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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 19th April, 2022

\+ **ARB. A. (COMM.) 78/2021 & I.As. 17021-22/2021**

SPLENDOR BUILDWELL PVT LTD & ANR. ..... Petitioners

Through: Mr. Sudhir Nandrajog, Mr. N. S. Bajwa, Mr. Sarthak Gupta and Mr. Shashank Shekhar Mishra, Advocates.

versus

RAJESH KUMAR PASRICHA ..... Respondent

Through: Mr. Siddhant Asthana, Mr. Siddhant Nath and Mr. Chhetarpal Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The Appellant [*being* the Counter-Claimant in arbitration], is aggrieved with the Order dated 08th November, 2021 [*hereinafter*, '***Impugned Order***'] passed by the Sole Arbitrator, deciding the Respondent's [Claimant in arbitration] application under Section 17 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, '***the Act***'], whereby, *inter alia*, directions have been passed to secure an amount of Rs. 1,42,35,279.50/- by way of fixed deposit receipts [*hereinafter*, '***FDR***'] or an

irrevocable bank guarantee.

BACKGROUND:

2. Briefly stated, the facts giving rise to the instant appeal are as follows:

2.1. Appellant No. 1 is a property developer and Appellant No. 2 is the owner of the underlying land. The Respondent entered into two agreements with Appellant No. 1, both dated 04th October, 2017, *viz.* a Space Buyer's Agreement [*hereinafter*, '***SBA***'] and a Memorandum of Understanding [*hereinafter*, '***MoU***'] to purchase Units no. 601 to 606 (admeasuring a super area of 5385 Sq. Ft.), sixth floor, Tower D, Spectrum One, Sector-58, Village Behrampur, Tehsil Sohna, District Gurgaon, Haryana [*hereinafter*, '***Property***'] for a total consideration of Rs. 1,61,55,000/-.

2.2. Clause 4 of the MoU provides that construction shall be completed within 12 months from the date of MoU, failing which, Appellant was to pay a minimum assured return at the rate of Rs. 71.50/- per sq. ft. per month from 06th October 2018 till the time the Property is leased out to a prospective lessee. Upon Appellant's failure of neither leasing out the Property nor make such payment, disputes arose. Respondent approached this court under Section 9 of the Act, wherein, with the consent of the parties, the Arbitral Tribunal was appointed, with a direction to treat the said petition as an application under Section 17 of the Act before the Tribunal.[1]

2.3. Respondent's claim in arbitration is for specific performance of the

[1] Order dated 28th May 2015 in O.M.P. (I) (COMM) 121/2021.

Agreements by directing the Appellant to execute sale deeds in his favour, and for payment of the amount of assured contractual returns under the MoU, among others. By way of interim application under Section 17 of the Act, the Respondent *inter alia* sought restraint against the Appellant from creating third-party interest in respect of the Property, and also sought to secure its claim of Rs. 1,42,35,279.50/- towards assured returns, which were allowed. It is noted that though the Impugned Order also restrains the Appellant from creating third-party rights during the pendency of arbitral proceedings, the said direction is not the subject matter of challenge in the present appeal.

CONTENTIONS OF THE PARTIES:

3. Mr. Sudhir Nandrajog, Senior Counsel for the Appellant, impugns the order on the following grounds:

3.1. The merits of the claim of the Claimant cannot be the sole criteria for issuing a direction for securing the amount in dispute.

3.2. The amount claimed by the Respondent is highly disputed, which aspect can only be adjudicated after parties are afforded an opportunity to lead evidence.

3.3. The Arbitrator has not viewed the Section 17 application in light of the requirements under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ['***CPC***']. The broad principles to be followed for deciding Section 17 are akin to Section 9 of the Act, and both are again akin to Order XXXVIII Rule 5 of CPC. Interim measures under Section 17 cannot be passed mechanically, merely on a presumption

that there are 25 cases pending against the Appellant with respect to the same project, or that there is a likelihood of liquidation.

3.4. It is well settled that merely finding a just and valid claim or a *prima facie* case does not entitle an applicant to an order of attachment before judgment, unless it has also established that the opposite party is attempting to remove or dispose of its assets with the intention of defeating the decree that may be passed.[2]

4. *Per contra*, Mr. Siddhant Asthana, counsel for the Respondent, defends the Impugned Order and makes the following arguments:

4.1. The amount in question needs to be secured. The Arbitrator has passed the direction for furnishing of security in light of Clause 4 and 9 of the MoU.

4.2. These amounts are admittedly due to the Respondent, for which there cannot be any plausible defence.

4.3. The claim of assured returns is akin to lease rentals – which have been consistently secured by this court under Section 9 of the Act and by Arbitral Tribunals under Section 17 of the Act.

