Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO. 1206 OF 2019
WITH
INTERIM APPLICATION NO. 82 OF 2019

AshokPalav Coop. Housing Society Ltd. .. Petitioner
Vs.
Pankaj Bhagubhai Desai & Anr. .. Respondents

Mr. H.V. Kode with Mr. Yogesh Yagnik and Ms. Janhavi Karnik for the petitioner.

CORAM : G.S. KULKARNI, J.
DATE : JUNE 10, 2022.

ORAL JUDGMENT:

1. This is an appeal filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short "the ACA") whereby the petitioner has challenged an order dated 4 September, 2019 passed by the arbitral tribunal on an application filed by the petitioner under section 17 of the Act. By the impugned order, the following prayers as made by the appellant in Section 17 have been rejected:

> "(a) Pending the hearing and final disposal of the application, this Hon'ble Court may be pleased to declare that neither the respondents nor any persons claiming through or under them have any right, title or interest on or upon the property of the claimant as referred to in the aforesaid First Schedule of the said Agreement or to put up or carry out any construction work on the aforesaid plot of land, described in the First Schedule to the agreement for sale;
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> (b) Pending the hearing and final disposal of the application, by order of mandatory injunction, may be pleased to permanently restrain the respondents or any other person, claiming through or under them, from entering or committing trespass or developing and/or putting up any construction on the plot of land;
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> (c) Pending the hearing and final disposal of application, this

> Hon'ble Court may be pleased to restrain the respondent no. 1 and/or respondent no. 2 from putting up any further construction at the suit property.
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> (d) Pending the hearing and final disposal of application, this Hon'ble Court may be pleased to direct the respondent no. 1 and/or respondent no. 2 to demolish and remove all and entire construction put up by them at the said property on any such terms and conditions as may be deemed fit and proper by this Hon'ble Court.
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> (e) This Hon'ble Court may be pleased to grant ad-interim relief in terms of prayer clauses (a), (b), (c) and (d), mentioned hereinabove."

2. This appeal was filed on 4 October, 2019. It was earlier listed before the coordinate Bench of this Court, when the respondents were represented by Maniar Srivastava & Associates. It also appears that the said advocates had appeared from time to time. On 12 December, 2019, this petition was before this Court (G.S. Patel, J.) and was adjourned to 20 January, 2020. On 20 January, 2020, hearing on this petition was again adjourned on the ground that the parties are in negotiations to arrive at a settlement. It appears that the negotiations could not succeed, accordingly the proceedings are before the Court today.

3. Today the respondents are not represented. Being an old appeal, the hearing of the proceedings cannot wait any further. Accordingly, the appellants are heard.

4. Mr. Kode, learned counsel for the appellant has more than one

grievance against the impugned order. His first grievance is on an issue of law, namely, in regard to the legality of the findings as recorded by the learned sole arbitrator on Section 79 of the Real Estate (Regulation and Development) Act, 2016 (for short "RERA"), whereby the learned Sole Arbitrator has held that by virtue of Section 79 of the RERA, the arbitral tribunal was barred from passing any order of injunction under Section 17 of the Act. Secondly, it is contended that despite such observations, the arbitral tribunal has proceeded to consider the merits of the dispute. On this count, it is submitted that although the impugned order considers the merits of the appellant's case, however, no finding has been recorded when the impugned order rejects reliefs on the Section 17 application.

5. In the context of Mr. Kode's first contention is concerned, Section 79 of RERA which provides for a Bar of Jurisdiction needs to be noted. The said provision reads thus:

> "**79. Bar of jurisdiction -** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted **by any court or other authority** in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."
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> (emphasis supplied)

6. The impugned order observes that the arbitral tribunal is nothing but a forum for adjudication selected by the parties under an arbitration agreement and therefore, the bar against grant of injunction is definitely

applicable to a pending proceeding before an arbitral tribunal. The observations of the learned sole arbitrator in that regard are required to be noted, which read thus:

