

M/s Jaideep Devloper & Buildtech Pvt. Ltd.

Vs.

Vinish Mithal & Ors.

OMP (I) (Comm) no. 38/2020

4-7-2020

Present:- Dr. Amit George and Sh. Nitesh Mehra, advocates for petitioner company

The proceedings were conducted through video conferencing about 35 minutes as courts are closed till 15-7-2019 as per directions of Hon'ble High Court due to Coved-19 pandemic. I have heard counsels for petitioner company who also referred para no. 17 of case law **V.K. Sood Engineers vs. Northern Railways 2017 SCC Online Del 9211** and argued that principles of Order 39 Rule 1 & 2 CPC are akin to Section 9 of the Act.

In this petition under Section 9 of Arbitration & Conciliation Act, petitioner company is seeking interim relief for staying the construction and development of the property in question being carried out by the respondents and for maintaining status quo of the same. Relief is also sought for restraining the respondents from creating any third party interest in this property.

As per averments made in para no. 1 of the petition, respondents are raising unauthorized construction in the property no. 27/19, Shakti Nagar, Delhi. In support of these allegations some photographs are also filed which merely shows that boundary wall has been constructed and there is no other construction upon this property of any kind.

This property in question belongs to the respondents and they entered into a collaboration agreement on 7-11-2014 with the petitioner company for its construction and development after demolition of old structure. It is alleged that petitioner company paid Rs. 25 lakhs to the respondents and started digging basement in the property but some dispute arose and work was stopped.



Petitioner spent Rs. 2 lakhs on the digging work of basement by that time. As the collaboration agreement became infructuous, so petitioner demanded Rs. 27 lakhs back from the respondents but it was not given. Meanwhile some criminal litigations also started between the parties. As the collaboration agreement was containing arbitration clause, so the petitioner approached Hon'ble High Court where vide order dated 26-11-2018, a retired District & Sessions Judge Smt. Bimla Makin was appointed as sole arbitrator. During pendency of proceedings before Id. Arbitrator, a settlement arrived at between the parties full and final at Rs. 18 lakhs payable by the respondents to the petitioner company in two installments and MOU dated 16-8-2019 was prepared in this regard.

On the basis of this settlement vide MOU dated 16-8-2019, at joint request award was passed on 4-9-2019 by Id. Arbitrator. As per para no. 13 of the award, cheque of Rs. 5 lakhs bearing no. 507609 drawn on Vaish Cooperative Bank, Kamla Nagar branch was given to the petitioner and another postdated cheque no. 507610 of Rs. 13 lakhs drawn on same bank was also given by respondents to the petitioner. The MOU dated 16-8-2019 was made a part and parcel of the award as Mark-P-1. Para no. 30 and 31 of the petition mention that both the cheques were post dated bearing dates of 15-9-2019 and 31-10-2019.

According to the petitioner company, though in the award dated 4-9-2019, it is mentioned that the both cheques have been given to the petitioner but infact no such cheques were handed over to it by respondents. Petitioner moved an application u/s 33 (1) (a) of the Arbitration and Conciliation Act for rectification of the award before Id. Arbitrator in this regard after about 4 months on 29-1-2020 but this application has not been disposed off by her till date despite various reminders. Petitioner mentioned in its application that words 'given' in para no. 13 of the award in context of the cheques should be changed as 'to be given' because respondents had not given both the cheques to it till date. It is also alleged that respondents are now raising unauthorized constructions in the property without making payment of Rs. 18 lakhs as settled. Thus,

petitioner company prayed for interim ex parte relief against respondents as mentioned above.

If the petition and other documents on record are taken into consideration, then it is clear that petitioner company had left no interest in the property in question and it is only interested in its Rs. 18 lakhs amount as per MOU. It is not the case of the petitioner that any charge, right or encumbrances was created upon the property in question for securing this settled amount, so in such circumstances no stay as prayed for can be granted. Moreover, para no. 6 of the Hon'ble High Court order dated 26-11-2018 also mentions that petitioner is not claiming any right in the property. This property belongs to the respondent and they have every right to deal with the same in any manner. They are at liberty to dispose off also to anyone being the rightful owner. Hence, they cannot be restrained from creating any third party interest in the same. Photographs placed on record simply reveal that respondents have only raised boundary wall to protect their property and no construction of any type is raised on it. Even if for the sake of arguments, it is presumed that they are raising any unauthorized construction over the same, then it is a matter to be looked into by Municipal Authorities and not by this court.