4.4. A strong *prima facie* case exists in favour of the Respondent. Further, sufficient material is available on record, which would indicate that in case the amount is not secured, the award that would be passed in favour of the Respondent would be rendered as a paper award.

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[2] Reliance was placed upon the following cases:- *BMW India Private Limited v. Libra Automotive Private Limited and Ors.* 2019 SCCOnline Del 9079.; *Raman Tech & Process Engg Company v. Solanki Traders*, 2008 2 SCC 302.; *Pearl Hospitality & Events Pvt. Ltd. v. OYO Hotels & Homes Pvt. Ltd.*, in O.M.P. (I.) (COMM.) No. 123 of 2020.; *Shabnam Dhillon v. Zee Entertainment Enterprises Ltd. and Ors*. 2019 SCC

ANALYSIS

5. The Court has considered the contentions of the counsel for the parties. First and foremost, the nature of the claim amount, which is sought to be secured by the Respondent, has to be comprehended. This claim, labelled as 'assured return', is founded on Clause 4 of the MoU, which stipulates as under:

> *"4. That the Developer has assured the Allottee that the building shall be completed within 12 months from the date of execution of this MOU. In case the building is not completed in stipulated time, then the Developer will pay Rs. 71.50/- (Rupees Seventy One and Fifty Paisa Only) per sq. ft. per month as an assured return to the Allottee from 6th October 2018 till the Said Unit is leased out to the prospective Lessee(s). The above assured return cheques shall be payable on or before 15th day of each succeeding calendar month subject to deduction of TDS as per rates prescribed under the Income Tax Act, 1961 in the relevant period."* [Emphasis supplied]

6. From the aforenoted clause, it appears that the Appellant had assured a return to Respondent at the rate of 71.50 per sq. ft. per month from 06th October, 2018 until the unit is leased out to the prospective lessees. This assured return becomes payable, in case the building is "not completed" within 12 months from the date of execution of the MoU. The Appellants have argued that the building was completed within 12 months of the execution of the MoU, as is evident from the Completion Certificate dated 25th September, 2018, issued by the Architect and the Engineer supervising the construction of the building, and hence, they are not liable to pay the assured returns. However, the Respondents state that the Appellants applied for an Occupation Certificate *vide* application dated 26th November, 2018,

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Online Del. 8905.; *Dinesh Gupta and Ors. v. Anand Gupta and Ors.*, ARB. A. 4/2020.

and the same was granted by the competent authority (Director, Town and Country Planning Department) on 06th September, 2019, and thus, the building was not completed by the time stipulated in the MoU.

7. The Arbitrator has proceeded on the premise that since the Appellant applied for an Occupation Certificate one year after the stipulated time, and further failed to explain as to what steps it took to avoid its impending liability, it become liable to pay assured returns to the Respondent under Clause 4 of the MoU. Although this observation has been made on *prima facie* basis, it nevertheless becomes the foundation for giving the direction for securing the amount, as is evident from the following extract of the Impugned Order:

> *"23. There is no dispute that the Completion Certificate can be issued only by the statutory authority i.e. Director, Town and Country Planning Department under said Rule 16. As per their own case, the Respondents had applied for the Occupation Certificate only after one year i.e. on 26.11.2018 and the Occupation Certificate was issued to them on 06.09.2019 by the Competent Authority. There is no pleading by the Respondents that even if the said building was completed within one year, what steps they had taken to inform the Claimant to avoid their impending liability to pay assured returns @ of Rs, 71.50/- per sq. ft. per month to the applicant. In any case, the Occupation Certificate dated 06.09.2019 shows that the subject property was not completed within the stipulated time i.e. by 04.10.2018. Therefore, prima facie it appears that the building was not completed within the stipulated period as per clause 4 of the MoU and thus making the Respondent no. 1 liable to pay assured returns to the applicant."*

8. On a bare reading of Clause 4, in the *prima facie* opinion of the Court, there is no linkage between the payment of assured return with the procurement of an Occupation Certificate. The clause uses the expression '*if the building is not completed*'. Respondent predictably contends that 'completion' can only be construed once statutory authorities issue a

certificate to that effect, that is the Occupation Certificate. However, at this stage, no firm view in this regard is to be taken one way or the other, so as to avoid prejudice to either party. Nevertheless, the contention of the Appellant is certainly arguable. Thus, in the opinion of the court, since there are highly disputed questions of fact relating to the interpretation of the event for triggering of Clause 4, and the claims are hinged to such interpretation, the liability of the Appellant for assured return cannot be assumed with absolute certainty. In other words, the possible extent of the claim that is likely to be awarded cannot be a foregone conclusion. Therefore, the Arbitrator fell in error by exercising jurisdiction under Section 17 of the Act for securing the amount.