> "22. As regards the contention raised on behalf of the claimant that Section 79 of RERA cannot come in the way of arbitral tribunal granting injunctions, the contention is thoroughly misconceived. Section 79 bars jurisdiction of civil court. What an arbitral tribunal does is to exercise the powers of a civil court in disputes between two parties arising from an agreement containing an arbitration clause. Hence, Section 79 is as much applicable to arbitral tribunals as it applies to a civil court.
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> 23. As regards the contention urged on behalf of the claimant that Section 79 will not apply to an arbitral proceeding which had commenced prior to coming into force of RERA on 1 May, 2017, it needs to be noted that Section 79 is in two parts. The first part is regarding jurisdiction of the civil court (and therefore also of an arbitral tribunal) to entertain any suit or proceeding in respect of any matter which the authority/officer/tribunal is empowered by or under the Act to determine. It may be possible to argue that a suit or arbitral proceeding pending on 1st May, 2017 will continue even after establishment of RERA. But, as far as the second part of Section 79 is concerned, the bar against grant of injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under RERA is applicable to a pending proceeding and as such the bar is applicable not only to any Court but also other authority. It is observed that the arbitral tribunal is nothing but a forum for adjudication selected by the parties under an arbitration agreement and therefore, the bar against grant of injunction is definitely applicable to a pending proceeding before an arbitral tribunal.
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> 24. In view of the above, the tribunal is of the view that grant of any interim injunction as prayed for by the claimant society will amount to violation of the provisions of Section 79 of RERA and, therefore, it is not open to this tribunal to entertain such a prayer."
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> (emphasis supplied)

7. Mr. Kode has submitted that the above observations as made by the arbitral tribunal would not satisfy the test in law, for the reason, that in the present case, the dispute between the parties concerns an Agreement dated 4 February, 2010 (Conveyance Deed) and the subsequent

MOU/Agreement is dated 5 February, 2010, under which the parties had agreed for the disputes being referred to arbitration as contained in Clause No. 13 of the said Agreement. Mr.Kode contends that these agreements were entered prior to the RERA being brought into force. It is submitted that further the agreements came to be terminated on 28 February, 2013 and much thereafter, the provisions of RERA were brought into force with effect from 27 April, 2016.

8. It is Mr.Kode's submission that consequent to the termination of the agreement, a suit (Suit No.298 of 2014) was filed by the appellant before the City Civil Court, Dindoshi, Mumbai in which an interim order came to be passed, which was challenged to the interim order passed in the suit before this Court, and against the order passed by this Court, the proceedings ultimately reached the Supreme Court. The Supreme Court by a consent order dated 2 September, 2016 passed on Special Leave to Appeal (C) No. 19508 of 2015 appointed the learned sole arbitrator to adjudicate the disputes and differences between the parties, subject matter of the proceedings of the suit, which was pending before the City Civil Court, Dindoshi, Mumbai. It is submitted by Mr. Kode that when the Supreme Court had passed the said order appointing the learned sole arbitrator, RERA had come into force, however, no contention in regard to any proceedings barred before the arbitral

tribunal was raised by the respondents before the Supreme Court Court.

9. Having heard Mr.Kode, and having perused the record, in so far as his first contention on the issue of RERA is concerned, it clearly appears from the scheme of RERA that the same has been enacted for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of a real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and for such purpose, to establish an Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith. As to what is the import of the provisions of Section 79 would be required to be seen. Section 79 creates a bar on the jurisdiction on the Civil Court to entertain any suit or proceedings in respect of any matter which the authority or the adjudicating officer or the appellate tribunal is empowered by or under RERA to determine, and a further bar to any injunction being granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under RERA. Thus, primarily Section 79 postulates a bar on the Civil Court to exercise any jurisdiction to entertain any suit or proceedings,

as also that no injunction shall be granted by "any Court" or "any other authority" as provided in the concluding part of the said provision.

10. The arbitral tribunal certainly cannot be a Civil Court falling under the Code of Civil Procedure. In such context, it may be useful to refer to the decision of the Supreme Court in **Food Corporation of India Vs. M/s.Evdomen Corporation, AIR 1999 SC 2352.** In such decision, the Supreme Court had the occasion to interpret the phrase "Civil Court" as falling under Section 2(c) of the Arbitration Act,1940, to observe that the phrase "Civil Court having jurisdiction to decide" as contained in Section 2(c) of the Arbitration Act,1940, would refer to a Court having jurisdiction under Section 20 of the Code of Civil Procedure (**CPC**). In paragraphs 5 and 6 of the said decision, the Supreme Court considering the legal position on the jurisdiction of the Civil Court under Section 20 of the CPC *vis a vis* its applicability to Clause 12 of the Letters Patent of the Bombay High Court, observed thus:-

