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ORDER SHEET

AP-COM/608/2024

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

BENGAL SHELTER HOUSING DEVELOPMENT LIMITED
VS
THE KOLKATA MUNICIPAL CORPORATION

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 13th August, 2024.

Appearance:
Mr. Joy Saha, Sr. Adv.
Mr. Reetobrata Mitra, Adv.
Ms. Jayati Chowdhury, Adv.
Ms. Rashhmi Singhee, Adv.
Ms. Sucheta Mitra, Adv.
Ms. Priya Malakar, Adv.
…for the petitioner

Mr. Jaydip Kar, Sr. Adv.
Mr. Biswajit Mukherjee, Adv.
Mr. Altamash Alim, Adv.
…for KMC

The Court: The petitioner Bengal Shelter Housing Development Limited was incorporated on January 28, 2004 as a Joint Sector Company between one Shelter Projects Limited and the West Bengal Housing Board (WBHB). In the said joint venture, the WBHB has 49.5 per cent share, Shelter Projects has 49.5 per cent share and the rest 1 per cent is public.

Pursuant to a tender floated by the respondent Kolkata Municipal Corporation (KMC), the petitioner entered into a development agreement for the purpose of developing the College Street Market premises for the purpose of constructing a Book Mall where primarily book shops would be

rehabilitated. There would be other shops in the said premises as well. The agreement for development was entered into between the parties on February 24, 2006 and a supplementary agreement on June 12, 2006. The development work was to be completed within 54 months which ended roughly on December 26, 2010.

Thereafter the petitioner was permitted to continue the work and on January 17, 2022, a termination letter was issued by the KMC to the petitioner. On the self-same date, a letter of possession was also issued and the KMC took possession of the market.

The petitioner, being aggrieved by the same, seeks to refer the matter to arbitration pursuant to an arbitration clause in the agreement between the parties.

The scope of the dispute in the arbitration would primarily be a challenge to the termination and possession as well as allied reliefs.

The present application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) has been filed in aid of the said intended arbitration, seeking injunction restraining the respondent from transferring, alienating and/or dealing with the subject-property in favour of third parties, injunction restraining the respondent and its men and agents from entering into any agreement with any other third party or developer or contractor for completion of the said Mall as well as other consequential reliefs.

Learned senior counsel for the petitioner argues that the respondent allowed the petitioner to work much beyond the contractual 54 months and issued the notice of termination only on January 17, 2022, that is, after

about 12 years from the expiry of the stipulated time. Thus, time was never intended to be the essence of the contract.

Learned senior counsel cites the judgment of *Welspun Specialty Solutions Limited Vs. Oil and natural Gas Corporation Limited*, reported at *(2022) 2 SCC 382* for the proposition that whether time is of the essence in a contract has to be culled out from a reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. In the said case, the Supreme Court observed that as the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforced the fact that timely performance was necessary. The fact that such extensions were granted, it was held, indicated the efforts of the respondent therein to uphold the integrity of the contract instead of repudiating the same.

Learned senior counsel appearing for the petitioner next argues that as per Section 55 of the Contract Act, 1872, when a party to a contract promises to do a certain thing but fails to do it before the specified time, the contract becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. If it was not the intention of the parties that time should be essence, the contract does not become voidable for failure to do such thing at or before the specified time, but the promisee is entitled to compensation from the promisor. In case of a contract being voidable on account of the promisor's failure to perform the promise at the time agreed, if the promisee accepts performance, it cannot claim compensation for any loss occasioned by the

non-performance of the promise at the time agreed, unless at the time of such acceptance, he gives notice to the promisor of his intention to do so.

In the present case, having not given any such notice despite permitting the petitioner to exceed the initial 54 months by about 12 years, it is argued that the respondent is not entitled either to compensation or to termination.

Learned senior counsel appearing for the petitioner next contends that there was no delay in performance due to the fault of the petitioner at any point of time. Learned senior counsel relies on the averments made in the application under Section 9 of the 1996 Act to argue that the work got stalled at various stages due to rehabilitation of occupants, shifting of cable, drainage, overhead lines, water supply/connection, shifting of a Mazar and staff quarters.