9. The Respondent has also relied upon Clause 9 of the MoU, which is reproduced below:

> *"9. That the Intending Allottee has clearly understood and agreed that the Said Space is not for the purpose of self occupation and use by the Intending Allottee and it is for the purpose of leasing to third parties alongwith combined Units as larger area. The Intending Allottee hereby gives unfettered right to the Developer to negotiate, finalize, effectuate and enter into Lease Deed and/or other requisite documents, agreements, deeds with any suitable and prospective tenants to lease out the Said Space alongwith other combined Units as a larger area on the terms and conditions that the Developer would deem fit. The Intending Allottee shall at no point of time object to any such decision of leasing by the Developer."*

10. The aforenoted clause also does not advance the case of the Respondent. It only indicates the object and the dominant purpose of the MoU, but does not help in determining the liability. Be that as it may, at the highest, it could only be said that Respondent has a *prima facie* case. Even if that is the case, it does mean that securing the amount in question is imperative. *Prima facie* case alone does not entitle the Respondent to relief

under Section 17 of the Act. This well recognised principle in law also noted by the Tribunal, but erroneously applied. The tribunal rightly proceeded to analyse whether there exists any circumstance which necessitates securing the amount, and expressed as under:

> *"24. Even if a prima facie case exists, that by itself does not entitle the applicant to relief under section 17 of the Act as it is also to be shown that if the relief of securing the amount in dispute is not granted, the applicant might not be able to recover the amount if awarded to it and the award if passed in his favour, may become a paper award only. Admittedly as mentioned hereinbefore, 25 cases have been pending against the Respondents on behalf of similarly placed allottees in relation to the same project. Ld. counsel for the claimant while expressing the grave concern of the applicant argued that Respondent no. 1 might not be in a financial position to pay the awarded amount as it might go into liquidation due to Respondents' ongoing litigation and subsequent financial liabilities. At this juncture, it is important to refer to the judgment of the High Court of Delhi in Pearl Hospitality & Events Pvt Ltd Vs Oyo Hotels And Homes Pvt. Ltd. O.M.P. (I) (COMM) 123/2020 which was a petition under section 9 of the Act asking for inter-alia for securing the sum in dispute. The Petitioner in their petition and rejoinder had stated that there were several cases pending against the Respondent for breach of contract, for winding up the Respondent company due to non-payment of operational debts and an FIR was also registered against the officials of the Respondent because of non-payment of assured revenues. These averments were not denied by the Respondent during the course of the arguments and in this situation, after finding a prima-facie case in favour of the Petitioner, the Court held as under:*
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> > *"100. A prima facie case of entitlement, in favour of the petitioner, having thus been made out, it remains to be seen whether furnishing of security, as prayed, would be justified on the principles of balance of convenience, irreparable loss and on the indicia applicable to Order XXXVIII Rule 5 of the CPC. These considerations, apropos Section 9(1)(ii)(b) of the 1996 Act, are interlinked, and may, therefore, be examined together.*
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> > *102. Mr. Jeevan Ballav Panda did not, during his submissions, choose to refute the contentions, of the petitioner, as extracted hereinabove, and as contained in the petitioner and rejoinder. In my opinion, these averments, if correct, do make out a case for securing the amount, to which the petitioner claims to be entitled, so as to ensure that the arbitral award, if ultimately passed in favour of the petitioner, is not rendered a futility.*

103. At this juncture, I deem it appropriate, at the cost of repetition, to emphasise that, in directing furnishing of security, this Court is not adjudicating the entitlement, of the petitioner, to the amount directed to be secured, with any modicum of finality. Were any such attempt to be made, this Court would be trespassing on the jurisdiction of the arbitrator, to arbitrate on the dispute, which is clearly impermissible. All that this Court is required to determine, while examining a prayer relatable to Section 9(1)(ii)(b), is whether a case, for securing the amount in dispute in the arbitration, is, or is not, made out. Once the Court determines that the petitioner has an arguable case, and that the interests of justice requires securing of the amount, so as to render the award, if finally passed in favour of the petitioner, meaningful and capable of enforcement, the Court is not only empowered, but is also obligated, to secure the amount. The opinion of the Court, in such a case, has to be understood as expressly limited to determining the issue of whether the amount is required to be secured or not, in the context of Section 9, and is not to be regarded as an expression of opinion on merits, regarding the entitlement of the petitioner to the said amount The Arbitral Tribunal would, therefore, proceed to decide the petitioner's entitlement, uninfluenced by any observations, in that regard, contained in this judgement."

