



PSL Advocates
& Solicitors

Once an Award is passed by the Arbitrator, a recourse to relief under Section 9 or 17 is not maintainable.

Raigad Co-operative Housing Soc. Ltd. v. Truly Creative Developers Pvt. Ltd. & Ors.

Case No.	ARB.P. 491/2021
Date	16 December 2021
Court	High Court of Bombay
Coram	Hon'ble Mr. Justice G. S. Kulkarni, J.

1. BRIEF FACTS:

- 1.1 Respondent No.1- Truly Creative Developers Pvt. Ltd. ("**the developer**") was appointed as a developer by the petitioner-society i.e., Raigad Co-operative Housing Soc. Ltd. ("**the society**") to undertake redevelopment project.
- 1.2 Respondent No.1 appointed Respondent No.2 - M/s. Labh Shub Properties Pvt. Ltd. ("**the sub-contractor**") as its sub-contractor.
- 1.3 In the contract entered between the developer and sub-contractor, there was an arbitration agreement and admittedly, between the petitioner and the sub-contractor, there was no arbitration agreement.
- 1.4 Disputes had arisen between these parties which made the sub-contractor approach the Hon'ble Bombay High Court in a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996 ("**the Act**") in which by the order and the consent of the sub-contractor and the developer, a sole arbitrator was appointed to adjudicate the disputes and differences that had arisen between the parties. Neither the petitioner nor the Respondent No.3 - federal society were parties to the said arbitral proceedings, however, Respondent No.3- Samata Nagar Cooperative Housing Union Societies Ltd. ("**federal society**") was made a party without procuring their consent.
- 1.5 Eventually, the arbitration was necessarily an arbitration between the sub-contractor and the developer.
- 1.6 That the said arbitral proceedings between the subcontractor and the developer concluded into an award. However, the execution proceedings for the enforcement of the award which were initiated by the sub-contractor were not completed and thus were not surviving.
- 1.7 In the meantime, the federal society having terminated the appointment of the developer and appointed a new developer who has substantially undertaken construction, which was completed by the new developer, and the buildings so constructed were at a stage of an Occupation Certificate to be received from MHADA (Maharashtra Housing and Area Development Authority).
- 1.8 The dispute herein was concerning the rehabilitation of a building which was also at such completion stage and which would be accommodating about 1700 members of the societies who were members of federal society as concerning.
- 1.9 Consequently, the sub-contractor filed an application under Section 17 of the Act in an arbitral proceeding which was disposed of praying for appointing of a court receiver to take possession of the property being redeveloped.

2. SUBMISSIONS OF THE PETITIONER:

- 2.1 The most important contention raised by the petitioners is that the learned sole arbitrator has acted in clear lack of jurisdiction in passing the impugned order having become functus officio.
- 2.2 Also further contended that the impugned order in appointing the Court Receiver is ex-facie illegal claiming that the learned sole arbitrator did not have any jurisdiction to appoint the Court Receiver in the exercise of powers conferred under Section 17 of the Act, such powers are available only to the Court.
- 2.3 The learned senior counsel for the petitioner then urged that there was an apparent fraud and collusion between the developer and the sub-contractor and what the respondents could not have achieved otherwise was sought to be achieved by the impugned order from the sole arbitrator.

3. SUBMISSIONS OF THE RESPONDENT:

- 3.1 Learned counsel for the sub-contractor - Respondent No.2 contended that his client would not mind if such order is stayed. He further contended that however an opportunity be granted to his client for filing a detailed reply to the petition. He also urged that in so far the Court Receiver was not been approached, so there was no question of the Court Receiver taking further steps to take possession as directed by the learned arbitrator.
- 3.2 The learned counsel for the sub-contractor was unable to demonstrate how jurisdiction could be assumed by the learned arbitrator to pass the impugned order after becoming functus officio.

4. ISSUE RAISED:

- 4.1 Whether the learned sole arbitrator acting on such proceedings under Section 17 of the Act and passing the impugned order inherently lacked jurisdiction?

5. DECISION OF THE COURT:

- 5.1 The Hon'ble Bombay High Court contemplated that what is peculiar is that the learned arbitrator has gone beyond the scope of the award in appointing the Court Receiver to take possession of the buildings but also passing an order that the federal society and MHADA are restrained from allocating the development work to any third party wherein the MHADA was never a party to the arbitral proceedings.
- 5.2 The High Court considering the reliance placed by the petitioner on the case of *Centrient Pharmaceuticals India Pvt. Ltd. V/s. Hindustan Antibiotics Ltd.*¹, held that the arbitrator was out of its jurisdiction while passing the impugned order as the execution proceeding was already filed, the principles which become applicable to interim proceedings filed under Section 9 of the Act would also apply to the Section 17 proceedings in as much as once the award had become enforceable.
- 5.3 Further it stated that the only remedy available to the award creditor was to execute the award, thus a recourse to Section 9 of the Act was not available, and it will equally apply to Section 17 proceedings.
- 5.4 The Hon'ble Court also held that the federal society- Respondent No.3 which was made as a party to the Section 17 application was required to give consent. Whereas, the arbitration agreement of parties being an agreement prior to the year 2015, and in absence of the consent of the party for proceeding with arbitration, the jurisdiction of the arbitral tribunal could not be invoked unless the parties to the arbitration agreement had agreed for allowing the provision of amended Section 17 (as amended in the year 2015) to be applied to their arbitration agreement.
- 5.5 Certainly, there was no such agreement and hence per-se the arbitral tribunal had no jurisdiction to entertain the Section 17 application.

6. PSL OPINION:

¹ 2019 SCC OnLine Bom 1614.

- 6.1 In the present matter, the Hon'ble Bombay High Court contemplated that assuming proceedings under Section 17 of the Act with effect to the 2015 Amended Act² to be applied, the said section has to succeed the test as provided under Section 26 of the 2015 amendment Act, which as quoted by the Hon'ble Court is:-
- “26. Nothing contained in this (Amendment) Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this (Amendment) Act unless the parties otherwise agree but this (Amendment) Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this (Amendment) Act.”*
- 6.2 Thus, elucidating the legality with reference to the application of amendment act clarifying the amendment having a prospective effect with respect to the arbitral proceedings under section 17 of the Act.
- 6.3 The Hon'ble Court also paved further clarity contemplating that the parties to the arbitration agreement shall give consent accepting the provisions of 2015 Amendment Act in order to align the arbitration agreement within the ambit of the 2015 amendment Act. This view surely strengthens the party autonomy in the arbitration agreement.
- 6.4 The Hon'ble Court also demonstrated the jurisdiction of the arbitrator and his limitations after the arbitral order is passed by him.

² The Arbitration And Conciliation (Amendment) Act, 2015 No. 3 of 2016 [31st December, 2015].