

7th October, 2022

APPLICATION OF SECTION 79 OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 TO SECTION 17 OF THE ARBITRATION AND CONCILIATION ACT 1996

Introduction

1. Section 17 of the Arbitration and Conciliation Act, 1996 (for short '**the Arbitration Act**') as amended in 2015 provides for interim measures which can be ordered by the Arbitral Tribunal. Any party to the dispute pending adjudication before an Arbitral Tribunal may make an application for interim reliefs during the proceedings or at any time before the arbitral award is enforced.
2. Section 17(1) of the Arbitration Act makes such interim order subject to any order passed in an appeal under Section 37 (Appealable orders) of the Arbitration Act. An interim measure granted or refused under Section 17 of the Arbitration Act may be challenged in an appeal under Section 37(2)(b).
3. In *Ashok Palav Coop. Housing Society Ltd. vs. Pankaj Bhagubhai Desai* [Commercial Arbitration Petition (L) No. 1206 of 2019], the order of the Arbitral Tribunal rejecting the application for interim measure was challenged by way of an appeal under Section 37 before the Hon'ble Bombay High Court.
4. The interim relief was denied by the Arbitral Tribunal on the ground that Section 79 of the Real Estate (Regulation and Development) Act, 2016 (for short '**RERA**') bars the Tribunal from passing any order of injunction in cases falling under RERA.
5. The provisions of RERA are applicable to builders/developers and property dealers/buyers for the promotion and regulation of the real estate sector.
6. Section 79 of RERA provides for a bar of jurisdiction on civil courts in respect of matters which the Authority or the Appellate Tribunal under the Act is empowered to determine and further that no injunction shall be granted by any court or authority against any decision taken or to be taken in pursuance of such powers.

The Findings of the Arbitral Tribunal

The Arbitral Tribunal while rejecting prayer came to

specific finding that an arbitral tribunal may be called a civil court and Section 79 of RERA bars jurisdiction of any other court or authority from granting injunction and hence the bar on injunction being applicable.

Contentions

The Respondents were not represented. The Court proceeded on the basis of the arguments of the Appellant. The contentions were:

1. The findings of the Arbitral Tribunal were wholly illegal as it misinterpreted Section 79 of RERA.
2. Even after making an observation on the legal aspect and holding Section 79 of RERA to be applicable, the Arbitral Tribunal proceeded to consider the merits of the matter.
3. The provisions of RERA would anyway not apply to this case as the Agreement in dispute in the instant case was entered prior to enactment of RERA. The termination of the Agreement also happened before enactment of RERA in 2016. The dispute is governed by such Agreement where the parties agreed to refer the dispute to arbitration.
4. The dispute between the parties was first addressed in a suit, an order from which had ultimately reached the Supreme Court by way of appeals. The Supreme Court appointed the Sole Arbitrator in such proceedings when RERA had already come into force.
4. However, at such stage, the Respondents raised no objection with regard to the proceedings being barred under RERA.

Observations

1. The Court while interpreting Section 79 of RERA observed that the provision primarily contemplates a bar on civil court to entertain matters that otherwise lie before the adjudicating officer provided



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for under RERA and also bars any injunction being granted against orders of such officer by any court or any authority.

2. The Court in *Food Corporation of India vs. M/s. Evidomen Corporation*, AIR 1999 SC 2352 observed that an Arbitral Tribunal cannot be equated with a civil court.
3. In *Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation*, (2009) 8 SCC 646 the Supreme Court held that Arbitral Tribunal is not a Civil Court within the meaning of the Code of Civil Procedure, 1908.
4. The Court while rejecting the observations made by the Arbitral Tribunal gave a plain and holistic reading to Section 79 of RERA. It observed that “authority” as used under Section 79 is a species of “court”.
5. While interpreting ‘or’ in ‘any court or authority’ the court relied on *J.Jayalalitha vs. Union of India*, (1999) 5 SCC 138, wherein it was observed that word “or” is a conjunction and normally used for the purpose of joining alternatives and that the alternatives need not always be mutually exclusive.
6. The Court also relied on *IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna*, (2021) 3 SCC 241 which held that wherever two remedies are available, the parties shall have the right to select either of the forums for adjudication of their dispute (Doctrine of Election). In *IREO Grace Supra*, reliance was placed on *Imperia Structures Ltd. vs. Anil Patni Civil Appeal No. 3581-3590 of 2020*, wherein it was held that Section 18 of RERA specifies that remedies under RERA are without prejudice to any other remedy available.
7. Section 88 of RERA also provides that the provisions under the Act shall be in addition and not in derogation of any other law for the time being in force. When the parties had decided to submit their dispute to arbitration, the provisions of the Arbitration Act would be applicable in such cases and Section 79 of RERA would not apply thereto.
8. In view of the Agreement between the parties and the decision of the Supreme Court in referring the parties to arbitration, the Court observed that the dispute sufficiently fell within the jurisdiction of the Arbitral Tribunal.
9. The parties themselves had decided to refer their dispute to arbitration and be bound by the Arbitration Act, thus the only logical conclusion that can be derived is that the parties accepted the dispute being adjudicated by the Arbitral Tribunal.
10. The Court also noted that even after making an observation regarding bar on the tribunal from passing an injunction order, the Arbitral Tribunal went on to discuss the merits of the matter.

Judicial Decision

The Court held:

1. The Arbitral Tribunal may have some characteristics of a court as it carries out adjudicatory functions but it cannot be called a civil court within the meaning or purview of the Code of Civil Procedure, 1908. Thus, the bar on courts under Section 79 of RERA cannot be read into arbitral proceedings. The Arbitral Tribunal cannot be elevated to the status of a civil court.
2. The Arbitral Tribunal cannot come under the scope of “any authority” under Section 79 as such interpretation would create a realm of uncertainty where it would entail any adjudicatory body as an authority without falling into a specific definition. This certainly cannot be said to the intent of the legislature behind framing such a provision. Thus, the bar under Section 79 would not apply to an Arbitral Tribunal.
3. Where the parties have selected arbitration as their dispute resolution mechanism, it would naturally culminate into a final award. Hence, where an Arbitral Tribunal can pass a final order, it can pass an interim order as well.
4. While going into the merits of the matter after holding that Section 79 of RERA would apply to arbitral proceedings, the Arbitral Tribunal failed to apply the settled principles of law for granting injunctions before denying the prayer.
5. A cumulative reading of the provisions of Section 79 read with the provisions of Section 88 of the RERA provides that the RERA shall be in addition to and not in derogation of any other law for the time being in force.
6. The Court directed the Arbitral Tribunal to reconsider the Section 17 application under the Arbitration Act on the merits and in accordance with law.
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Conclusion

The decision in the above case makes it clear that the Arbitral Tribunal falls outside the definitions of “court” or “any authority” under Section 79 of RERA. Bar under Section 79 would not be applicable to arbitration proceedings, especially to the power of Arbitral Tribunal to pass interim measures under Section 17 of the Arbitration Act.