Punjab and Haryana High Court

RAJIV NARAIN RAINA, J.

Mgf Developments Limited v. Emaar Mgf Land Limited

ARB-ICA No.3 of 2019 (O&M) AND ARB-ICA No.4 of 2019 (O&M)

28.11.2019

(i) Arbitration and Conciliation Act, 1996, S. 9 – The jurisdiction in international arbitration commercial disputes to pass orders under section 9 of the Act lies exclusively with the High Court is not disputed – The principles applicable in the matter of grant of injunctions in arbitration cases are broadly from the principles drawn from Order 39 Rules 1 & 2 of the Code of Civil Procedure, 1908 in the matter of grant of temporary injunctions which are roughly similar through the avenue of section 9 of the Act of 1996 and are to be dealt with in similar fashion – Grant of an injunction or interim measure or its refusal remains guided by the three cardinal and well accepted principles of prudence attaching to courts for consideration at the initial stage of litigation guiding that the three ingredients must reasonably co-exist before any ad interim order issues forth for or against the defendant, a somewhat similar position in which the parties are placed today – Court has also to refrain from making any comment on the merits of the case to avoid any prejudice to the parties or pre-judging the issues – These are the limitations in which the consideration has to take place for passing interim orders of restraint or its refusal. [Para 3]

Held, balance of convenience in my view lies in favour of the Applicants by preserving ad interim the corpus/subject matter in the status quo and to restrain parties from changing its character irretrievably, thereby, creating complications for the proposed Arbitral Tribunal when it comes into existence, which predictably is around the corner, for them to reverse if interim order is refused and third party rights allowed to be created. This will unnecessarily expand the scope of the arbitration by permitting creation of fiats accomplis leaving no option to the Tribunal but to accept them. I would not let parties go that far afield before the Arbitral Tribunal starts work on the disputes and considers for itself an interim or permanent measure in their collective wisdom pending arbitration. This order is only for the time being. Besides, the Applicants have a prima facie case in their favour for grant of an interim measure, as at present advised, looking to the overall balance of convenience that non-grant may entail and tilt the scales in favour of the respondents even before the arbitration takes place. Lastly, if injunction is refused, the loss will be irretrievable for the Applicants and much less in impact to the respondents who resist the section 9 order which if not issued today will make it be very hard to retrieve in the end for the Tribunal in moulding the relief with the introduction of outsiders, if not impossible, to compensate the successful party in terms of money as against the losing one; especially in a commercial contract of the scale which is up for consideration. [Para 18, 19, 20]

(ii) cpc, Order 16 Rule 5 , Order 6 Rule 17 – Affidavit – Defect in verification clauses – Defects are curable – There were noticeable defects in the verification clauses in the affidavits in support of the applications – Amended through applications filed under Order 6 Rule 17 of the CPC – Allowed, the defects being curable – Objections of the respondents that they are still defective being not in conformity with the provisions of Order 16 Rule 5 of the CPC stand overruled for substantial compliance to make way for hearing parties on the substance of the dispute. [Para 9]

(iii) Arbitration and Conciliation Act, 1996, S. 9 – Plea that an injunction should not go to a party who has failed to raise a dispute with the respondent and has not appointed an arbitrator before approaching the Court in a section 9 application, showing lack of bona fides – There are judgments no doubt, indicating this legal position but the Court evolved principle it is not a hard and fast rule –

When there is long delay between the stay order and the resort to litigation through arbitration the principle is salutary – But the principle is not in full bloom in this case – No doubt, court ought not to pass a temporary injunction against a party and expect the aggressor not to appoint an arbitrator or avoid it endlessly only to continue yielding the fruit of the order without any consequential orders or an adjudication of the dispute on merits through arbitration taking place – Nevertheless, the directions which I propose to pass take care of this situation by a compulsive pinning down of the warring parties to promptly appoint their respective arbitrators under the ICC rules by an undertaking to the Court so that the adjudication of the dispute takes place speedily and effectively, which was the principal fear harboured by the respondents and to this extent they are absolutely right.[Para 21]

Mr. Akshay Bhan, Senior Advocate, with Mr. A.S.Talwar and Mr. Akhilesh Barak, Advocates, for the petitioners in ARB-ICA No.3 of 2019. Mr. Vikas Bahl, Senior Advocate, with Mr. Omar Ahmed, Mr. Vikram Shah, Mr. Kamaljeet Singh, Mr. Amandeep Singh Talwar, Ms. Drishtana Singh and Ms. Priyanka Kansal, Advocates, for the petitioner in ARB-ICA No.4 of 2019. Mr. Ashok Aggarwal, Senior Advocate, with Mr. Saurabh Gautam, Mr. Mayank Mishra, Ms. Gaurav Arora and Mr. Ashish Joshi, Advocates, for respondent No.1 in both cases. Mr. Sumeet Mahajan, Senior Advocate, with Mr. Rohit Khanna and Mr. Saksham Mahajan, Advocates, for respondents No.5 & 7 6 in ARB-ICA No.3 of 2019 and for respondents No.5 to 19 in ARB-ICA No.4 of 2019.

