

**Jaksons Developers Pvt. Ltd. Vs. Delhi Development Authority**

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**SooperKanoon Citation :** [sooperkanoon.com/1096116](http://sooperkanoon.com/1096116)

**Court :** Delhi

**Decided On :** Oct-29-2013

**Judge :** Rajiv Shakdher

**Appellant :** Jaksons Developers Pvt. Ltd.

**Respondent :** Delhi Development Authority

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment delivered on:

29. 10.2013 + ARB.A. 22/2013 JAKSONS DEVELOPERS PVT. LTD. ....  
Appellant Versus DELHI DEVELOPMENT AUTHORITY ..... Respondent  
Advocates who appeared in this case: For the Appellant: Mr Sandeep Sethi, Sr.  
Advocate with Mr Ajay Kumar & Mr Badal Dayal, Advocates. For the Respondent:  
CORAM: HON'BLE MR. JUSTICE RAJIV SHAKDHER RAJIV SHAKDHER, J IA  
No.17366/2013 (Exemption) Allowed subject to just exceptions. Arb. A. 22/2013 &  
IA No.17365/2013 (Stay) 1. This is an appeal filed against the order dated  
22.10.2013 passed by the learned arbitrator on an application moved by the  
petitioner under Section 17 of the Arbitration & Conciliation Act, 1996 (in short the  
Act). The appellant is aggrieved by the impugned order in as much as the learned  
arbitrator has rejected its plea for continuing with the injunction granted by this  
court, on the invocation and consequent encashment of the bank guarantee  
furnished towards performance security. Arb.A. 22/2013 furnished by the appellant  
is of the value of Rs. 9.30 crores.

2. In order to appreciate the contours of this appeal, the following broad facts need to be noticed:

2. 1 The Delhi was chosen as a venue for the 2010 Common Wealth Games. The respondent, along with other statutory authorities, was tasked with the responsibility of putting in place the relevant and necessary infrastructure. It is in this context that in October, 2007 the respondent floated tender for allotment of land to set up hotels in different parts of National Capital Territory of Delhi. It is against one such tender that the appellant filed its bid, whereupon, it was declared a successful bidder in respect of a commercial plot described as: Plot No.3, B-1, Rohini Twin District Centre, New Delhi (in short the plot). The said plot admeasured 11130.40 sq. metres. 2.2 The appellants bid was in the sum of Rs. 186 crores, which was accepted on 04.01.2008; when a demand-cum-allotment letter was issued to it. Since the appellant had already deposited 25% of the bid amount, it was called upon to deposit the balance 75% of the bid amount, i.e., a sum of Rs. 139,20,00,045/-. 2.3 It is not in dispute that as per clause 3.14 of the tender document the appellant was required to complete the construction of the hotel within twenty four (24) months; commencing from the date of the issuance of the allotment-cum-demand letter. The failure to complete the construction of the hotel within the time frame provided in the said clause, was to result in the encashment of the bank guarantee in issue furnished by the appellant; which is valued at Rs. 9.30 crores. The extent of the encashment was dependent on the period of delay. A graded scale, in that behalf, stands incorporated in the bank guarantee itself. Indisputably, if the delay in the execution of the work was in excess of 180 days, the respondent was entitled to encash the entire value of bank guarantee. 2.4 The appellant, does not dispute that though the period for performance (i.e., construction of the hotel) expired on 03.01.2010, it could secure completion only on 15.09.2010. The case of the appellant is that the delay beyond 03.01.2010 was solely on account of reasons attributable to the respondent. In this behalf the following important milestones are required to be noted: (i) On 16.01.2008 the appellant applied for grant of permission to excavate the plot in issue for the purposes of constructing a basement. (ii) The respondent granted permission on 11.02.2008, at the risk and cost of the appellant with a caveat that the appellant would not build any superstructure on it. The reason for the same

