September 7, 2017. However, no actual transfer took place, and the Escrow Agent states that they received subsequent instructions by respondent nos. 1-12 to not transfer the shares.

b. The SPA laid down terms and conditions which the petitioner and respondent nos. 14 and 15 had fulfilled. However, only respondent nos. 14 and 15 received the shares pursuant to the

SPA and Escrow Agreement. Thus, respondent nos. 1-12 were unwilling to transfer shares to the petitioner as per the SPA. The shareholders, inclusive of all respondents, were colluding against the petitioner.

c. Respondent nos. 14 and 15, on receiving the shareholding of the company, began mismanaging its affairs by illegally entering into the development agreement. This activity created third party rights over the company's assets, which prompted an application under section 17 of the Act to be filed before the arbitrator by the petitioner. Thus, it is the strong assertion of the counsel that the signing of the development agreement was done with the intent to render the company assetless. The same was being done in anticipation that if an award would be made in favour of the petitioner by the arbitrator, it would be reduced to a mere paper award as they would be 36% shareholders of nothing.

d. All respondents had wilfully concealed several events to the detriment of the petitioner:
   i. Respondent nos. 14 and 15 becoming shareholders of the company;
   ii. Signing and execution of the development agreement;
   iii. Particulars of allocation of the company's properties already made to the third party;

iv. Non-filing of audited Balance Sheet of respondent nos. 13 for the last two financial years i.e., 2020-21 and 2021-22.

e. The audited balance sheet for the financial year of 2019-20 did not depict any income from the sale of commercial space in the said property. Thus, it was argued that since the petitioner was completely unaware of the aforesaid events leading to the creation of third-party rights, there was no need to approach the arbitrator for interim protection at that point of time.

f. The petitioner was unaware of several material events as described above, namely respondent nos. 14 and 15 becoming shareholders and the execution of the development Agreement, the petitioner had no means to know if any transaction occurred/have been occurring. Moreover, it was not until the newspaper advertisement in 2019, depicting sale of commercial and office spaces, that it was brought to the petitioner's attention that third party rights are actively being created following which the arbitration proceedings were initiated.

g. Respondent nos. 1-12 and respondent no. 13 were directed by the arbitrator to disclose the allocations of assets. However, they failed to adhere to the same resulting in the inability of the arbitrator to appreciate the factual matter.

h. Finally, the senior counsel argued that the 36% shareholding contains voting rights of which they have been deprived. Thus, had they been shareholders of the company they would have a say in the company's affairs, especially whether to dispose of its assets and enter into the development agreement. However, since they were not given their shares, all respondents collectively took the opportunity to conspire together to enter into the said development agreement illegally.

16. Mr Jishnu Saha, senior counsel appearing on behalf of respondent nos.1-13 made the following submissions: -

a. The petitioners had previously prayed for interim relief under section 9 of the Act [A.P. No. 122 of 2018] with respect to the development agreement which was refused by this Court vide order dated June 18, 2018. The petitioner further submitted an application under section 17 of the Act before the arbitrator which was also refused while taking into consideration that the construction commenced in 2015.

b. This court had granted the liberty to the petitioners to file an application under section 17 of the Act before the arbitrator, vide its order dated December 12, 2018. However, there was an undue delay of nearly four years until the said application was made, which is when the arbitral proceedings were at its concluding

stage. The senior counsel further submits that the arbitrator, being conscious of the delay, refused to pass an order in favour of the petitioners. Thus, any order passed by this court, interfering with the arbitrator, would severely prejudice respondent no. 13 and its shareholders.

c. The petitioner had wilfully suppressed and misrepresented facts since several advertisements, regarding the sale of commercial and office spaces in the new building at the said property, were made since the commencement of its construction. Furthermore, the senior counsel submits that the development being conducted in the said property was registered under the provisions of the West Bengal Housing Industry Regulation Act, 2017 [hereinafter referred to as 'HIRA'] on November 19, 2018, which is in public domain. Moreover, the senior counsel maintains that these facts were also suppressed by the petitioner in their application under section 17 before the arbitrator, which disentitled them from any reliefs.