It is argued that the petitioner has in fact handed over the entire share of the respondent and has already delivered possession to 864 shops. As per the agreement, the respondent was entitled only to 30 per cent share in the developed property whereas the petitioner is entitled to 70 per cent. Even out of the said 30 per cent, a substantial chunk was sold by the respondent to the petitioner.

To support such contention, learned senior counsel appearing for the petitioner places reliance on photocopies of two cheques of Rupees Five Crore each, paid by the petitioner and its hundred per cent subsidiary, one Barnaparichay Book Mall Private Limited ("Barnaparichay" for short). Thus, it is argued that having allowed the petitioner to work so far and after the petitioner having completed more than 90 per cent of the work and having

handed over the respondent's share, the termination was palpably *mala fide* and illegal.

Learned senior counsel next argues that the second ground of termination, apart from delay, was the alleged assignment to a third party. It is argued that there was no assignment at any point of time. Barnaparichay was incorporated on or about May 7, 2007 as a wholly owned subsidiary of the petitioner-Company. The shareholding of the petitioner-Company in Barnaparichay is 100 per cent. It is submitted that the latter was formed merely as a Special Performance Vehicle (SPV) to carry out the project of construction of the Book Mall. Hence, Barnaparichay is not a third party as such. There was no assignment at any point of time. The SPV was to complete the work for the petitioner-Company.

Secondly, the formation of Barnaparichay and entrustment of the work to it was well within the knowledge of KMC, as a Director of WBHB has been a nominee member in the Board of Directors of the petitioner-company. The petitioner/Joint Sector Company is a conglomeration of the WBHB and Shelter Projects Limited. Thus, every decision of the petitioner was well within the knowledge of the WBHB, which is but another instrumentality of the State as is the KMC/respondent. Hence, it is argued that the KMC cannot feign ignorance of the formation of the SPV and the entrustment of the work to it at the relevant point of time.

Learned senior counsel cites a Division Bench judgment of this Court in the matter of *Bajrang Prasad jalan and another Vs. Raigarh Jute and Textile Mills Ltd. and others*, reported at *1999 SCC OnLine Cal 534* as well as an order of the Supreme Court in the matter of *Shankar Sundaram Vs.*

Amalgamations Ltd. & Ors. in support of the proposition that in petitions under Sections 397/398 of the Companies Act, 1956, the corporate veil can very well be lifted, upon which the holding and subsidiary companies should be regarded as one and the same for the purpose of grant of relief.

Learned senior counsel for the petitioner argues that Rs. 237 Crore has already been invested by the petitioner through Barnaparichay and the project is on the verge of completion. Thus, the issuance of the termination notice, simultaneously with possession notice, on the self-same date all on a sudden was unwarranted and arbitrary; as such, *de hors* the law.

It is submitted that a Corporate Insolvency Resolution Process (CIRP) was started in respect of Barnaparichay. The termination of the present contract was challenged in connection therewith before the National Company Law Tribunal (NCLT), which set aside the termination. Against the same, the National Company Law Appellate Tribunal (NCLAT) was moved, which set aside the order of the NCLT, holding that there was assignment by the petitioner to Barnaparichay. The matter went up to the Supreme Court which refused to interfere, however, with the observation that the issue of termination was left open to be challenged before a civil forum. Thus, the observations in the said proceeding are not germane in the present context as the issues were kept open by the NCLAT and the Supreme Court.

Lastly, it is argued that the availability of the relief of damages is not an absolute bar to injunction.

Learned senior counsel appearing for the respondent commences with the argument that the present application under Section 9 is not

maintainable, since the remedy of the petitioner lies at best in damages and not in injunction. It is highlighted by learned senior counsel that the petitioner seeks to stall a public infrastructure project, which would adversely affect the public at large. It is argued that the petitioner has taken different stances regarding completion of the work at different points of time. In a prior application under Section 9, which was subsequently withdrawn with leave to file afresh, the petitioner had contended that only 70 per cent of the work had been done, whereas now they argue that more than 90 per cent has been completed. It is contended that the property is spread over 13 bighas in a prime location of the city of Kolkata. It is further submitted that all the vendors have not been rehabilitated in the developed property and at least 5-10 per cent of them are still to be handed over possession by the petitioner.