> "5. Under Section 2(c) of the Arbitration Act, 1940, "Court" means a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit. Under Section 31(1) of the Arbitration Act, 1940 an award may be filed in any Court having jurisdiction in the matter to which the reference relates.
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> 6. Ordinarily, the phrase "Civil Court having jurisdiction to decide" in Section 2(c) of the Arbitration Act,1940 would refer to a Court having jurisdiction under Section 20 of the Civil Procedure Code. Section 20(a) of the Civil Procedure Code provides, "subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction (a) the defendant or each of the defendant where there are more than one, at the time of the commencement of the suit,

> actually and voluntarily resides or carries on business or personally works for gain…….. (c) the cause of action wholly or in part arises." In the present case no part of the cause of action has arisen within the jurisdiction of the Bombay High Court. We have, therefore, to see whether Section 20(a) would confer jurisdiction on Bombay High Court as has been held in the impugned judgment. Section 20(a) has to be read along with the explanation to Section 20 which provides as follows:-
> "Explanation : A Corporation shall be deemed to carry on business at its sole or principal office in India or in respect of any cause of action arises at any place where it has also a subordinate office at such place."
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> In view of this Explanations the appellant under Section 20 is deemed to carry on business at its principal office in India. In respect of any cause of action which arises at a place where it has its subordinate office, the Court at that place would also have jurisdiction. In view of this Explanation, the Bombay High Court would not have jurisdiction under Section 20 of the Civil Procedure Code."

11. To appreciate that the arbitral tribunal is not a Civil Court, it would also be useful to refer to the decision of the Supreme Court in "**Nahar Industrial Enterprises Ltd. vs. Hong Kong and Shanghai Banking Corporation**" **(2009) 8 SCC 646.** In the context 'whether the arbitral tribunal is a Civil Court', the Supreme Court observed thus:-

> "**Whether tribunal is a civil court**
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> 67. The terms "tribunal", "court" and the "civil court" have been used in the Code differently. All "courts" are "tribunals" but all "tribunals" are not "courts". Similarly all "civil courts" are "courts" but all "courts" are not "civil courts." It is not much in dispute that the broad distinction between a "court" and a "tribunal" is whereas the decision of the "court" is final the decision of the "tribunal" may not be. The "tribunal", however, which is authorized to take evidence of witnesses would ordinarily be held to be a "court" within the meaning of Section 3 of the Evidence Act, 1872. It includes not only Judges and Magistrates but also persons, **except Arbitrators**, legally authorized to take evidence. It is an inclusive definition. There may be other forums which

> would also come within the purview of the said definition."
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> (emphasis supplied)

12. Adverting to the above position of law, it can be observed that although the arbitral tribunal has some trappings of the Court, the arbitral tribunal is not a Civil Court within the meaning and purview of the Code of Civil Procedure, so that the bar to arbitral proceedings can be read under Section 79 of the RERA.

13. Insofar as the second part of Section 79 is concerned, it provides that in respect of matters falling within the jurisdiction of the authority or the adjudicating officer or the appellate tribunal under the RERA, no injunction shall be granted by "*any Court or other authority*", in respect of any action taken or to be taken in pursuance of any power conferred by or under RERA. Thus, when it comes to grant of an injunction, the provisions of Section 79 refers to two significant phrases firstly the phrase "by any court" and "or other authority". The learned Arbitrator has proceeded on a footing that the arbitral tribunal would be "an authority", hence it falls within the purview of Section 79, and consequently, would be barred from making an order of injunction. In my opinion, the tribunal is not correct in adopting such approach in interpreting Section 79 so as to apply the bar under Section 79 to arbitration proceedings before an arbitral tribunal, for more than one

reason, as may be discussed.