d. The petitioner was not entitled to the shares due to failure of making payment of the entire consideration in terms of the true and correct SPA. As such he further submits that the SPA relief upon by the petitioner is a fabricated copy of the true SPA, evident by their inability to produce the original of their purported SPA whereas respondent nos. 1-12 and respondent no. 13 have submitted the original true and correct SPA to the physical

custody of the arbitrator. Thus, the petitioner is required to prove their entitlement before staking any claim over the company and/or its allocation in the new building at the said property.

e. The issue of entitlement and compensation is a matter reserved for the determination of the arbitrator and until the issue is resolved, the petitioner cannot challenge or assert any right over the company. The petitioner was merely entitled to 36% shares which they have not received. Thus, he highlights the error of the petitioner in seeking an entitlement of a right to an actual right over the company's affairs. Thus, since the petitioner was neither a shareholder at that stage nor at present, there is no justifiable reason for the respondent no. 13 to submit financial statements and similar documents to the petitioner.

f. Arguendo, even if the petitioner had their entitled shareholdings, contrary to their claim, it did not entail any voting rights. Thus, even if the petitioner were to be designated as shareholders, they would not have any influence over the decision of the company entering into the said development agreement.

g. The documents pertaining to the company are confidential and no outside party is entitled to have access to it. Senior counsel expressed his anxiety that if the financial statements were to be disclosed to the petitioner, they would exploit the same to the

detriment of the company and possibly jeopardise the development agreement which is the product of a decision taken by the existing shareholders of the company. Thus, the petitioner's insistence on viewing the audited balance sheet following the financial year of 2019-20 is merely to further their agenda as troublemakers, challenging the decisions of the company without proving a prior entitlement.

h. The development agreement is not the subject matter of the arbitral reference considering the statement of claim made by the petitioner. Consequently, they cannot obtain any relief in lieu of the development agreement and the construction of the new building in the property.

Analysis

17. In light of the present factual matrix, I find it exceedingly important to identify the principle of minimum judicial intervention which is one of the fundamental tenets of arbitration law. The present regime under the Act, especially after the Amendment of 2015, validated the anxiety of the Law Commission of India which recommended limitations on judicial interference, ***while enhancing the powers of the arbitrator in providing interim reliefs***.

The Test for Interim Measures

18. I am conscious of the fact that the current application is made under section 37 of the Act, appealing against the Impugned order that denied any further interim protection to the petitioner under section 17 of the Act.

19. The required threshold for providing interlocutory relief has been identified by the Division Bench of the Supreme Court in ***Shanti Kumar Panda vs Shakutala Devi*** as reported in (2004) 1 SCC 438.The relevant paragraph is reproduced below: -

> *At the stage of passing an interlocutory order such as on an application for the grant of ad interim injunction under Rule 1 or 2 of Order 39 of the CPC, the competent Court shall have to form its opinion on the availability of a prima facie case, the balance of convenience and the irreparable injury __ the three pillars on which rests the foundation of any order of injunction.*

20. The threshold has been in existence even earlier than 2003, designated as a cornerstone of consideration when providing interlocutory injunctions. However, the rationale is limited to the Civil Procedure Code, 1908 (hereinafter referred to as 'CPC') and it is also

settled law that the procedures and rules encoded within it are merely for the sake of assistance. In view of the same, the Supreme Court quite recently settled the issue in the case of ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited*** as reported in ***2022 SCC OnLine SC 1219***. The relevant paragraphs are extracted below: -

> *48. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.*
>
> *49. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.*

21. In consonance with the judicial precents set out above, I can succinctly conclude that for granting an interim protection a party must satisfy four specific criteria:- (i) there is a prima facie case in their favour, (ii) not granting the relief would result in irreparable harm and loss which cannot be compensated at a later stage and (iii) the balance of convenience, if such interim protection is granted, must lie in favour of the applicant and (iv) the application praying for the relief is made expeditiously.