was perhaps that the balance sum required to be paid against the purchase consideration had not been deposited by the appellant. However, to expedite the process, the respondent agreed to the appellant taking preliminary steps towards construction of the hotel, without establishing any permanent rights in the plot till such time the entire consideration was paid. (iii) Accordingly, on 13.02.2008 the respondent permitted the appellant to submit building plans for construction of the hotel on the plot in issue. On 10/11.03.2008 the appellant forwarded the building plans to the respondent alongwith necessary documents. (iv) On 29.05.2008 the appellant paid the entire bid amount alongwith interest. (v) The bank guarantee in the sum of Rs. 9.30 crores was furnished by the appellant, on 09.06.2008. (vi) The respondent vide its letter dated 01.09.2008, informed the appellant that the possession of the plot will be handed over to the appellant on 08.09.2008. Apparently, on the same date a conveyance deed was executed qua the plot in issue. (vii) It appears that on 04.09.2009, the respondent informed the appellant that since the time for completion of the contract was coming to an end on 03.01.2010, it should furnish a completion certificate alongwith proof of the hotel having become functional, failing which, the bank guarantee in issue, would be encashed without further notice. In response to the same the appellant vide letter dated 12.09.2009 sought extension of time for completion of hotel upto 30.06.2010. The extension of time was based on assertions, each of which, pointed an accusatory finger towards the respondent. (viii) The respondent, however, vide communication dated 23.12.2009, rejected the request of the appellant for extension of time. A formal letter was, evidently, issued in this behalf on 31.05.2010. 2.5 In the background of the above circumstances, the respondent, on 08.07.2010, invoked the bank guarantee in issue. 2.6 The above action of the respondent propelled the appellant to approach this court by way of a petition under Section 9 of the Act. This petition was numbered as OMP No.360/2010. The appellant was granted interim protection in the form of an order of injunction dated 09.06.2010. The respondent was restrained from encashing the bank guarantee in issue. However, by an order dated 21.10.2011, this court permitted the appellant to file an application under Section 17 of the Act in view of the fact that arbitration proceedings had commenced. Pending disposal of the application, the interim order passed by this court was to continue to operate. Parties herein were allowed

to rely upon the pleadings filed in the Section 9 petition.

3. It is in this background that the impugned order came to be passed by the learned arbitrator.

4. Mr Sethi, learned senior counsel, who appeared for the appellant, assails the order dated 22.10.2013 on the ground that the learned arbitrator had ignored the fact that the delay in the completion of the hotel was solely attributable to the respondent. For this purpose, he relied upon the minutes of meeting dated 08.02.2010. It was Mr Sethi's contention that there were issues which required attention of the respondent. These issues being: payments towards establishment of grid and electric sub-station to NDPL; provisioning of street lights; construction of internal roads; laying of water lines; construction of UGR; and cleaning/ de-silting/ making of sewer-line and SW drains functional. 4.1 Mr Sethi submitted that even though in the minutes of 08.02.2010 it was indicated that no payment was required to be made to NDPL by the respondent, it got revealed, contrary to the stand taken in the meeting, that the respondent was required to make payment to the NDPL, as on account of non-payment of money by respondent to NDPL, the appellant had to approach this court by way of a writ petition being: WP(C) 265/2010. Mr Sethi stated that it was only after an order dated 26.04.2010 was passed in the said writ petition, that the respondent paid the requisite charges to the NDPL. 4.2 To be noted, thus purpose of drawing my attention to the order dated 26.04.2010 was that between the date when the joint meeting held between the parties herein, i.e., 08.02.2010 and the passing of order by this court, there was a delay of over two months. 4.3 Apart from the above, it was Mr Sethi's contention that the land in issue could not have been sold by the respondent till such time when the necessary infrastructural facilities were in place. An attempt was made to draw the attention of this court to the provisions of the Delhi Development Act, 1957. 4.4 The sum and substance of Mr Sethi's submission was that there were no basic infrastructure facilities available, and therefore the hotel could not be completed by the due date. The reasons cited for the delay by Mr Sethi were broadly as follows: delay in sanctioning the building plan; delay in handing over of the possession of the plot; delay in issue of completion certificate; delay by the respondent in payment of its contribution for electrification of the twin

district centre; and lastly, delay in provision of basic infrastructure and amenities, as indicated hereinabove. 4.5 At the very outset, I asked Mr Sethi as to whether the respondent had filed a reply to the statement of claims, evidently lodged by the appellant. Though Mr Sethi affirmed the fact that a reply had been filed by the respondent, he regretted that a copy of the same had not been placed on record by the advocate on record for the appellant. I, therefore, called upon Mr Ajay Kumar, Advocate, to place the same on record. A perusal of the reply dated 19.12.2011 filed by the respondent would show that it has set up a defence which, as rightly pointed out by the learned arbitrator, would require trial.

