PVR

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# ORDINARY ORIGINAL CIVIL JURISDICTION
# IN ITS COMMERCIAL DIVISION

## COMMERCIAL ARBITRATION PETITION (L.) NO.23500 OF 2021

Godrej Properties Ltd. ...Petitioner

V/s.

Goldbricks Infrastructure Pvt. Ltd. ...Respondent

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Dr.Birendra Saraf, Senior Advocate with Yash Nomaya, Samit Shukla, Karan Dhawan, Saloni Shah i/b. DSK Legal, for Petitioner.

Mr.Shyam Dewani with Mr.Chirag Chanani i/b. Dewani Associates, for the Respondent.

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CORAM : G. S. KULKARNI, J.

DATE : OCTOBER 13, 2021

JUDGMENT:

1. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act,1996 (for short '**the Act**') assailing an ex-parte order 8 October 2021 passed by the learned Sole Arbitrator on a Section 17 application filed by the respondent. By the impugned order, the learned Sole Arbitrator has granted ex-parte ad-interim reliefs in terms of prayer clauses (a), (b), (c) and (d) of the respondent's application, which read thus:

> (a) Restrain the Respondent and its agents, servants, employees, directors, officers, representatives and/or any one claiming through or under the Respondent, from dealing with, alienating, encumbering, creating third party rights or selling the unsold flats/inventories of Residential Zone-II in any manner whatsoever, without express/written permission or consensus of the claimant and sharing of the Gross Sales Revenue thereof with the Claimant in accordance

with terms agreed upon between the parties, pending adjudication of the present proceeding by the Hon'ble Tribunal;

b) Restrain the Respondent from deducting the alleged pending D. M. Fees towards 'Facilities Agreement' and 'Villa DMA' or any other claim/s from the Gross Sales Revenue of the unsold inventories or any other receivables from Flat purchasers in the Residential Zone-II Project, pending adjudication of its claims by the Hon'ble Tribunal and without express permission to the effect being granted by the Hon'ble Tribunal, in the peculiar facts and circumstances of the present case;

c) Direct the Respondent to disclose all the transactions made by it in respect of all the inventories of Tower 'F' or any other part of the Residential Zone-II, and also to provide copies of all Deeds, Sale Agreements etc. in respect of all such transactions, which are yet not provided by the Respondent to the Claimant;

d) Direct the Respondent to disclose all the actions performed/taken by it in pursuance to the Power of Attorney granted by the Claimant to the Respondent on 05/10/2012 in respect of the Residential Zone-II and not to use the said Power of Attorney for any purpose, whatsoever without express permission of the Claimant, in the facts and circumstances of the present matter, pending adjudication of the present dispute by the Hon'ble Tribunal ;"

2. The relevant facts are :- By an order dated 22 January 2021 passed by this Court in Commercial Arbitration Application (lodg) No.6975 of 2020, by consent of the parties, the learned Sole Arbitrator came to be appointed to adjudicate the disputes between the parties. The learned Sole Arbitrator entered arbitral reference. Applications under Section 17 praying for interim measures were filed by both the parties. On 8 September 2021 and thereafter on 12 September 2021, these Section 17 applications were reserved for orders, which are awaited.

3. It is the appellant's case that subsequent to 12 September 2021 there was an exchange of e-mails between the parties in regard to sale of unsold flats in Tower F in Residential Zone II and in regard to the DM Fees, facilities agreement, Villa DMA etc. On this backdrop, on 7 October 2021 at 6 p.m. the appellant received an e-mail, from the Advocates for the respondent, which was a copy of the email addressed by the respondent to the learned Arbitrator, enclosing therewith a second application being filed by the respondent under section 17 of the Act. The respondent recorded in the email that it was compelled to move such application for the reasons as set out in the said application. It was stated that the appellant was trying to arbitrarily sale the balance inventories of Tower 'F', without sharing the Gross Sales Revenue with the respondents. It was stated that the appellant was high-handedly threatening appropriation of the share of the respondent/claimant, towards the alleged pending D.M.Fees of "Facilities Agreement" and "Villa DMA", although the issue pertaining to the entitlement of the appellant was pending adjudication before the tribunal. By the said email on behalf of the respondent, the following request was made to the arbitral tribunal:-