Reliefs under Section 9 and Section 17

22. The current application is an appeal to an order under section 17. I find myself entirely conscious of the fact that section 9 and section 17 are different provisions and the analysis conducted in ***Essar House(supra)*** was based on a section 9 application. However, I also find it essential to reiterate the recommendations made in the 246th Law Commission Report, 2013, the relevant paragraph of which is reproduced below: -

> *49.The Commission believes that while it is important to provide teeth to the interim orders of the arbitral tribunal as well as to provide for their enforcement, the judgment of the Delhi High Court in* ***Sri Krishan v. Anand*** *is not a complete solution. The Commission has, therefore, recommended amendments to section 17 of the Act which would give teeth to the orders of the Arbitral Tribunal and the same would be statutorily enforceable in the same manner as the Orders of a Court.*

23. In the Amendment of 2015, this recommendation was accepted and the powers of the arbitrator were accordingly enhanced. In fact, as the Madras High Court had identified in ***Flywheel Logistics Solutions Private Limited v. M/S. Hinduja Leyland Finance Limited*** as reported in ***2020 MAD LJ 475***, the enhancement made the powers of the arbitrator under section 17 akin to that of the Court under section 9 and consequently as a corollary, the arbitrator passing interim reliefs under section 17 would be bound by the same standards as section 9. The relevant paragraphs are reproduced below: -

> *24. …it is clear that the object of amending Section 17 of the Act was to vest with the Tribunal with the same powers as a civil court in relation to the grant of interim measures. In other words, the power to pass interim measures imposes a discretion vested in the Tribunal would have to be exercised in consonance with thewell settled principles governing the grant of such reliefs by the civil court.*
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> 25. *Section 17 was, accordingly, amended by Act 3 of 2016. Under Clause 17(1) the Tribunal was given identical powers of the Court under Section 9. A fortiori, the Arbitral Tribunal can now pass orders akin to those passed under Section 9. As a natural corollary, it follows that the ratio of the decision in Adhunik Steels would apply equally to Tribunals as well, with*

the result that Tribunals passing interim measures under Section 17 would be bound to observe the guiding principles governing the grant of such reliefs under the Code. The discretion conferred on the Arbitral Tribunal under Section 17 to pass interim measures is undoubtedly judicial. As the Supreme Court pointed out in Dev Prakash v. Indra [(2018) 14 SCC 292] "judicial discretion has to be disciplined by jurisprudential ethics and can by no means conduct itself as an unruly horse".

24. Moreover, quite recently, I had identified in ***Gainwell Commosales Private Limited v. Minsol Limited*** as reported in ***2022 SCC OnLine Cal 3975***, that the powers of an arbitrator post amendment of 2015 under section 17 of the Act is *pari passu* with the powers of the Court to provide interim reliefs under section 9. Thus, I see no reason as to why the four-part test for interim protection under section 9 cannot be applied to test the validity of an order passed under section 17 of the Act.

25. In the current dispute it is established as a matter of fact that the petitioner's application under section 17, praying for interim protection, was refused by the arbitrator. Aggrieved by the same the current application for appeal was moved under section 37 of the Act. The same reads as follows:-

37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court.

26. Section 37(2)(b) provides the opportunity for appealing against an arbitral tribunal's orders which refuses to grant any measure under

section 17. I have already established in the preceding paragraphs and in ***Gainwell (supra)*** that section 17 and section 9 are *pari passu* and further with ***Flywheel (supra)*** that section 17 would follow the same standards as applicable to section 9. Thus, utilising the said reasoning I conclude that the threshold guiding the eligibility of interim measures for both these provisions are identical and hence, applicable.