It is argued that Section 55 of the Contract Act does not prevent the petitioner from terminating the contract if the petitioner commits inordinate delay in completion of the project. It is argued that although the petitioner was granted 10 years to complete the project even after the expiry of the initially stipulated period, the petitioner having failed to substantially complete the work even within such extended time, the termination notice and consequential possession notice were justified.

It is argued that the respondent had issued a prior notice in the year 2020 under Clause 9(g) of the agreement, granting opportunity to the petitioner to rectify the defects, which is annexed to the petition. Even thereafter, the pre-termination show-cause notice was issued on November 12, 2021. Only after exhausting such prior procedure, a termination notice

and a notice of possession was issued on January 17, 2022. Thus, the respondent fully complied with the provisions of the agreement before issuing the termination notice. Despite getting opportunity for over a year after the Clause 9 (g) notice, the petitioner failed to complete the work.

Clause 13 of the agreement, the respondent argues, precludes any third party assignment, which was violated by the petitioner by assigning the work to Barnaparichay. It is argued that Barnaparichay being a different company and a separate juristic entity, the argument as to the said company being an alter ego of the petitioner is not acceptable.

The NCLAT finally decided the issue of assignment having taken place and only the question of termination was left open for being decided separately. Thus, learned senior counsel for the respondent contends that the issue of assignment cannot now be reopened in arbitration or otherwise.

It is argued that no notice of assignment was given at any point of time by the petitioner to the respondent. It is submitted that the argument regarding there being common Directors between WBHB and the petitioner is specious, since the KMC is an entirely independent authority having no connection with WBHB and in the absence of specific intimation of the assignment to the respondent-KMC, the petitioner was liable to termination in terms of Clause 13 of the agreement.

Apart from justifying the termination notice on the grounds of non-performance and assignment, learned senior counsel for the respondent hands over certain photographs to argue that the present state of the property is undeveloped, seeking to destroy the argument of the petitioner that the work has been substantially concluded.

It is reiterated that the petitioner was granted sufficient time over the years but failed to avail of the opportunity to rectify its non-performance despite a notice being given under Clause 9(g) of the agreement as long back as in the year 2020. Thus, the injunction sought is intended to prevent a public infrastructure project, which ought not to be permitted by the court.

Learned senior counsel appearing for the respondent next submits that even the Supreme Court order from the decision of the NCLAT was passed on March 4, 2024, whereas the present petition has been filed only on May 16, 2024. Till date, no notice under Section 21 of the 1996 Act has been issued by the petitioner. The above conduct, it is argued, makes it explicit that the petitioner has not approached the court with clean hands, having no intention to refer the matter to arbitration but merely to stall the project by hook or by crook.

Learned senior counsel argues that Section 9 contemplates a 90 days' period for issuance of a notice under Section 21 of the 1996 Act in exigent situations. In the present case, the facts and circumstances do not justify the petitioner not having invoked the arbitration clause over such a long period of time.

Thus, the respondent seeks dismissal of the application.

Upon hearing learned counsel for the parties on the question of grant of ad interim orders, the Court comes to the following conclusions:

The first question which arises is whether a *prima facie* case has been established by the petitioner with regard to the termination notice being invalid or illegal. The notice is assailed *inter alia* on the strength of Section 55 of the Contract Act.

The petitioner has an arguable case on Section 55. The three courses of action open in a case where the promisor fails to perform a promise within the stipulated time as per Section 55 are:

i) For the promisee to terminate the contract, it being voidable due to non-performance within the stipulated time where time is the essence of the contract.

ii) If time is not the essence of the Contract, the contract does not become voidable but the promisee is entitled to compensation from the promisor for any loss occasioned by such failure.

iii) Even in case of the contract being voidable, if the promisee accepts performance beyond the agreed time, it cannot claim compensation for loss occasioned by the non-performance of the promise within the agreed time unless at the time of acceptance, the promisee gives a notice of the promisor of its intention to do so.