****

RAJIV NARAIN RAINA, J. – This order disposes of ARB-ICA No.3 of 2019 (O&M) and ARB-ICA No.4 of 2019 (O&M).

2. The immediate concern in which the effective order is to be passed is in ARB-ICA No.3 of 2019 and ARB-ICA No.4 of 2019 (O&M). The main dispute which has arisen between the parties springs from the Litigation Indemnity agreement (LIA) dated 13.04.2016 confined to ARB-ICA No.3 of 2019 and Warranties Indemnity Agreement (WIA) dated 13.04.2016 confined to ARB-ICA No.4 of 2019 in applications filed under section 9 of the Arbitration & Conciliation Act, 1996 for interim measures against the respondents due to issuance of letters dated 17.09.2019 giving rise to the present cause of action. This is resisted by the respondents pleading that an injunction should not be issued in favour of the Applicants.

3. The jurisdiction in international arbitration commercial disputes to pass orders under section 9 of the Act lies exclusively with this Court is not disputed. The principles applicable in the matter of grant of injunctions in arbitration cases are broadly from the principles drawn from Order 39 Rules 1 & 2 of the Code of Civil Procedure, 1908 in the matter of grant of temporary injunctions which are roughly similar through the avenue of section 9 of the Act of 1996 and are to be dealt with in similar fashion. Grant of an injunction or interim measure or its refusal remains guided by the three cardinal and well accepted principles of prudence attaching to courts for consideration at the initial stage of litigation guiding that the three ingredients must reasonably co-exist before any ad interim order issues forth for or against the defendant, a somewhat similar position in which the parties are placed today. Court has also to refrain from making any comment on the merits of the case to avoid any prejudice to the parties or pre-judging the issues. These are the limitations in which the consideration has to take place for passing interim orders of restraint or its refusal.

4. Heard at length the Senior Advocates Mr. Akshay Bhan and Mr. Vikas Bahl for the applicants and Mr. Ashok Aggarwal and Mr. Sumeet Mahajan for the contesting respondents on caveat assisted by their respective battery of counsel for final disposal of the cases with consent of parties and without exchanging any further pleadings as are not found necessary.

5. These are applications brought under Section 9 of the Arbitration & Conciliation Act, 1996 for interim

measures and for issuance of a restraint order against the respondents following the cancellation of the agreements by them on 17.09.2019.

6. The disputes between the parties i.e. MGF (Applicant) and Emaar MGF (Respondent) and its partners, which are the two companies coming into separate existence on demerger of the parent company split into two, and arise out of two contracts, namely, LIA and WIA which dispute in ARB-ICA No.3 of 2019 and ARB-ICA No.4 of 2019 respectively is ripe for settlement through international arbitration as the parties have failed to reconcile their differences. ARB-ICA No.3 of 2019 concerns the Litigation Indemnity Agreement (LIA) dated 13.04.2016 represented by Mr. Akshay Bhan, Senior Advocate while the companion case (ARB-ICA No.4 of 2019) involving WIA covering liabilities as per the agreement, if they arise, filed by the same company, is led by Mr. Vikas Bahl, Senior Advocate.

7. The agreements contain an arbitration clause but an Arbitration Tribunal is not in the picture yet.

8. These two applications were filed on 02.11.2019 in this Court.

9. There were noticeable defects in the verification clauses in the affidavits in support of the applications. Time was taken by the applicants to remove them by amending the applications through applications filed under Order 6 Rule 17 of the CPC. The misc. applications have come up today for hearing with the main cases and by this order they have been allowed, the defects being curable. The amended applications under section 9 of the Act are taken on record. Objections of the respondents that they are still defective being not in conformity with the provisions of Order 16 Rule 5 of the CPC stand overruled for substantial compliance to make way for hearing parties on the substance of the dispute.