The four-stage Test

Prima Facie case

27. The phrase 'prima facie' literally translates to 'at first face' or 'at first appearance'. This standard is laid down keeping in view that Court's interference with the arbitral proceedings is minimised. In ***Godrej Industries v. Colin Mario Rebello and Ors.*** reported in ***2013 BOM CR 755***, the Bombay High Court when faced with an application under section 37, indicated a mechanism, the relevant extracts of which are provided below: -

> *'24. For assessing prima facie case in the matter at hand, examination of the clauses of MoU and other documents will be required. This examination, however, need not be and cannot be*

as in depth as will be done at the time of main arbitration proceedings…

25. …What needs to be noticed however is that generally the courts have regarded detailed scrutiny and interpretation of documents as a matter within the domain of arbitrator. The scrutiny at the stage of Section 9 is to ascertain whether the petitioner has prima facie case so as to consider granting protection till the parties approach the Arbitrator. The enquiry at the stage of Section 9 of the Act is to ascertain whether the party approaching the Court has a triable dispute and if so how best the subject matter of the dispute is to be protected in the intervening period. An order passed under Section 9 is not an end in itself but is only a means to facilitate effective arbitration between the parties. The inquiry under Section 9 of the Act, is not meant to be as comprehensive as the main arbitral proceeding.'

28. In light of the current factual matrix, it would be pertinent to scrutinise, albeit not in great detail, the SPA signed between the parties, this court's order dated June 18, 2018 dismissing the section 9 application and the arbitrator's refusal to grant additional reliefs under section 17 in the Impugned Order. The petitioner claimed to have paid the consideration as per the SPA but have not received any shareholdings of the company. Moreover, there are other factors to be considered which are mentioned herein below: -

a. Shares not being transferred to the petitioner even after they claimed to have paid the consideration.
b. The Escrow Agent being informed not to execute the SPA in favour of the petitioner.
c. Respondent nos. 14 and 15 becoming shareholders under the same SPA being concealed from the petitioner.
d. Respondent nos. 1-13 were not disclosing relevant facts even when directed to do so by the Learned Arbitrator.

These events cumulatively may have made for a prima facie case in favour of the petitioner, but there are delays which would be addressed in the succeeding paragraphs. The senior counsel for the petitioner has expressed their anxiety that the activities of respondent nos. 1-13, if allowed unchecked, would reduce the arbitral award to a mere paper decree. As per the petitioner, respondent nos. 1-13 were allegedly disposing of the assets of the company to ensure that in the event an award is issued in favour of the petitioner, which means that, if the 36% shareholding is transferred to the petitioner, it would be of no tangible value. In consideration of similar circumstances, the Delhi High Court in ***Ajay Singh v. Kal Airways Private Limited*** as reported in ***(2018) 209 Comp Cas 154*** identified as follows: -

> *'112. …in the facts of the present cases, that if the respondents will dispose of the shares of respondent No. 1 to the third party,*

award if passed in favour of the petitioners, the same will become merely paper decree.

113. Without expressing anything on merit, as all the disputes have to be decided by the Arbitral Tribunal the part prayers in both petitions are allowed…'

In relation to same, I find it necessary to reiterate what the Supreme Court in ***Essar House (supra)***, had previously observed in this regard:-

'50. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice.'

29. I remain conscious that there are multiple facts in dispute. The senior counsel appearing for respondent nos. 1-13 have expressed that the SPA submitted by the petitioner is a fabricated copy and that they had not paid the consideration as per the true and correct SPA. As such the arbitrator has not rendered its award and remains to adjudicate over the dispute.

30. Thus, I find merit in the approach adopted by the Delhi High Court in ***Ajay Singh (supra)*** as per which I am not to enter the merits of the dispute, rather at this stage, decide the eligibility of interim protection

at the prima facie stage. Furthermore, ***Essar House (supra)*** clarifies that no actual proof disposing off the assets is required but rather a strong possibility indicating the same. Prima facie, both the petitioner on one hand and respondent nos. 14 and 15 on the other, had paid consideration for the SPA but only the latter group received the shareholdings of the company, following which the company entered the development agreement and proceeds to dispose of its assets.

