

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT  
BHUBANESWAR.**

Present :

**Dr. D.P. Choudhury,**  
District Judge, Khurda  
at Bhubaneswar.

*Dated, Bhubaneswar the 22<sup>nd</sup> Aug. '14.*

**Arb. (A) No. 01 of 2007.**

(Arising out of the order dated 09.03.2007 passed by learned sole Arbitrator Shri B.N. Mishra, District Judge (Retd.), in Arbitration Case No.02 of 2006.)

**Arb. (A) No. 02 of 2007.**

(Arising out of the order dated 13.04.2007 passed by learned sole Arbitrator Shri B.N. Mishra, District Judge (Retd.), in Arbitration Case No.02 of 2006.)

M/s. Shree Annapurna Build Cons. Ltd., Cuttack Road,  
P.S. – Laxmisagar, P.O. – Budheswari, Bhubaneswar-6,  
Dist. – Khurda, Represented through its Directors :

1. Mr. Navin Chandra Patel, aged about 45 years, Son of Nanjee Raja Patel, Old Station Square, Cuttack Road, Bhubaneswar, Dist. – Khurda.
2. Mr. Himmatlal Patel, aged about 35 years, Son of Narayan Patel of Malha Sahi, Mangalabag, Town and Dist. – Cuttack.

... **Appellants.**

(Respondent–Opp. Parties before the Arbitrator.)

***-V e r s u s-***

M/s. Sarthak Builders Pvt. Ltd. With its registered office  
At - A/149, Sahidnagar, Bhubaneswar, Dist. – Khurda  
And Corporate Office at Chinta, Behind Arunodaya Market,

P.O. – Arunodaya Nagar, P.S. – Madhupatna, Dist. –  
Cuttack.

... **Respondent.**

(Claimant–Petitioner before the Arbitrator.)

**Counsel :**

For Appellants    --    Shri B.H. Mohanty &  
Associates.

For Respondent    --    Shri A.C. Swain &  
Associates.

Date of argument : 07.08.2014.

Date of judgment : 22.08.2014.

**J U D G M E N T**

These two appeals under section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter called “the Act”) are directed against orders dated 09.03.2007 and 13.04.2007 passed by learned sole Arbitrator Shri B.N. Mishra, District Judge (Retd.) in Arbitration Case No.02 of 2006. The questions involved in the appeals being interlinked with each other, both the appeals have been heard analogously and are disposed of by this common judgment.

**FACTS :**

2.            The unsworn details of the case of the appellants is that the respondent is the owner of the property situated at Jayadev Vihar, Bhubaneswar, as described in the schedule of

property appended to the agreement, whereas the appellant-Company being represented through its Directors are developers. It is averred that the respondent was interested to develop the schedule land for construction of residential and commercial complexes and they were in search of developers to construct vertical units consisting of several floors. On the other hand, the appellants being developers were also searching for suitable site to raise construction. Both the parties mutually agreed upon for construction of the building. The developers agreed to deliver 30% of the total saleable area to the owner and the entire cost of construction will be born by the developers. So, the owner shall be entitled to possession of ownership of 30% of the total proposed constructed building and the developers shall be entitled to agreement for sale, transfer, alienation to the extent of 70% of the entire units of the building. It was further agreed upon that time being essence of the contract, it should be completed within twelve months. Since the building could not be completed from 02.08.2002, the respondent claimed Rs.11,80,85,928/- as compensation against the appellants. Due to arbitration clause in the agreement, the matter was referred to the learned sole Arbitrator Shri B.N. Mishra, Retired District Judge at Bhubaneswar.

3. During course of arbitral proceeding, the respondent filed a petition under section 17 of the Act for the appointment of receiver as an interim measure in order to preserve, protect and improve the arbitral property. The prayer of the respondent was allowed as per order dated 09.03.2007 passed by the learned Arbitrator, but subject to furnishing security of rupees ten crores. The appellants challenged the above order, stating that the learned Arbitrator has no power to pass such order under section 17 of the Act. Hence, the appellants preferred Arb.(A) No.01 of 2007 assailing the order dated 09.03.2007.