10. Emaar MGF in on caveat resisting passing of any stay order represented for advancing submissions by Mr. Ashok Aggarwal, Senior Advocate contesting the applications for any interim interference. Land Owning Companies are represented by Mr. Sumeet Mahajan, Senior Advocate.

11. Respondent Emaar MGF and the respondent Land Owning Companies and the arrangement between them are in common interest against Applicant/s MGF in opposition to the application/s under section 9 of the Act.

12. As per the agreement MGF-Applicant is the indemnifying party. Emaar MGF is the indemnified party.

13. Emaar MGF is a company holding a building contract signed by the parties to build and raise constructions on various real estate properties in different locations spread over more than one State in India and described in a schedule called ‘Category B'. The disputes in the LIA and the WIA cases are confined to ‘Category B' scheduled properties, as mentioned in separate letters dated 17.09.2019.

14. Respondents claim to have paid off the amounts decreed by Courts and Consumer Disputes Commissions etc. against them in hundreds of cases involving several hundred crore rupees. Parties to and in the agreements have agreed to fix 39.89% as the indemnified sum of monies in sharing of the total costs of litigation and pay offs likely to be incurred by the judgment debtor Emaar MGF to the extent of indemnity to satisfy the claims of the decree or award holders who are/were the prospective owners of dwelling units and the commercial property etc. agreed to be raised by the parties on sites scheduled in ‘Category B' for their commercial interests.

15. The cause of action is an email letter from Emaar MGF/the respondent Land Owning Companies sent to the Applicant MGF unilaterally cancelling the contractual-agreements on 17.09.2019 without notice.

16. Narration of facts and events beyond this point and all the acts and conduct of the parties and the material correspondence exchanged between them by e-mail etc. prior to and after the cancellation is not necessary for the purposes of deciding the relevant application. Those documents have been read out extensively by the

senior counsel and relied on by one or the other of the parties including the material terms and conditions of the contract relevant to the facts-in-issue during the course of prolonged hearing. A view on them need not be taken or the documents adverted to form an opinion one way or the other, in order to refrain from stepping out of the confines of section 9 of the Act by expressing any opinion on them but those are kept in mind while considering broadly the entire question of grant of appropriate interim measures to balance the competing interests of the parties keeping in view that they will shortly be before the Arbitral Tribunal where not only the merits will be canvassed but also interim measures considered with which the life of this order will be coterminous for the arbitrators to make an order changing or continuing with the interim measures in this order granting a temporary injunction.

17. To disclose briefly the understanding of this Court on the totality of facts and circumstances presented and assimilated as far as possible at the prolonged and rambunctious hearing of the senior counsel which has led to the order is that the balance of convenience in my view lies in favour of the Applicants by preserving ad interim the corpus/subject matter in the status quo and to restrain parties from changing its character irretrievably, thereby, creating complications for the proposed Arbitral Tribunal when it comes into existence, which predictably is around the corner, for them to reverse if interim order is refused and third party rights allowed to be created. This will unnecessarily expand the scope of the arbitration by permitting creation of fiats accomplis leaving no option to the Tribunal but to accept them. I would not let parties go that far afield before the Arbitral Tribunal starts work on the disputes and considers for itself an interim or permanent measure in their collective wisdom pending arbitration. This order is only for the time being.

18. Besides, the Applicants have a prima facie case in their favour for grant of an interim measure, as at present advised, looking to the overall balance of convenience that non-grant may entail and tilt the scales in favour of the respondents even before the arbitration takes place.

19. Lastly, if injunction is refused, the loss will be irretrievable for the Applicants and much less in impact to the respondents who resist the section 9 order which if not issued today will make it be very hard to retrieve in the end for the Tribunal in moulding the relief with the introduction of outsiders, if not impossible, to compensate the successful party in terms of money as against the losing one; especially in a commercial contract of the scale which is up for consideration.

20. It cannot also be lost sight of by court that the ultimate beneficiaries are going to be private investors and dwelling unit hunters who wait expectantly the construction and possession of their proposed homes and business premises, parks, walkways and other facilities of the township proposed to come up in different locations pan-India under the subject agreements. Inordinate delay in construction will seriously endanger and frustrate the dreams that they have already built for themselves as a legitimate expectation. They are not before the Court nor will be in arbitration but they are the suffering and the actually affected parties for whom the project has been envisioned and proposed to be created for the future, notwithstanding the high-stake commercial interests of the litigating parties embroiled in the dispute. One cannot forget about the end users of properties when they come up at the expense of luxury litigation. Though for them it matters little who constructs so long as the buildings are robust, well appointed and of lasting value. But parties seem to forget the interest of the person seeking shelter of homes and setting up business in offices which is bound with the fate of the disputing parties.