31. However, when inspecting the orders of the arbitrator, it has been noted that the petitioner had not adequately satisfied the arbitrator that it had paid consideration as per the SPA. This determination when viewed against the allegation of the respondent that the SPA submitted by the petitioner is fabricated further complicates the issue. In fact, the allegation of fabrication itself distinguishes the current dispute from that of ***Ajay Singh (supra)***, ***Essar House (supra)*** and ***Godrej Industries (supra)*** wherein prima facie cases existed, but basis a valid instrument. The answer to this predicament can be inferred from the formula expounded within ***Godrej Industries (supra)***. The Bombay High Court identified that the purpose of section 9 (and consequently, section 17) is for facilitating effective arbitration and not to operate as a comprehensive inquiry running parallel to the main arbitral proceeding. Furthermore, I find it essential to note the analysis expounded by the Delhi High Court in ***World Window Infrastructure Private Limited v. Central Warehousing***

Corporation as reported in (2021) 3 HCC (Del) 731which is reiterated below: -

> *'29. The scope of interference, in appeal, against orders passed by arbitrators on applications under* Section *17 of the 1996 Act is limited…the court has to be alive to the fact that, by its very nature, the 1996 Act frowns upon interference, by courts, with the arbitral process or decisions taken by the arbitrator. This restraint, if anything, operates more strictly at an interlocutory stage than at the final stage, as interference with interlocutory orders could [*cause*] interference with the arbitral process while it is ongoing, which may frustrate, or impede, the arbitral proceedings.*
>
> *30. Views expressed by arbitrators while deciding applications under* Section *17 are interlocutory views. They are not final expressions of opinion on the merits of the case between the parties. They are always subject to modification or review at the stage of final award. They do not, therefore, in most cases, irreparably prejudice either party to the arbitration.* Section *17 - like* Section *9 - is intended to be a protective measure, to preserve the sanctity of the arbitral process. The pre-eminent consideration, which should weigh with the arbitrator while examining a* Section *17 application, is the necessity to preserve the arbitral process and ensure that the parties before it are placed on an equitable scale. The interlocutory nature of the order*

passed under Section *17, therefore, must necessarily inform the court seized with an appeal against such a decision, under* Section *37…'*

32. In my opinion, the arbitrator is yet to identify the correctness of several key facts in dispute, few of which I have identified above. Until a concrete finding regarding the same is made, any order passed by me would possess the possibility of prejudicing or affecting the ongoing arbitral proceedings which, as per the reasoning provided above, has been forbidden.

Irreparable Harm

33. At this stage, several third-party rights have been created over the said property due to the development agreement and judging by the facts presented, more third parties would be added which would further complicate execution of the award. The senior counsel for the petitioner submitted that once respondent nos. 14 and 15 became shareholders of the company with respondent nos. 1-12, they cumulatively conspired to keep the petitioner from acquiring their entitlement over the company. As per the petitioner, the respondents collectively utilised this opportunity to enter into the development agreement behind their back and began the process of alienating assets of the company. In fact, as identified in the preceding

paragraphs, it is the apprehension of the petitioner that by the time an award is issued in the former's favour would render the company assetless.

34. Senior counsel on behalf of the petitioner emphasised on their request to direct the company to share the audited balance sheets succeeding the financial year of 2019-20. The rationale behind such a request as the petitioner asserts, is to accurately determine the true extent of assets already alienated by the respondent nos. 13. However, I cannot interpret as to why they insist on the company to reveal the balance sheets. As indicated earlier, which I shall now reiterate, third party rights have already been created over the said property and consequently, the arbitrator granted an interim injunction against respondent no. 13 from entering transactions over the property up to the 9th floor. Furthermore, if respondent no. 13 fails to adhere to the order, the arbitrator has indicated that it would be subjected to the final award.