4. In pursuance of order dated 09.03.2007, the respondent furnished security to the tune of rupees ten crore before the learned Arbitrator and it was accepted by the learned Arbitrator vide order dated 13.04.2007. It was the claim of the appellants that such order of Receiver is not enforceable and the security bond being not registered merits no acceptance. Rejecting the contention of the present appellants, the learned Arbitrator accepted the security bond. Challenging such order dated 13.04.2007, Arb.(A) No.02 of 2007 has been filed. Hence the two appeals.

5. The case of the respondent is that there was agreement dated 02.08.2002 with the appellants to refer all the

disputes and differences between the parties arising out of the said agreement to a sole Arbitrator. It is further averred that after completion of fifth floor of the flat, the respondent took decision to enter into a collaboration agreement for completion of the project, as sanctioned by the Competent Authority, including Bhubaneswar Development Authority (“BDA”, for short), was required for which the agreement was entered with the present appellants. A General Power of Attorney was also executed by the present respondent in favour of the present appellants to go ahead to negotiate, sell the flats and to mutate the land, etc. within the stipulated time frame. But, due to unreasonable delay and for clandestine conduct of the appellants to dispose of the property during pendency of the arbitral proceeding, the respondent filed petition before the learned Arbitrator to pass order to preserve, protect and improve the same and for that to appoint the respondent as Receiver of the arbitral property under section 17 of the Act. Upon this prayer, the learned Arbitrator appointed the present respondent as Receiver with the condition to deposit a sum of rupees ten crores as security. The respondent furnished the security bond of rupees ten crores and that was accepted by the learned Arbitrator. He supports the orders dated 09.03.2007 and 13.04.2007.

**CONTENTIONS :**

6. Learned counsel appearing for the appellants submitted that the order dated 09.03.2007 passed by the learned Arbitrator is not based on facts and law. He submitted that the learned Arbitrator has erred in law by ignoring the mandate of section 17 of the Act. The learned Arbitrator should have taken into consideration the agreement between the parties and the factual position before invoking power to pass order under section 17 of the Act. He further submitted that the learned Arbitrator has committed error in law in appointing the respondent as Receiver by cryptic order and by not considering the scope and ambit of section 17 of the Act and the contingencies required for appointing Receiver as envisaged under Order 40, Rule 1 of the C.P.C. According to him, while appointing Receiver, the *de facto* possession of the party should be taken into consideration. The learned Arbitrator should have taken into consideration the factors like contractual relationship, physical possession, intervention of third party, who have purchased the flats. The learned Arbitrator has failed to take note of the fact that the cancellation of the agreement unilaterally is the subject matter of controversy in the present case. The learned Arbitrator has exceeded his limits by appointing Receiver, as section 17 of the

Act is silent in that regard, whereas section 9 of the Act expressly directs the Court to appoint Receiver as an interim measure. Not only this, but also learned counsel for the appellants submitted that the learned Arbitrator has erred in law by accepting the arbitral property as security from the respondent. Since the order of the learned Arbitrator is unenforceable, the appointment of Receiver and acceptance of security are all beyond the scope of the learned Arbitrator. He further submitted that the learned Arbitrator has illegally accepted the security bond, which does not disclose any property amounting to rupees ten crores. The impugned order of the learned Arbitrator is also wrong and bad in law, as he has not imposed any conditions on the respondent while appointing him as Receiver. For that, the order dated 13.04.2007 of the learned Arbitrator is not sustainable in law and should be set aside. On the whole, he submitted that in both the appeals, the orders of the learned Arbitrator are indefensible and prayed to allow the appeals.

7. Learned counsel appearing for the respondent submitted that section 17 of the Act has empowered sufficiently to the learned Arbitrator to take care of the arbitral property and for that he can pass any order as an interim measure. While supporting the order of the learned

Arbitrator, he submitted that due to invasion of the appellants to the right of the respondent over the arbitral property and finding the clandestine conduct of the appellants in disposing of the property, the learned Arbitrator has rightly appointed Receiver within the scope of section 17 of the Act. He further submitted that the security bond furnished by the respondent is thoroughly according to law, as enshrined in the C.P.C. So, he submitted that the orders passed by the learned Arbitrator are not against the principles of law and the same should be upheld. He submitted to dismiss the appeals.

**DISCUSSION :**

8. In these two appeals, the following points emerge for determination :

i) Whether the learned sole Arbitrator is competent to pass order under section 17 of the Act for appointment of Receiver over the arbitral property ?

ii) Whether the learned Arbitrator is correct in appointing the respondent as Receiver subject to furnishing security amount of rupees ten crores ?

iii) Whether the learned Arbitrator is correct in accepting the security bond furnished by the

respondent ?