(Emphasis Supplied)

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30. *In conclusion it can be said that prima facie it appears that the building in question was not completed within 12 months of the MoU dated 04.10.2017 as the Respondents applied for the Occupation Certificate after expiry of one year i.e. on 26.11.2018 and obtained it from the Competent Authority only on 06.09.2019. It also prima facie appears that the assured returns scheme does not fall within the definition of a "deposit" as per section 2(4) of the BUDS Act. The pendency of 25 cases against the Respondents with respect to the same project on behalf of similarly placed allottees is admitted by the Respondents and there is every possibility of the Respondents going into liquidation, and in that case the award, if any, in favour of the Claimant would merely be a paper award incapable of being enforced. The Balance of Convenience of the case rests in favour of the applicant and if the amount sought to be secured is not directed to be secured, it would certainly jeopardize the applicant. I do not find any reason to decline the prayer to direct the respondent no. 1 to secure the amount in dispute. Therefore, the Respondent no. 1 is directed to secure the amount of Rs. 1,42,35,279.50 within 2 weeks by way of a FDR of any bank or an*

irrevocable bank guarantee. Nothing said or addressed in this order by the Arbitral Tribunal shall have any bearing on the merits of the case during final adjudication." [Emphasis Supplied]

11. The above-extracted portion of the Impugned Order reveals the error therein. Apart from finding a strong *prima facie* case in favour of the Respondent, the only factor which prevailed upon the Arbitral Tribunal to direct furnishing of the security, was the pendency of 25 cases against the Appellant with respect to the same project, on behalf of the similarly placed allottees. Basis the large volume of cases, it was assumed that there exists a likelihood of the Appellant going into liquidation, as a consequence of financial liabilities assumed from losing such cases. The Tribunal has also assumed that the since the allottee (Respondent herein) has an arguable case, the interests of justice require securing of the amount. These are assumptions not founded on any cogent material.

12. It was imperative for the Tribunal to examine if the Respondent had made the pleadings and proved that it had a *prima facie* case in its favour, and also that the Appellant was in the process of dissipating or removing its assets/funds so as to render the Award nugatory. The law on the above aspect, as cited by both the parties in judgments noted above, is now well established. This Court in ***BMW India Private Ltd v. Libra Automotives (P) Ltd.***, (*supra*), has held that an Order securing the amount claimed in arbitration, prior to the passing of the final award, has to be passed keeping the well-known principles provided under Order XXXVIII Rule 5 of CPC in mind. In ***Dinesh Gupta*** *(supra)*, the Court held that while exercising jurisdiction under Section 17(1)(ii)(b) of the Act, though the Arbitrator is

not strictly bound by the confines of Order XXXVIII Rule 5 of CPC, but he is proscribed from acting in a manner completely opposite thereto.

13. This aspect, in the Impugned Order, is entirely absent. No emergent apprehension was made out from the mere pendency of numerous cases against the Appellant, and it does not constitute a sufficient basis to apprehend that the award, if made against it, would be rendered infructuous. No other material has been placed on record to demonstrate that the Appellant would go into liquidation. No material was placed to suggest that the Appellant is disposing of any part of the Property, much less removing itself or its assets out of India so as to create a possibility of frustrating the monetary award that may be passed in favour of Respondents in the future upon the conclusion of arbitral proceedings.

14. Lastly, it must also be noted that the Appellant No. 1 has stated that it is willing to hand over the possession of the Property to the Respondent, notwithstanding the fact that it has made a counter-claim. During the course of arguments, counsel for the Appellants has clarified that pending adjudication of *inter se* monetary claims, they would have no objection in executing the transfer documents in respect of the Property in favour of the Respondent. However, the Respondent has declined this offer, for the reasons best known to him, insisting instead on payment of assured returns which according to him are due, notwithstanding the said offer. From the above, it cannot be said that there is a convincing possibility of irreparable harm being caused to the Respondent, if the amount in dispute was not secured.

15. For the foregoing reasons, the direction to the Respondent to secure the amount by way of FDR or irrevocable bank guarantee, as directed in the Impugned Order, is set aside. The Impugned Order is modified to that extent.

16. The appeal is allowed in the above terms. All pending applications are disposed of.

17. Needless to say, all contentions which may be available to either party are kept open. The observations in the present order shall treated to be confined to the aspect of deciding the application under Section 17 of the Act, and shall not have any bearing on the final adjudication of claim liability in arbitration.

SANJEEV NARULA, J

APRIL 19, 2022
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(*corrected and released on 24th April, 2022*)