35. It is undisputed that an arbitral award is enforceable as a decree of court. The wordings of section 36 of the Act clearly indicate the same and given that the entitlement of the petitioner over the shareholdings is disputed, the damages incurred can always be assured by valuation of shares before the concealed transactions took place.

36. Respondent nos. 1-13 have constantly emphasised on the ineligibility of the petitioner's claims. Senior counsel for the respondent nos. 1-13

in their oral submissions indicated that a mere claim of entitlement over the shares does not translate into an actual right. Perusing the prayers and allegations made by the petitioner, I cannot but find merit in the respondent's insistence that the petitioner does not have a right over the said property especially considering that the entitlement over the company itself is in dispute.

37. At the current stage the petitioners are not shareholders of the company and consequently have no right over the inner workings and management of the same. As a result, their insistence on the balance sheets regarding the transactions that took place is entirely unjustified. I am entirely conscious of the threat of alienation as expounded by the senior counsel appearing on behalf of the petitioner, but the arbitrator has already granted an injunction effecting the same. The entitlement of the shares is the subject matter of arbitration and even if the said allegations as expounded by the petitioner were to be held true, as aforementioned, the petitioner is entitled to apply for due compensation in respect of their original entitlement of shares and therefore get access to the balance sheet and financial documents. Thus, there exists a mechanism for the petitioner to be compensated and I do not see any irreparable loss or injury to occur.

Balance of Convenience

38. As aforementioned, the petitioner has already received an injunctive relief from the arbitrator who is yet to make a firm determination of various facts in dispute. When deciding whether serious harm would be caused to the petitioner if their prayers are not granted, I have concluded that there is none. However, respondent no. 13 on the other hand had entered into a development agreement and engaged in the sale of commercial and office spaces in the said property. If the petitioner's prayers are granted there is no doubt that the respondent nos. 1-13 will be seriously prejudiced as the development agreement and all rights created under it would be halted. Respondent nos. 1-13 have already made serious investments and have incurred loans from multiple parties for the construction of the new building at the said property. As I had indicated earlier, the petitioner has already received injunctive reliefs and I cannot but designate the current application to be nothing more than troublesome as the balance of convenience lies hugely in favour of the company.

Delay

39. With respect to the element of delay, I find it necessary to identify that sufficient cause needs to be established when considering delays. The

arbitrator themselves did not find any 'sufficient cause' and primarily dismissed the application under section 17 on grounds of delay. I, in light of the overwhelming evidence against the petitioner, arrive at an identical conclusion. The reasons are given below: -

a. First, the petitioner was aware of the existence of the development agreement when the application under section 9 was made. However, there was a total gap of nearly three years since the application was disposed vide this court's order dated June 18, 2018 and the section 17 application was made. To that effect, I can conclude that the latter application was not made expeditiously.

b. Second, the section 9 application itself was delayed. The construction of the new building began in 2014 and the application was moved after four years. Having perused the order of the Court, I do not see any justifiable grounds for delay.

c. Third, the Court while dismissing the section 9 application gave the petitioner the liberty to approach the arbitrator for interim protection. However, the said application was made three years later. The petitioner in their written submissions have maintained that they became aware of the third-party rights only after the advertisement circulated in 2019 for sale of commercial and office spaces in the said property. However, there exists overwhelming

evidence against such a claim as noted by the arbitrator, which I have listed below :-

i. The construction of the building in the said property was registered under the HIRA in 2018. By virtue of the same, the fact of construction became part of the public domain.

ii. The arbitrator has also come to an identical conclusion refusing the petitioner's application under section 17. As such I see no tangible reason or valid grounds for not instituting the application under section 17 expeditiously instead of sleeping on their rights for nearly three years.

iii. Notwithstanding the registration under HIRA, it is entirely unreasonable to expect that the petitioner had become aware of the status quo only on a single newspaper advertisement nine years after commencement of its construction.