> "Therefore, while tendering an apology for the inconvenience which is being caused to Hon'ble Tribunal, **the Claimant is requesting the Hon'ble Tribunal for fixing an early date for the hearing of the said application**, so that the Claimant is in a position to demonstrate to the Hon'ble Tribunal the illegalities on the part of the Respondent and request for grant of appropriate interim relief. (**emphasis supplied**)

4. The learned Arbitrator immediately on the next day i.e. on 8 October 2021 and suo moto, considered the respondent's section 17 application, even without hearing the respondent/applicant on the said application much less the appellant, and passed the following ex-parte order:-

> The arbitral Tribunal is in receipt of the **second application u/s. 17 of the A&C Act, 1996** filed by the **Claimant.**
>
> Let the Respondent file Reply to the application **in 10 days.** Subject to the reply being filed, the Tribunal can hear this application on **20.10.2021** from **11.30 am** to **1.30 pm and 2.30 pm to 4.30 pm.** Learned Counsel for the parties are requested to block the above date for hearing on the application and confirm to the undersigned if they are agreeable for such hearing. The date 23-10-2021 (time 5 to 7 pm) already appointed, may not permit hearing on this application being accommodated.
>
> The parties are aware that one application u/s. 17 A&C Act filed by the Claimant and two application u/s. 17 A&C Act filed by the respondent have been heard and the Order on the applications is under consideration of the Tribunal. Looking at the nature of the grievance raised in the application, an ad interim direction in terms of prayers (a), (b), (c), (d) of the application is granted ex parte which order shall remain in operation till the application is taken up for haring bi parte.
>
> The order is being granted ex-parte primarily persuaded by the consideration that the facts set out in the application call for status quo being maintained till the application is heard lest the delay in hearing should render the application itself infructuous."

5. Being aggrieved by the above ex-parte ad-interim order passed by the learned Sole Arbitrator on the respondent's section 17 application the appellants have filed, this appeal , under Section 37 of the Act.

6. Dr.Saraf, learned Senior Counsel for the appellant has made the following submissions:

(i) It is submitted that when the parties were already before the arbitral tribunal, it is a legitimate expectation of the parties and certainly of the appellant in the present facts, that the arbitral tribunal would hear the parties, before any order on any fresh Section 17 application was passed by the arbitral tribunal. It is submitted that this was a requirement in law as postulated under Section 18 read with sub-section (2) of Section 24 of the Act.

(ii) It is submitted that a perusal of the respondent's averments in the second Section 17 application would clearly demonstrate that it was never the prayer of the respondent to seek any ex-parte ad-interim order.

(iii) Placing on record a copy of the said e-mail dated 7 October 2021, the contents of which are discussed above, it is submitted that the only request made to the arbitral tribunal was that the arbitral tribunal should fix a date for hearing of the section 17 application.

(iv) It is submitted that it is alien to the arbitration jurisprudence and/or that it is not a practice in our country, that an arbitral

tribunal would pass exparte ad-interim orders or pass orders without notice to the parties involved in the arbitral proceedings. In supporting this submission, Dr.Saraf has submitted that there is an express departure from what has been adopted in the year 2006 under the UNCITRAL Model Law on International Commercial Arbitration (for short "**the UNCITRAL Model Law**"). In this regard reference is made to Section 2 of the 2006 amendment to the UNCITRAL Model Law, which was adopted by the Commission at its thirty-ninth session in 2006, to incorporate the provisions interalia on Interim measures and Preliminary orders by Section 2 thereof, whereby Article 17B providing for '*applications for preliminary orders and conditions for granting preliminary orders*' came to be inserted. Sub Article (1) of Article 17 B provided that unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested. Sub-article (2) provided that the arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party

against whom it is directed risks frustrating the purpose of the measure. Referring to these amendments to the UNCITRAL Model Law it is submitted that although an occasion arose for the Indian legislature to consider amending Section 17 in terms of what has been adopted under the UNCITRAL Model Law, the legislature did not accept such a change to be incorporated in Section 17 of the Act, as clearly seen from the 2015 Amendment Act as brought into effect from 23 October 2015 as also the subsequent 2019 Amendment Act.