14. To find out the intent, meaning and purpose behind a legislative provision, namely, for an appropriate construction of Section 79 of the RERA, the endeavour of the Court would be to gather the meaning of the provision from its plain and holistic reading. In its first part, Section 79 bars jurisdiction of Civil Court to entertain any suit or proceedings in respect of any matter which may fall within the jurisdiction of the authority or the adjudicating officer or the appellate tribunal. As a sequel to the bar so created, the second part of Section 79 provides that no injunction shall be granted by "any Court or other authority", in respect of any action taken or to be taken in pursuance of any power conferred by or under the RERA. Thus the embargo in prohibiting the grant of any injunction is on "any Court or other authority".

15. The expression "any Court or other authority" as used in Section 79 would be required to be construed to mean that the word "authority" is a species of the word "Court". This more particularly, as the word "Court" would be required to be read in conjunction with the word "authority" as it is well settled that when the words are separated by a conjunction "or", the intention of the legislature is of joining the alternatives. Thus, the word "or" being a conjunction, it is being used for

joining two alternatives namely the word "Court" and the word "authority". Thus, the words "other authority" as used in the second part of Section 79 certainly derives its colour from the words in its company namely the "Court". If such interpretation is not made the consequences are likely to be quite weird or absurd inasmuch as the word "authority" cannot be read into a realm of uncertainty so as to be left to the imagination of a situation which may come up in variety of circumstances. The legislature would never intend words being used in a provision leading to an absurdity or uncertainty.

16. Thus, it can never be the intention of the legislature to elevate the status of the arbitral tribunal to that of a civil Court as also to construe the arbitral tribunal as an authority like a Civil Court although the arbitral tribunal being a private tribunal has adjudicatory functions. In this context, it would be useful to refer to the decision of the Supreme Court in "**J.Jayalalitha Vs. Union of India & Anr." (1999)5 SCC 138** in which the Supreme Court was considering the challenge to the validity of Section 3 of the Prevention of Corruption Act,1988, in so far as it empowered the State Government to appoint as many as Special Judges as may be necessary "for such case or group of cases". In such context the Supreme Court considering the use of the word "or" as used in the expression "for such case or group of cases", considered the dictionary meaning of the word "or" which is usually used to connect the words,

phrases or classes representing alternatives. The Supreme Court observed that the word "or" is a conjunction and normally used for the purpose of joining alternatives and that the alternatives need not always be mutually exclusive. The Supreme Court in such context in paragraph 9 observed thus:-

> "…..The dictionary meaning of the word "or" is "a particle used to connect words, phrases, or classes representing alternatives". The word "or", which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. Alternatives need not always be mutually exclusive. Moreover, the word "or" does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context of Section 3. It is a matter of common knowledge that the word "or" is at times used to join terms when either one or the other or both are indicated. …. …. ..."

17. To my mind, the above discussion would make it quite clear that the bar of jurisdiction so as to not make an order of injunction would certainly not apply to an arbitral tribunal as held by the learned arbitrator in the impugned order.

18. The position in law in regard to Section 79 of the RERA was recently considered by the Supreme Court in its decision in **IREO Grace Realtech Pvt. Ltd. vs. Abhishek Khanna and Ors., (2021) 3 SCC 241.** The question before the Supreme Court was as to whether the provisions of the RERA must be given primacy over the Consumer Protection Act, 1986 when the home buyers had chosen to pursue their remedies

against the builder before the National Commission. The Court interpreting Sections 79 and 88 of RERA held that an allottee of a flat may elect for one out of the remedies provided by law for redressal of its grievance. The Court expounding the doctrine of election held that when two remedies are available for the same relief, the aggrieved party has an option to elect either of them but not both. It was held that in the absence of a bar under section 79 of the RERA to the initiation of proceedings before a fora which is not a Civil Court, read with the provisions of Section 88 of the RERA, would make the position clear that such bar would not operate qua the proceedings initiated under the Consumer Protection Act. It was held that a deeming provision as incorporated under sub-section (2) of Section 17 does not bring about a legal consequence that the arbitral tribunal is a Civil Court. The position in the present case is not different. The proceedings before the arbitral tribunal are per se not proceedings before the Civil Court. The observations of the Supreme Court in such context are required to be noted which read thus:

> 42. In a recent judgment delivered by this Court in *Imperia Structures Ltd.* v. *Anil Patni*[29], it was held that remedies under the Consumer Protection Act were in addition to the remedies available under special statutes. The absence of a bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear. Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available". We place reliance on this judgment, wherein it has been held that: (SCC p. 811, paras 31-32)
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> > "31. Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP Act before the RERA Act