40. There is no doubt in concluding that at every stage and every application made by the petitioner suffered from unreasonable delay and no 'sufficient cause' could be made out by the petitioner for a delay amounting to several years. The conduct of the petitioner entirely disqualifies any grounds of urgency or a serious consideration that they would indeed suffer irreparable harm and there is no doubt that the petitioner had wilfully concealed the fact that advertisements were circulated at a much earlier stage. Moreover, the court had

granted liberty to the petitioner to approach the arbitrator for reliefs but for insufficient explanations, they failed to do so expeditiously. The same was also observed by the Learned Arbitrator who dismissed the application under section 17 on grounds of delay alone.

41. For the purpose of convenience, the principles that can be culled out from a reading of the legal analysis undertaken above are mentioned herein:

a. The power of the arbitrator to grant interim reliefs under section 17 of the Act is akin to the court's powers under section 9. The 246th Law Commission Report recommended the enhancement of arbitrator's powers to give teeth to their orders by elevating them to the status of a statutorily enforceable order of a court. The Parliament responded accordingly and made section 17 *pari passu* to that of section 9. Succeeding precedents such as that of ***Flywheel Logistics (supra)*** and my own observation in ***Gainwell (supra)*** reiterate the identical nature of sections 9 and 17 and the acceptance of the principle that applications under both these provisions would be governed under the same test of interim measures.

b. The test guiding the court's power to grant interim relief is equally applicable to the arbitrator's power under section 17. The court need not go beyond the standard, when determining appeals under

Section 37 against arbitrator's orders under Section 9, than to determine:

1. prima facie case is in whose favour,
2. not granting the relief would result in irreparable harm and loss which cannot be compensated at a later stage,
3. the balance of convenience, if such interim protection is granted, must lie in favour of the applicant, and
4. the application praying for the relief is made expeditiously;

c. The grounds for appeal in the current application stems from section 37(2)(b) of the Act. The investigation as established in the precedents set in ***Ajay Singh (supra)***, ***Essar House (supra)*** and ***Godrej (supra)*** cannot extend to entertain the merits of the dispute. Instead, the degree of scrutiny is limited to a prima facie overview. Furthermore, in ***World Window (supra)*** it was settled that the Act by its very nature frowns upon judicial interference against an arbitrator's decisions and even more so when such decisions are made at interlocutory stages where the arbitral process remains to be ongoing. A constrained overview in light of the test stated above in sub-paragraph (b) is to be carried out.

Conclusion

42. Having been fully acquainted with the factual matrix, the tests for granting interim reliefs and various stages of delay incurred by the

petitioner, there are several key elements within the current dispute which are unsettled, namely (i) the entitlement of the petitioner over the shares of the company, (ii) whether the 36% shares included voting rights and (iii) whether the development agreement was valid. Matters (i) and (ii) squarely fall under the jurisdiction of the arbitrator who at this stage has not rendered an award. It would be incorrect to interfere with the same. With respect to the development agreement, I cannot comment on whether it is the subject matter of the dispute. The arbitrator under his own authority has already restricted any transaction up to the 9th floor of the new building and has explicitly stated that any transaction entered would be subject to the final award. No award has been issued yet and to that effect I am not to make any determination until the same is issued.

43. I cannot pass any orders without risking interfering with the arbitral proceedings. Furthermore, I do not see any irreparable harm to be suffered by the petitioner if their prayers are not addressed, especially considering the unreasonable delay in filing their applications. There is no urgency in this matter and the balance of convenience lies in favour of the respondent nos. 1-13, especially considering that the arbitrator has already provided injunctive reliefs to the petitioner.

44. In view of the law as mentioned above, A.P.O. 108 of 2022 along with G.A. 1 of 2022 are dismissed. There shall be no order as to costs.

45. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J)