(v) Dr.Saraf has also referred to the extract of Commentary of Michael W.Buchler and Thomas H.Webster from the Handbook of ICC Arbitration wherein the insertion of Article 17 B under the UNCITRAL Model Law, by the 2006 amendment, has been criticized on the ground that such provision is generally not available in most arbitration laws and therefore, there is an issue as to its enforceability.

(vi) Also regarding the approach which the arbitral tribunal is required to adopt in passing any interim order or ex-parte order, reliance is placed on the decision of the learned Single Judge in **Vendhar Movies Vs. S.Mukundchand Bothra.**[1]

1 2017 SCC OnLine Mad 13577

(vii) It is next submitted that even if it is assumed that an exparte ad-interim relief is prayed the requirements as prescribed by Order 39 Rule 3 of the Code of Civil Procedure need to be followed, which were also not satisfied by the respondent's application for any ex-parte orders, of the nature passed by the arbitral tribunal. In support of this contention reliance is placed on the decision of the Supreme Court in "**Shiv Kumar Chadha Vs. Municipal Corporation of Delhi & Ors."**[2].

(viii) It is thus submitted that the ex-parte order of a nature having such serious consequence ought not to have been passed without hearing the appellants and/or parties.

7. On the other hand Mr.Dewani, learned Counsel for the respondent in supporting the impugned order passed by the arbitral tribunal, has drawn my attention to the contents/averments as made by the respondent in the Section 17 application, to submit that, the cause to move such application, was to prevent the appellant to frustrate any orders which will be passed by the arbitral tribunal on the pending Section 17 application, as seen from the specific prayers made in the respondents section 17 application. He submits that the requirement of sub-rule (3) of Order 39 of the CPC also stood

2 (1993)3 SCC 161

satisfied as per the averments in paragraphs 49 and 52 of the application, to the effect that if the reliefs as prayed for are not granted by the arbitral tribunal, and if an award is made, it would be rendered a paper award as also there is likelihood of multiplicity of proceedings. Mr. Dewani has also referred to the contents of the impugned order to submit that the learned Arbitrator has indicated a clear concern, that the parties were heard earlier on the initial Section 17 applications and orders on such applications were under consideration of the arbitral tribunal. It is submitted that in such context, looking at the nature of the grievance as raised in the Section 17 application, the learned Arbitrator has recorded that he was *"persuaded by the consideration that the facts set out in the application call for status quo being maintained till the application is heard."* It is Mr.Dewani's submission the parties would now be heard by the arbitral tribunal on the adjourned date of hearing, and the parties would be at liberty to assert their respective pleas before the arbitral tribunal. He has accordingly prayed for dismissal of this appeal.

**Discussion and Conclusion**

8. I have heard learned Counsel for the parties, as also I have perused the record and the impugned ex-parte order passed by the arbitral tribunal. The issue which arises for consideration is as to whether in the facts of the case, was it appropriate for the learned Arbitrator to pass an ex-parte ad-

interim order on the Respondent's Section 17 application ?

9. At the outset the scheme of the Act and primarily the provisions of Act falling in Chapter V which deals with "the Conduct of the Arbitral Proceedings" are required to be seen. The relevant provisions in the present context are the provisions of Section 18 which provides that the parties shall be treated with equality and each party shall be given a full opportunity to present his case; Section 19 which provides for determination of rules of procedure and Section 24 which provides for 'Hearings and written proceedings'.

10. On a reading of these provisions it can be gathered that the Act postulates that in conduct of the arbitral proceedings the fundamental requirement would be that the parties are not only treated with equality but each party 'shall be' given a full opportunity to present his case. This would be more imperative when the parties are already before the arbitral tribunal. Sub-section (2) of Section 19 recognizes the role of the parties when it provides that the parties are free to agree on the procedure to be followed by the tribunal in conducting its proceedings, which places an arbitral tribunal in a different position from that of a Court, when it confers such choice on the parties. The crucial provision however, is of Section 24.