> came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the complainant concerned but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act. As against that the mandate in Section 12(4) of the CP Act to the contrary is quite significant.
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> 32. Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came into force, there is nothing in the RERA Act which bars such initiation. **The absence of bar under Section 79 to the initiation of proceedings before a fora which cannot be called a civil court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is "without prejudice to any other remedy available". Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act."**

19. It thus needs to be observed that the impugned conclusion of the arbitral tribunal cannot be accepted also on a cumulative reading of the provisions of Section 79 read with the provisions of Section 88 of the RERA which provides that the RERA shall be in addition to and not in derogation of any other law for the time being in force. If the provisions of Section 88 of the RERA are taken into consideration, it was not well founded for the respondent to contend before the arbitral tribunal, as also the arbitral tribunal was not correct to hold that the nature of the dispute was such that it would fall purely under RERA, to which Section 79 of the RERA would strictly apply. Also *per se* it is not an agreement between a developer and a flat purchaser. It is a dispute which is sufficiently falling within the jurisdiction of the arbitral tribunal, even as mandated by the Supreme Court, in its order dated 2 September, 2016

while referring the parties to arbitration and keeping open all contentions of the parties including Section 17 application to be decided by the arbitral tribunal.

20. Adverting to the above principles of law, it needs to be stated that in the facts of the present case the parties elected to resolve their disputes through arbitration. Therefore, the parties clearly wished to bind themselves by the ACA. It cannot be logically conceived that the parties would seek a remedy which bars any interim or final adjudication if the case of the respondent is to be accepted. In such event, the recourse to arbitration would amount to an empty formality. As rightly urged by Mr. Kode, this was never the intention, even when the Supreme Court passed an order (supra) referring the disputes for adjudication by an arbitral tribunal. It was hence legally not well founded for the arbitral tribunal to apply the provisions of Section 79 of the RERA and hold that such provision barred the jurisdiction of the arbitral tribunal, and more particularly considering the facts of the case.

21. This apart, something even more peculiar is seen from the impugned order, namely, that the arbitral tribunal on one hand has observed that the bar under Section 79 of the RERA would operate in regard to any prayer for an interim injunction being considered by the

arbitral tribunal, however, on the other hand, despite such observations on a cryptic reasoning as made in paragraph 27, the arbitral tribunal has proceeded to consider the application on merits. The only reason in rejecting the interim prayers is as to what is set out by the arbitral tribunal in paragraphs 27 and 28 of the impugned order, being the only reasons. These paragraphs read thus:

> "27. In view of the above recitals and clauses of the contract, the tribunal is of the view that the claimant society has not made out any case for grant of any interim injunction to restrain respondent no. 2 from continuing with the construction in a project regulated by the provisions of RERA and having building plans sanctioned by MCGM and in absence of 80 tenants and 130 purchasers having registered agreements in their favour.
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> 28. As regards the disputes about obtaining Occupation Certificate for the building of the claimant society and non-execution of the conveyance deed, these are disputes to be decided at the final hearing."

22. On a reading of the reasons as set out in the aforesaid paragraphs, in my opinion, they are certainly not sufficient to reject an application of the appellant seeking interim reliefs, as the arbitral tribunal has failed to consider and evaluate the case of the appellant on the basis of the well settled principles applicable for grant of interim reliefs, namely, of a prima facie case, balance of convenience and whether an irreparable injury has been caused in denying such reliefs. Thus, Mr. Kode's submission that the appellant's case on merits has not been considered by the arbitral tribunal needs to be accepted.

23. In view of the above discussion, the impugned order cannot be sustained and would be required to be set aside. It is accordingly set aside.

24. The arbitral tribunal shall reconsider the Section 17 application as filed by the appellant on its own merits and pass a fresh order in accordance with law. The learned Arbitrator shall make an endeavour to decide the Section 17 application as expeditiously as possible and within a period of three months from the date a copy of this order is placed before the learned Sole Arbitrator.

25. Disposed of in the above terms. No costs.

26. In view of disposal of the petition, the Interim Application would not survive and is accordingly disposed of.

[G.S. KULKARNI, J.]