In the present case, the promisee, that is the respondent, did not give any notice to the promisor\petitioner as to its intention to claim compensation, when permitting the petitioner to prolong the work well beyond the stipulated time. By their mutual conduct, the parties have given a go-bye to the 54 months' outer limit for completion of the project.

Instead of terminating the contract after the expiry of the 54 months or claiming compensation at any time, the respondent has corresponded with the petitioner all along, which goes on to show that the petitioner was granted the liberty to extend the time for completion of the work. Before the year 2020, there is nothing on record or argued by the parties which could

indicate the respondent's intention to terminate the contract or claim compensation. By its very conduct, the respondent has acquiesced to the extension of the time and thus it is, to say the least, arguable as to whether the respondent is entitled to any compensation or to treat the contract as voidable and terminate the contract.

The question is arguable since the respondent also has raised a relevant question as the whether even if Section 55 of the Contract Act is attracted, whether the respondent is required to wait indefinitely for a public project to be completed. At this juncture, thus, at least an arguable case to be referred to arbitration has been made out between the parties which itself furnishes a *prima facie* triable case for the petitioner in the application under Section 9.

Regarding delay, the petitioner has made elaborate pleadings and annexed several documents to its application under Section 9 to *prima facie* satisfy the court that the work was stalled not due to any fault of the petitioner but due to unforeseen circumstances and that the delay is not attributable solely to the petitioner. Rehabilitation of occupants, shifting of cable, drainage, overhead lines and water supply, shifting of a Mazar and staff quarters were some of the issue which cropped up on the way. Such hindrances would be sufficient justification, at least *prima facie*, for the delay in completion of the work.

The respondent, by permitting the work to be continued for 12 years after the expiry of the original time-limit, has virtually acquiesced to such a position. The numerous correspondences between the parties and by the petitioner to different authorities also substantiate such claim.

Moreover, the petitioner has already handed over 864 shops in terms of the agreements after development. Even as per the admission of the respondent, since it argues that 5-10 per cent of the shops are yet to be handed over, at least 90 per cent of the handing over is completed, which goes on to show that a substantial part of the project has been done by the petitioner.

Another valid argument of the petitioner is that it is entitled to 70 per cent of the shares of the developed property and a further share out of the 30 per cent of the respondent has been transferred to the petitioner and Barnaparichay subsequently. Thus, at this juncture, the petitioner would be entitled to invoke Sections 202 and 204 of the Contract Act, since the petitioner, as agent of the respondent for completion of the project, itself has an interest in the property and the authority given under the development agreement has been substantially exercised by the petitioner. The huge investment of Rs. 237 Crore by the petitioner through Barnaparichay in the project is also an important consideration to assess whether the termination at this juncture is *bona fide*.

As regards the alleged assignment in favour of a third party, it is arguable as to whether entrustment of the work by the petitioner-holding company to a hundred per cent subsidiary in the capacity of SPV can tantamount to an 'assignment'. Entrustment of work to a wholly owned subsidiary is qualitatively different from an assignment to a third party. Hence, the argument of the respondent that the termination was justified on the ground of assignment for violation of Clause 13 of the agreement is steeped in doubt, to say the least.

Hence, considerable doubt is cast on both the grounds of termination, be it failure to perform the work or alleged assignment.

The argument of the respondent as to stalling of a public infrastructure project is not applicable in terms. Although the project is public in nature, the same cannot be strictly construed as an 'infrastructure' project, in respect of which the amended Specific Relief Act has cast a bar to courts in granting injunction. The construction of a Book Mall to rehabilitate local shopkeepers and book stalls is not exactly an "infrastructure" project, although it has ramifications in the public domain.

That apart, the injunction now pressed for by the petitioner is to the limited extent that the respondent should not transfer the property or create a third party interest, which would not stall the development project in any manner. In any event, a *prima facie* case has been made out by the petitioner of having completed the work substantially.

It is also quiet arguable as to whether the respondent's portion, which is now less than 30 per cent, has already been handed over by the petitioner. Without an ascertainment as to the exact portion and extent of the project which has been concluded, the respondent cannot be permitted to frustrate the prospective arbitration by creating third party interest in the entire property.

