JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. No.104 of 2017
Defence Housing Authority
Versus.
Multi National Venture Development (Private) Limited

Date of Hearing:	**03.10.2017**
Appellant by:	**Mr. Abdur Rasheed Awan, Advocate.**
Respondent by:	**M/s Babar Sattar, and Zainab Janjua, Advocates.**

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant, Defence Housing Authority ("D.H.A.") impugns the order dated 14.06.2017, passed by the Court of the learned Civil Judge, Islamabad, dismissing the appellant's application under Order XXXIX, Rule 4 read with Section 151 of the Code of Civil Procedure, 1908 ("C.P.C.") seeking recall of the injunctive order dated 01.09.2014, whereby the contesting parties were directed to maintain status quo.

2. Learned counsel for the appellant submitted that vide order dated 12.06.2014, the learned civil Court allowed the respondent's application under Section 20 of the Arbitration Act, 1940 ("the 1940 Act"), and referred the matters in dispute between the parties to arbitration; that vide order dated 06.11.2015, the Hon'ble Mr. Justice (Retd.) Moulvi Anwaar-ul-Haq was appointed as the Sole Arbitrator by replacing the Hon'ble Mr. Justice (Retd.) Sair Ali; that the shopping plaza known as "Shop A Shop" was to be constructed with the funds provided by the purchasers of shops in the said plaza; that presently about 772 shops have been purchased by various purchasers, but till date they do not have possession; that on account of the injunctive order passed by the learned civil Court, the construction works have been stopped; that the said purchasers have been adversely affected by the said injunctive order; that the respondent has not contributed any amount towards the execution of the said property; that the delay in the construction of the shops will cause an increase in their costs, which will be detrimental to the

interests of the purchasers; that due to the delay in the arbitration proceedings, damage is being caused to the building in question; that the construction material at the site is also deteriorating; that the arbitration proceedings will consume considerable time; that the appellant is a public authority and, therefore, bound to protect the interests of its members; and that the impugned order dated 14.06.2017, whereby the appellant's application under Order XXXIX, Rule 4 C.P.C. was dismissed is unlawful and does not take into account the grounds agitated by the appellant in the said application. Learned counsel for the appellant prayed for the appeal to be allowed, and also for the appellant's application under Order XXXIX, Rule 4 C.P.C. to be allowed by vacating the injunctive order dated 01.09.2014.

3. On the other hand, learned counsel for the respondent submitted that the injunctive order dated 01.09.2014 has attained finality, as no appeal against the said order had been filed; that the joint agreement dated 06.06.2008 executed between the appellant and the respondent contains an arbitration clause; that in the year 2014, the matters in dispute between the said parties were referred to arbitration; that since an appeal was filed against the order referring the matter to arbitration, the learned arbitrator did not enter upon the reference until May, 2016; that the arbitration proceedings commenced on 30.05.2016; that the delay in the arbitration proceedings is solely attributable to the appellant’s conduct; that the appellant consumed a period of eight months in cross examining the respondent’s sole witness; that the appellant has dispossessed the respondent from the building site; that the respondent was responsible to market the shops in the plaza in question, which was successfully done and 772 shops were sold generating rupees 1.2 billion; that the said amount was paid to the appellant and the same had to be utilized to fund the project; that the appellant misappropriated the said funds and reneged on his contractual obligations; that the injunctive order dated 01.09.2014 does not prevent the parties from completing the construction of the project but only restrains the appellant from taking over possession of the same; that respondent has repeatedly offered to complete the project and handover the

shops to the purchasers; and that the appellant has hired contractors who have performed substandard work at the site. Learned counsel for the respondent prayed for the appeal to be dismissed.

4. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance.

5. On 06.06.2008, an agreement was executed between the appellant and the respondent under which the latter was to undertake the planning, development, construction, promotion and selling of a project by the name of "Shop A Shop". The said project was to be financed from the sale proceeds of the shops on the project site. The said project was to be executed on land measuring 06 *kanals* in D.H.A., Islamabad Phase-II Extension Overseas Sector. The allotment letters for the shops in the said project were to be issued by the respondent to the successful allotees. Under clause 8.5 of the said agreement, the appellant was to transfer rupees 10 million per month for the first eighteen months commencing from 01.01.2008. As per clause 12.11 of the said agreement, the shops were to be delivered by December, 2009. Clause 14.6 provided that the said project was to be completed within two years with an extension of six months. The respondent was to pay a penalty if the project was not completed within the said period.