The award dated 4-9-2019 mentions that two cheques have been given to petitioner by the respondents (which are postdated bearing respective dates of 15-9-2019 and 31-10-2019 if para no. 30 and 31 of petition are taken into consideration). The MOU dated 16-8-2019 which was made a part and parcel of the award has been withheld from the court. This MOU could show whether the cheques have been handed over to the petitioner on the same day or were to be handed over later on before Id. Arbitrator or at any other occasion. No reason has been given why the MOU dated 16-8-2019 which was also a part of the award has not been produced. When petitioner company had not been handed over the cheques in question as alleged, then how it came to know that it was bearing dates of 15-9-2019 and 31-10-2019. In the award of Id. Arbitrator only reference of cheques number of given and dates is not

mentioned. Thus, the possibility cannot be ruled out that petitioner received both cheques may be on the date of execution of MOU. Non production of the material document i.e. MOU dated 16-8-2019 draws an adverse inference against the petitioner even at this stage. It is also not the case of the petitioner that copy of the award dated 4-9-2019 was not received by it on the same day or any other nearby date from Id. Arbitrator. When petitioner already knew that post dated cheques were bearing dates of 15-9-2019 and 31-10-2019 then why it took about 4 months time in moving the application under Section 33 (1) (a) before Id. Arbitrator for rectification of award with plea that it had not received those cheques at any time and award is mentioning wrong facts. Thus, in such situation no ground is made out at this stage to grant any interim relief as claimed by the petitioner company against the property belonging to the respondents in respect of which no charge or interest is created as a guarantee of payments on basis of record produced. Respondents being the owner of the property in question are at liberty to raise any construction as per law and to dispose off the same as per their wishes. Thus, prayer made by the petitioner for grant of exparte interim protection is hereby rejected.

Petitioner company also moved another application for urgent interim relief for giving directions to the Id. Arbitrator to dispose off its application dated 29-1-2020 under Section 33 (1) (a) of the Act within a specified period of time. It is not disclosed by the petitioner under which provision such application lies before this court. Id. Arbitrator has already passed an award and only application dated 29-1-2020 for rectification of alleged typographical mistakes in the award is pending. No allegations of any type including of bias or doubtful integrity or intentional delay are leveled against Id. Arbitrator by the petitioner company in this application or even in whole of the petition. Some Whatsapp message sent to Id. Arbitrator by the petitioner point out that due to certain personal problems in her family due to death of her sister and serious condition of her brother, she could not take up the application of the petitioner. This court maximum can humbly request Id. Arbitrator to dispose off the



application of the petitioner dated 29-1-2020 within reasonable time as may be possible according to her convenience but no specific directions/order can be given to her to decide the same within a particular time frame as prayed for. If despite it petitioner is not satisfied with the act of the Id. Arbitrator or its application is not decided within reasonable time, then the proper remedy lies before Hon'ble High Court only for change of Id. Arbitrator or giving some another directions as the Id. Arbitrator was appointed by Hon'ble High Court. No relief as claimed in this application for giving specific directions to Id. Arbitrator to decide the application within a specified period of time can be granted, so this application is hereby dismissed.

Issue simple notice of the petition to all the respondents for 24-8-2020 at 11 a.m. to be taken up through video conferencing if by that time courts are not opened. Notice be sent to the respondents through process server (if process serving agency has started doing work), speed post, e-mail and Whatsapp number of all the respondents and petitioner can take dasti notice also from the court. Petitioner is directed to produce the MOU dated 16-8-2019 also on next date. Respondents are directed to file reply of this petition online and supply advance copy to the counsel for the petitioner upon his email. Petitioner is also directed to file the hard copy of the complete petition in the court by next date, if the courts are opened.

Reader is directed to upload this order upon the website of the court. One copy of the order be sent to Id. Arbitrator Smt. Bimla Makin, Retired District & Sessions Judge for information.

(Ashwani Kumar Sarpal)

Dt.-4-7-2020

District Judge-Commercial-5

Central District, Delhi