Sub-Section (2) of Section 24 interalia mandates that the parties 'shall be' given sufficient advance notice of 'any hearing',. The provisions of Section 18, 19 and 24 would be required to be read in conjunction, as there is a common thread passing through these provisions in relation to the conduct of the arbitral proceedings, which is to the effect that the parties need to be fairly treated at all stages of the arbitral proceedings, and an adequate/ sufficient opportunity is made available to them to present their case on any proceedings before the arbitral tribunal, which would also include before any order ad-interim, interim or final is to be passed by the arbitral tribunal. In my opinion such provisions certainly make it incumbent upon the arbitral tribunal to give sufficient notice of any hearing to the parties before it. If this is what is plainly reflected from the said provisions of the Act, it would be unknown to law and quite peculiar for an arbitral tribunal to pass an ex-parte ad-interim order, on the mere filing of a Section 17 application, without hearing even the party making the application, much less the contesting respondent, who would certainly be affected and/or prejudiced by an ex-parte order. It may be that the arbitral tribunal is of a firm opinion in the facts of a given case, that some urgent orders are required to be passed to protect the arbitral interest of the parties, however, fairness of the procedure and more particularly as reflected by the provisions, as discussed above, would not permit an arbitral tribunal to pass an exparte

order on a section 17 application and moreso when the parties are sufficiently before the arbitral tribunal.

11. It is seen that the Indian legislature has kept away and/or not accepted as to what was inserted by the 2006 Amendment in the UNCITRAL Model Law on International Commercial Arbitration. It clearly appears that under the UNCITRAL Model Law, upto the year 2006, there was no provision for any preliminary orders to be passed in arbitral proceedings. However a departure was made when the following amendments were inserted in the year 2006 by insertion of Chapter IV-A, providing for 'interim measures and preliminary orders' which reads thus:-

> CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS
>
> (*As adopted by the Commission at its thirty-ninth session, in 2006)*
>
> *Section 1. Interim measures*
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
>
> (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
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> (a) Maintain or restore the status quo pending determination of the dispute;
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
>
> *Article 17 A. Conditions for granting interim measures*

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that :

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweights the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

*Section 2. Preliminary orders*

*Article 17 B Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not."

12. The amendment of such nature as incorporated under the UNCITRAL Model Law, does not appear to be a common feature in the arbtiral jurisprudence prevailing in many countries, as observed in the commentary of Michael W. Buhler and Thomas H. Webster titled 'Handbook of ICC

Arbitration" on the subject "ex parte orders". The learned authors have observed such amendment as incorporated in the UNCITRAL Model Law, to be the most controversial part of the modification. They observe that an ex parte order as passed under the amended provisions of the UNCITRAL Model Law, does not appear to reflect the accepted practice in the major centres of arbitration. It is stated that a tribunal needs to carefully consider whether it has the power to issue an ex parte preliminary order, in particular under the law of the place of arbitration. It is also observed that such provisions are not generally available in most arbitration laws and therefore, there is an issue as to enforceability of such orders. It is profitable to reproduce the relevant extract of the said commentary which reads thus:-

> **23-21** The most controversial part of the modification to the UNCITRAL Model Law relates to exparte orders. Article 17 B provides as follows:-
> "(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
> (2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
> (3) The conditions, defined under Article 17A apply to any preliminary order, provided that the harm to be assessed under Article 17A(1)(a), is the harm likely to result from the order being granted or not."
>
> 23-22 The initial question is whether the Rules constitutes an "agreement to the contrary" so as to preclude ex parte orders. Despite various procedural safeguards, the better view appears to be that that is not the case. However, with respect to ex parte or preliminary orders, the UNCITRAL Model Law does not appear to reflect accepted practice in the major centres of arbitration. Therefore, a Tribunal would have to carefully consider whether it has the power to issue an

> ex parte preliminary order, in particular under the law of the place of arbitration.
>
> 23-23 A second question is whether the structure of the Rules is such as to provide an indication that a Tribunal should not act ex parte. In this respect, the general, albeit perhaps conservative reaction is that is is always better to hear both parties. One of the reasons for this is that, despite the obligation under Art. 17 for example of disclosure by the applying party of the relevant circumstances, there is not as yet a well-settled concept in international arbitration such as the requirement of "full and fair disclosure" as understood in England for example. In addition, hearing both sides permits the Tribunal to apprehend or fully appreciate arguments to which it may not otherwise give adequate weight.
>
> 23-24 Another question is whether a preliminary order would be effective in the circumstances of the case and how the Tribunal should act after the preliminary order has been issued. The effectiveness of a preliminary order will in many instances depend on enforceability in state courts, a subject that is dealt with in the UNICTRAL Model Law. As regards the procedure to be followed after the preliminary order has been issued. Art. 17C of the UNCITRAL Model Law provides overall guidance. However, a corresponding provision is not generally available in most arbitration laws and therefore there is an issue as to enforceability."