21. This is despite Mr. Ashok Aggarwal's vehement contention hammered throughout the hearing that an injunction should not go to a party who has failed to raise a dispute with the respondent and has not appointed an arbitrator before approaching the Court in a section 9 application, showing lack of bona fides. There are judgments no doubt, indicating this legal position but the Court evolved principle it is not a hard and fast rule. When there is long delay between the stay order and the resort to litigation through arbitration the principle is salutary. But the principle is not in full bloom in this case. No doubt, court ought not to pass a temporary injunction against a party and expect the aggressor not to appoint an arbitrator or avoid it endlessly only to

continue yielding the fruit of the order without any consequential orders or an adjudication of the dispute on merits through arbitration taking place. Nevertheless, the directions which I propose to pass take care of this situation by a compulsive pinning down of the warring parties to promptly appoint their respective arbitrators under the ICC rules by an undertaking to the Court so that the adjudication of the dispute takes place speedily and effectively, which was the principal fear harboured by the respondents and to this extent they are absolutely right.

22. Accordingly, for the reasons discussed above, ARB-ICA No.3 of 2019 and ARB-ICA No.4 of 2019 are disposed of. Sequitur, parties to take notice and act lawfully in the terms of the five directions issued:

(i) The petitioning Applicant shall be bound to invoke the Arbitration Clause and initiate the International Arbitration proceedings in terms of the Arbitration clause in the Litigation Indemnity Agreement (LIA) dated 13.04.2016 and Warranties Indemnity Agreement (WIA) dated 13.04.2016 to resolve the ensuing lis by taking steps positively within 14 days from the date of receipt of certified copy of this order, failing which the present interim order shall stand vacated automatically.

(ii) In view of the direction above given today, the Court requires the Applicant to propose the name of their Arbitrator in terms of the International Chamber of Commerce Rules of Arbitration (ICC Rules). The respondents on their part also undertake to propose the name of their Arbitrator in accordance with the ICC Rules with both the parties acting within the time-frame specified in those rules.

(iii) The parties shall not create 3rd party rights and shall maintain the corpus subject-matter of the dispute in the status quo and the respondents will not change the Developer/Builder till the matter is before the Arbitral Tribunal and it is seized of the dispute and until the parties have applied for any interim measure to be taken under Section 17 of the Arbitration and Conciliation Act, 1996 or the ICC Rules, as the case may be, and till the interim request is decided by an order in writing after hearing the parties to the dispute. Needless to say, the interim order passed today will remain subject to any further order(s) that may be passed by the Arbitral Tribunal when in seisin of the LIA and WIA dispute.

(iv) Also needless to say, the Tribunal may consider the application for interim relief filed by the Applicant-petitioners or the respondents, as the case may be, and it shall be at liberty to continue with, or modify, vary and vacate this interim order after hearing the parties on a consideration of the respective submissions likely to be addressed, in case pressed, and make such interim arrangements as they may devise appropriate till the final award is made.

(v) I would not dare to remind the learned Arbitrators who may be appointed to enter upon and adjudicate the disputes and differences between the parties that they would deal with the Application by any of the parties for interim measures, and if any such plea is submitted for consideration, then the Tribunal would be at liberty to consider the application without being influenced or burdened by the present order passed by this Court, as the purposes of the two were and are entirely different since the Tribunal can speak on the merits of the case. They may pass such further orders as are deemed fit in the facts and circumstances on the interim arrangement made today.

23. Parties are left to bear their own costs of this litigation with the further direction that the expenses incurred throughout the present litigation will not be passed on to the end users of the dwelling units and the investors in realty to their apparent detriment waiting when the residential buildings, towers and constructions are likely to be raised on the lands lying beneath the dispute falling in ‘Category B' properties in the Schedule to the Litigation Indemnity Agreement (LIA) and Warranties Indemnity Agreement (WIA) come up on completion of the project in the uncertain future. If the expenses are passed to them or sought to be recovered from them, the aggrieved persons are at liberty to apply to this Court in this disposed of matter through an application for appropriate directions for redressing their grievance. This order shall be put to

public notice by both the parties so that it may come to the knowledge of the interested but unspecified persons who may have invested their money in the project and will suffer by the delay that litigation may consume.

Tags: 2019 PLRonline 3030, Mgf Developments Limited v. Emaar Mgf Land Limited