In the event the respondent is permitted to do so, the ultimate reference to arbitration would be frustrated and nothing would remain for the Arbitrator to adjudicate upon.

The delay on the part of the petitioner in preferring the present application as argued by the respondent is also not tenable, since the matter

was sub judice up to the Supreme Court which passed its order only on March 4, 2014. The very next month, an application under Section 9 of the 1996 Act was preferred by the petitioner but due to technical error the same was withdrawn and re-filed in the present form on May 16, 2024. Also, there is no legal bar in taking out a Section 9 proceeding prior to reference to arbitration or invocation of the arbitration clause under Section 21 of the 1996 Act. Section 9 makes it amply clear that a reference may be made within 90 days from an order passed therein.

As regards the conclusiveness of the NCLAT findings in respect of assignment, the respondent's arguments cannot be accepted as well. Despite having held that there was an assignment, even the NCLAT made it clear that it did not have competence to decide on the issue of termination, which view was explicitly upheld by the Supreme Court by leaving it open for termination to be challenged before a competent civil forum/court. By keeping the issue of termination open to challenge, the Supreme Court also, by necessary implication, left it open for the grounds of termination (including assignment) to be challenged before the appropriate forum. Since the Arbitrator is the appropriate forum in the present case in view of the existence of an arbitration clause, there cannot be any doubt that the issue of assignment as well as alleged delay are amenable to the decision of the Arbitral Tribunal.

Since Section 9 of the 1996 Act derives its colour in aid of and from the subject-matter of the proposed arbitration, this Court has ample power under Section 9 of the 1996 Act to grant the relief now prayed for by the petitioner. In fact, the balance of convenience and inconvenience is squarely

in favour of grant of ad interim relief, since the petitioner not only claims a right to complete the work but also argues that it has more than 70 per cent right in the subject property. If third party rights are created at this juncture on the entire property, of which possession has already been taken by the respondent-KMC, the arbitral proceedings would be rendered infructuous *ab initio.*

The urgency is also implicit, since the termination notice was coupled with a possession notice and the respondent wasted no time in taking possession of the property simultaneously with termination of contract at a mature stage of development project. Hence, there is sufficient and justified apprehension that if the rights of the petitioner are not protected from third parties, the arbitral reference might be rendered irretrievably infructuous.

Although the arguments of the petitioner on the basis of the cited judgments on assignment cannot be taken into contention, since in those cases the Supreme Court and the Division Bench of this Court were looking at a situation where the corporate veil was lifted on allegations of oppression and mismanagement, which is distinct and different form the present case, in principle, it is at least arguable as to whether a holding company and its wholly owned subsidiary, entrusted as an SPV to complete the project, can be distinguished for the purpose of completion of a project, so much so that it can be said that there was an assignment violating the provisions of the agreement.

Also, the ratio laid down in *Welspun Specialty Solutions Limited (supra)* cannot be overlooked, where it has been held that whether time is the essence of the contract can only be culled out from a composite reading of

the entire contract as well as surrounding circumstances (obviously including the conduct of the parties) which in the present case, militates against time being the essence of the contract.

Thus, the petitioner in entitled to *ad interim* injunction as prayed for in prayers (a) and (c) of the present application. Accordingly, the respondent and its men and agents are restrained by an order of *ad interim* injunction from transferring, alienating, encumbering and/or parting with possession of the subject-property situated at the College Street Market at premises No. 226, Bidhan Sarani, Kolkata - 700 007, as well as at 83, College Street, Kolkata - 700 007 and 75, Madan Mohan Burman Street, Kolkata 700 007, under Ward No. 39 under the Jorasanko Police Station, under the jurisdiction of Borough No. IV of the Kolkata Municipal Corporation and/or from entering into any agreement for development of the said property with any third party/developer/contractor for completion of the said Mall till disposal of the present application under Section 9 of the Arbitration and Conciliation Act, 1996.

The respondent shall file its affidavit-in-opposition within 3 weeks from date. Reply, if any, shall be filed within a week thereafter. The application shall be listed for hearing on September 17, 2024.

(SABYASACHI BHATTACHARYYA, J.)