13. Now coming to the contention as urged by Mr.Dewani pointing out several paragraph of the Section 17 application, that the respondent's application fulfilled the need for an ex parte ad-interim order. It is difficult to accept Mr.Dewani's contention on a reading of such application. In my opinion, the application certainly did not reflect any glaring extraordinary situation for passing of an ex-parte order of the nature passed by the arbitral tribunal. Even assuming that there was jurisdiction to pass an ex-parte ad-interim order (when in there is none), such order was certainly not warranted considering the nature of the Section 17 application as filed. The

averments in the application and more particularly the averments in paragraphs 49 and 52, as pointed out by Mr. Dewani does not inspire confidence that any case of any extreme urgency for passing of an ex parte order was made out, without issuance of a notice and hearing being granted to the appellants. Moreover, the nature of the reliefs as prayed for as also granted by the impugned order, show that these are drastic reliefs which necessarily ought to have been granted after hearing the parties. The reliefs are also not of a nature, that the respondent in the absence of an exparte order would be placed in such a prejudicial position that no restitution of such petition was possible.

14. Dr.Saraf's submission relying on the provisions of Rule 3 of Order 39 of the CPC that an arbitral tribunal before granting an injunction ought to have issued a notice, in my opinion, stand recognized by the provisions of sub-section (2) of Section 24 of the Act. However, in view of the observations made above, the proviso which deals with the power conferred on the Court to pass ex parte orders, cannot be applied to arbitral proceedings, in view of the clear provisions of sub-section (2) of Section 24 read with Section 18 of the Act. Thus, even if the arbitral tribunal is recognized to have the same power for making orders as that of the Court, for the purposes of and in relation to any proceedings before it, due

meaning to the provisions of sub-section (2) of Section 24 read with Section 18 would be required to be given when it prescribes that a party shall be given sufficient advance notice of any hearing and further qualified with an obligation of the tribunal to treat all the parties equally and that each party shall be given a full opportunity to present its case, which is required to be recognized to be applicable at all stages of the proceedings before the arbitral tribunal. In view of this conclusion, I do not find it necessary to discuss the decision in **Shiv Kumar Chadha Vs. Municipal Corporation of Delhi & Ors.** (supra) as relied by Dr.Saraf which lays down the principles of law in regard to applicability of sub-rule (3) of Order 39 emphasizing that reasons to be recorded by the Court to be the basic requirement of the proviso to sub-rule (3) of Order 39.

15. In so far as the decision in **Vendhar Movies Vs. S.Mukundchand Bothra** (supra) is concerned, the learned Single Judge of Madras High Court has observed that proper hearing is required to be granted to the parties in arbitral proceedings. In this case the Court was examining the contention that the arbitral tribunal ought not to have proceed ex-parte against a party to the proceedings. The decision also examines a situation as to when the arbitral tribunal would proceed ex-parte against a party, when despite notice the party does not participate in the arbitral proceedings. Such are

not the circumstances in the present case. Thus the principle as discussed in the said decision may not be applicable in the facts of the present case.

16. Be that as it may, it appears that even the respondent was not heard before passing the ex parte ad-interim orders and only on perusal of the averments in the application, such an order has been passed by the arbitral tribunal. This could have been certainly avoided by placing the respondent's application for hearing even urgently, with notice to both the parties.

17. As a consequence of the above discussion, the following order would meet the ends of justice:-

**ORDER**

(I) The impugned order dated 8 October 2021 is set aside.

(II) The respondent is at liberty to move the arbitral tribunal on its second Section 17 application, with notice to the appellant, even before the returnable date assigned by the arbitral tribunal.

(III) The arbitral tribunal after hearing the parties on the respondent's second Section 17 application, may pass appropriate ad-interim or interim orders.

(IV) All contentions of the parties are expressly kept open.

(V) Disposed of in the above terms. No costs.

(VI) Needless to observe that the observations as made above, are in the context of the challenge as raised in the present proceedings and in no manner are a reflection of anything on the merits of the respondent's Second Section 17 application.

(G. S. KULKARNI, J.)