**Point No.(i) :**

9. Perused the petition, objection, documents filed by both the parties, impugned orders of the learned sole Arbitrator. It is admitted fact by both parties that the present respondent is the owner of schedule property and the present appellants are developers. The agreement dated 02.08.2002 executed between the appellants and the respondent shows that at the cost of developers, there will be construction of units on an area of Ac.0.281 decimals and it was further agreed upon that on the ground floor and first floor, owner will get 30% whereas developers will get 70%, the entire third floor was to be occupied by the owner and the entire second floor and fourth floor will be shared by the developers. It was also agreed upon that if local bye-laws permit for additional construction, then the developers shall have the right to construct and sell such construction after obtaining due permission. It was also submitted that within twelve months, the developers will complete the entire construction as per the approved plan of the BDA, as time is the essence of the contract. There is also a General Power of Attorney between the parties executed by the respondent in favour of the appellants on 02.08.2002 empowering the appellants to sign,

execute and deliver any conveyance or conveyances for sale pertaining to arbitral property and to execute all required deeds, agreements. There is one clause with regard to referring the matter to arbitration in case dispute arises. It is revealed from the petition before the learned Arbitrator that as per the agreement, the floors of the project were not completed within time frame. Rather, from three intending purchasers, an advance amount was collected; but due to non-completion, flats could not be delivered. For commercial complex, by taking into consideration the ground reality, the respondent asked the appellants to seek permission from the BDA to change the kind of users. Still the work could not be completed. On the other hand, the appellants constructed additional two floors without taking permission from the BDA, for which BDA has to declare the entire structure as illegal. Since the project could not be completed within time, the respondent suffered loss and claimed an award of Rs.11,80,85,928/- from the appellants.

10. The present appellants have filed the written statement, stating, inter alia, that they were kept in dark about pendency of unauthorised plan approval case initiated by the BDA against the present respondent. On the whole, they have refuted the allegations made by the respondent.

11. On going through the petition under section 17 of the Act filed before the learned Arbitrator, it is found that pending the aforesaid arbitral proceeding, the present respondent has alleged that without adhering to the rules and stipulations in the collaboration agreement and violating the written norms, the appellants went on with the work, although the respondent is the owner in possession of the arbitral property. Since the appellants were making clandestine preparation for disposal of the arbitral property, the respondent prayed before the learned Arbitrator to pass order appointing them as Receiver. The objection of the appellants shows that the learned Arbitrator has no power to appoint Receiver under section 17 of the Act. According to them, the claim of compensation and damage do not flow from the contract. Since the appellants are not preventing the respondent in any manner, the question of preservation, protection and improvement of the property does not arise. If Receiver is appointed, they will suffer irreparable loss. After considering both parties, the learned Arbitrator simply held in para-8 that in view of section 17 of the Act, he has got power to grant interim measure. However, in para-10, 11, & 12, he has stated that the respondents (appellants herein) executed the sale deed in favour of the owner of the arbitral property

and the apprehension of the claimants that the arbitral property is in danger and it needs protection is perfectly justified. Of course, the order does not disclose which documents were taken into consideration by the learned Arbitrator. However, let me find out if the learned Arbitrator has got power to appoint Receiver. Section 17 of the Act states as follows :

“17. **Interim measures ordered by arbitral tribunal.** – (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)”.

12. It is reported in the case of *M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd.* (AIR 2004 SC 1344), wherein Their Lordships have been pleased to observe at para-56 that :

“56. A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the Arbitrator is a limited one. It cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the Arbitrator under the 1996 Act is not required to be made a rule of Court, the same is enforceable on its own force. Even under Section 17 of 1996 Act, an interim order must

relate to the protection of subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof.....”.