6. The said agreement contains an arbitration clause providing for *inter alia* the disputes between the appellant and the respondent arising from and in connection with the said agreement to be referred to arbitration. On 20.07.2012, the respondent filed an application under Section 20 of the 1940 Act before this Court praying for the matters in dispute between the appellant and the respondent to be referred to arbitration. In the appellant's reply to the said application, the applicant nominated Brig. (Retd.) Javed Ashraf Bajwa as one of the arbitrators. Vide order dated 01.09.2014, this Court passed an injunctive order in the following terms:-

> *"The contentions of learned counsel, prima facie, are supported with documents and if the prevailing situation at the site is*

changed, the applicant shall suffer an irreparable loss. In this view of the matter, Respondents are restrained from taking over the possession of the project and parties are directed to maintain status quo till conclusion of the proceedings of the learned Arbitrator or some decision by the learned Appellate Court."

7. Vide order dated 06.11.2015, this Court appointed Mr. Justice (Retd.) Moulvi Anwaar-ul-Haq as a Sole Arbitrator. The learned Arbitrator is said to have entered upon reference in May, 2016. Till date, the arbitration proceedings have not been concluded. On 03.03.2017, the appellant filed an application before the learned civil Court under Order XXXIX, Rule 4 C.P.C. praying for the setting aside of the injunctive order dated 01.09.2014. The said application was contested by the respondent. Vide order dated 14.06.2017, the said application was dismissed by the learned civil Court. The ground on which the said application was dismissed was that the appellant had failed to show any new circumstances which warranted the injunctive order to be recalled. The reason why these proceedings took place before the learned civil Court as due to the amendment in the law, the learned civil Court had an unlimited pecuniary jurisdiction to adjudicate upon suits, and arbitration petitions.

8. Under Order XXXIX, Rule 4 C.P.C., an order for an injunction may be discharged, or varied, or set aside by the Court on the application of a party dissatisfied with such an order. An injunctive order can be discharged provided there is some justification for doing so. A change of circumstances causing an injunctive order to become unduly harsh, unnecessary or unworkable, can serve as a justification for vacating an injunctive order. The justification put forth by the learned counsel for the appellant for the recall of the injunctive order dated 01.09.2014 was that since the same was granted a long time ago, the allotees of the shops were suffering because they had not been given possession of their shops. Had the arbitration proceedings between the contesting parties culminated in an award within the time stipulated in the First Schedule to the 1940 Act, the occasion for filing the application under Order XXXIX, Rule 4 C.P.C. would not have arisen. The contesting parties are expected to cooperate with the learned Arbitrator for an expeditious adjudication of

dispute. The learned counsel for the respondent submitted that the respondent does not intend to produce more than one witness in the arbitration proceedings. The suffering of the third party purchasers/allotees of the shops in the "Shop A Shop" project would end with the end of the disputes between the appellant and the respondent. Since no change in the circumstances (other than a delay in the conclusion of the arbitration proceedings) as would warrant the recall or the variation of the injunctive order dated 01.09.2014 has been put forth by the appellant, I am not inclined to interfere with the order dated 14.06.2017, passed by the learned civil Court.

9. During the pendency of the arbitration proceedings, a Court can pass an injunctive order under Section 41(b) read with paragraph 4 of the Second Schedule to the 1940 Act. Such an injunction operates until the culmination of the arbitration proceedings in an award. Under Section 41(b) read with the Second Schedule to the 1940 Act, the Court has the power to issue interim injunction, but such an interim injunction can only be "for the purpose of and in relation to arbitration proceedings". Therefore, if the injunctive order is hurting the appellant, he ought to take steps necessary for the expeditious disposal of the arbitration proceedings.

10. In view of the above, this appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

Ahtesham*

(JUDGE)

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