With due respect to the above decision, power of the learned Arbitrator under section 17 of the Act is limited one, but for protection and preservation of the arbitral property he can pass order for interim measure. Unlike section 9 of the Act, which is applicable to before or during arbitral proceedings or at any time after the making of the arbitral award, order under section 17 is limited to the pendency of arbitral proceeding only. When power is given to the learned Arbitrator during course of arbitral proceeding to take any interim measure for protection and the interim measure can be extended to any extent, the appointment of Receiver by the learned Arbitrator cannot be said to be beyond his power. I subscribe this view by taking cue from the language as appearing in section 9 of the Act. Section 9 has given power to Court to pass any order as interim measure and, amongst them, there is express provision to pass interim injunction or appointment of Receiver. There is no definition of “interim measure” in the Act itself. So, the only words “interim measure” appearing in section 9 can be taken into

consideration to apply to the interim measure as required for protection of property which can be exercised under section 17 of the Act by the learned Arbitrator during arbitral proceeding. The question whether it can be enforceable or not depends upon the nature of interim measure taken by the arbitral tribunal. Be that as it may, I am of the considered view that the learned Arbitrator has got power to pass the order of appointing Receiver for protection and preservation of the arbitral property in the instant case. Point No.(i) is answered accordingly.

**Point No.(ii) :**

13. As discussed above, it is reiterated that the learned Arbitrator has not specified the materials basing on which he has appointed the respondent as Receiver, save and except the fact that the appellants have executed some sale deeds, without mentioning which sale deeds they have executed. Being the Appellate Court, this Court cannot close the matter by pointing out the defect in the order of the learned Arbitrator. In fact, after going through the pleadings of both parties, as discussed above, it appears that the developers are in possession of the arbitral property and the entire project has been declared illegal by the BDA. No material is produced by the respondent to show that the

appellants have been dispossessed. Of course, it has been brought out by the appellants that unilaterally the agreement dated 02.08.2002 has been cancelled. This is the subject-matter in the arbitral proceeding. After considering all these aspects, I am of the view that during arbitral proceeding, protection and preservation of the arbitral property is necessary. Now, the question arises what should be the interim measure for protection and preservation of the arbitral property. When the developers are in possession, as per the materials available on record, and the respondent is the owner of the arbitral property, the appointment of owner as Receiver is not in accordance with law because in the case of appointment of Receiver, always a party should be appointed as a Receiver, and particularly the party in possession should be appointed as Receiver. It is true that the owner cannot be kept out of the property in question. So, in the interest of justice, it would be better if the respondent and the appellants honour their agreement dated 02.12.2002 and, accordingly, share the construction already made, except the excess construction beyond the original BDA plan. This arrangement is made during pendency of the arbitral proceeding and both parties are to maintain status quo of the entire arbitral property till finalization of arbitral proceeding. So, for protection and

preservation of the arbitral property, both parties will maintain status quo by taking possession of the floors as per the original agreement. Consequently, the order dated 09.03.2007 of the learned Arbitrator is modified. Point No.(ii) is answered accordingly.

**Point No.(iii) :**

14. In view of discussion in point No.(ii), the order of the learned Arbitrator by accepting the security bond furnished by the respondent is not required to be discussed in detail. However, the security bond, as accepted vide order dated 13.04.2007, does not appear to be correct because the security bond has been submitted by the respondent towards their assets. Such assets have not been explained in the security bond so as to disclose whether they are worth rupees ten crores. Apart from this, the security bond should have disclosed the immovable property. Simply, submission of stamp paper worth Rs.50/- with due signature of the Managing Director of the respondent-Company is not enough towards compliance of furnishing security amount in question. Security bond must disclose the property other than the arbitral property to keep it as security for the arbitral property. So, in my considered view, the security bond furnished by the respondent in respect of the arbitral property and acceptance

of the same by the learned Arbitrator are not sustainable in law. Hence, point No.(iii) is answered in the negative. On the other hand, the order dated 13.04.2007 of the learned Arbitrator is not tenable in law and is liable to be set aside. Hence ordered :

**O R D E R**

Arb.(A) No.01 of 2007 is allowed in part. Arb.(A) No.02 of 2007 is dismissed and the order dated 13.04.2007 passed therein by the learned Arbitrator is hereby set aside.

Both parties are directed to maintain status quo in respect of the arbitral property to the extent of modification of the order dated 09.03.2007 of the learned Arbitrator in Arb.(A) No.01 of 2007, as observed above. No cost.

**District Judge, Khurda  
at Bhubaneswar.**

22.08.2014.

Dictated, corrected by me and pronounced in the open Court this day the 22<sup>nd</sup> August, 2014.

**District Judge, Khurda  
at Bhubaneswar.**

22.08.2014.