5. As noted above by me, there was an initial delay on the part of the appellant in paying balance 75% of the bid amount. In terms of clause 3.4 of the contract obtaining between the parties, the appellant was required to deposit the said amount within 90 days of the issuance of demand-cum allotment letter. The delay in payment could be condoned if sufficient reasons obtained in that behalf up to a maximum period of 180 days, subject to payment of interest as indicated in the said clause. Admittedly, the petitioner could not fork out the balance amount till 29.05.2008. As per clause 3.5 of the contract obtaining between the parties, the possession of the plot could only be given after payment of the balance bid amount and submission of the conveyance deed papers by it, which were required to be duly stamped by the Collector of Stamps. As indicated above, the possession letter was issued on 01.09.2008, while the bank guarantee was furnished by the appellant only on 09.06.2008. Whether or not there was delay on the part of the appellant in furnishing the conveyance deed, is not articulated in the appeal. Though admittedly there was delay on the part of the appellant in paying the balance bid amount, despite which the respondent appeared to have entertained the appellants request for excavation of the plot and submission of the building plans. Apparently, building plans were submitted by the appellant on 11.03.2008. According to the reply filed by the respondent, there were shortcomings in the papers submitted which was communicated to it vide communication dated 24.03.2008. As a matter of fact, on 31.03.2008, the appellant appears to have requested the respondent not to process its case for sanction of building plan. The reason for this was that the appellant had apparently been informed that its plot area had been enhanced which would have had an

impact on the FAR available to it for the purposes of construction of superstructure.

6. It appears that the appellant was required to cure defects in respect of documents submitted by it and obtain No-Objection Certificates (NOC) from the Delhi Urban Arts Commission (DUAC) and the Chief Fire Commission (CFO). The NOC from the CFO was received on 19.11.2008, while the NOC from the DUAC was received on 29.12.2008. On 19.02.2009, the appellant submitted drawings incorporating the recommendations of the DUAC and CFO. On 27.02.2009 the appellants case for sanction of building plan was processed for approval by the competent authority. It appears that on 13.04.2009 the appellant applied for waiver of sanction charges in respect of which the appellant was advised to submit documents vide communication dated 15.05.2009. It is in this background that on 18.05.2009 a sanction letter was issued in favour of the appellant.

7. It appears to be the stand of the respondent before the learned arbitrator that relaxation at various stages were granted by it in order to expedite construction of hotels keeping in mind the fact that the games were slated to be held on a designated date. Therefore, as indicated hereinabove, the respondent took the following steps to ensure expedition: (i) allowed not only excavation but also construction of the building upto the plinth level, pending clearances by the statutory bodies like CFO and DUAC; (ii) conditional waiver of prior sanction charges for construction of building beyond plinth level, subject to the hotel being made operational before the Common Wealth Games; and (iii) gave approval to forward the revised building plans with additional FAR to CFO and DUAC, pending consideration show cause notices issued for deviations in the building during the period of construction.

8. In so far as the respondents stand (which is evidenced in the reply filed with the learned arbitrator), with regard to availability of infrastructure facilities is concerned - it appears to be that the facilities can only be provided in tandem with the pace of construction on allotted plots. The reason for this, according to the respondent, appears to be that if facilities are provided much in advance, they are likely to get damaged in the intervening period. The respondent appears to take the stand that

a mechanism of fortnightly meetings was put in place, and that, the hoteliers, which included the appellant, were informed that the provision of amenities was not to be interlinked with the construction of the hotels.

9. To be noted, it is the stand of the respondent before the learned arbitrator, in its reply filed before him, that on 15.09.2009 the respondent had informed the appellant that it could not be issued an occupancy certificate due to non-submission of necessary statutory clearances. As per the respondent, the appellant submitted the NOC from the CFO on 07.03.2011. The respondent forwarded the plan submitted by the appellant to the DUAC for approval on 21.03.2011. The DUAC, vide communication dated 02.04.2011, approved the completion plans. Consequently, after the appellant had submitted necessary documents and fee for issuance of the occupancy certificate dated 15.06.2011; the said occupancy certificate was issued by the respondent on 16.06.2011.

10. Having regard to the aforesaid stand taken by the respondent before the learned arbitrator in the pleadings filed before him, it cannot be said that the impugned order is either perverse or arbitrary or capricious or is passed in ignorance of principles of law for grant of interlocutory injunctions. It is trite to say that the scope of an appeal qua discretion employed by the authority of the first instance is restricted to an appeal in principle. [See *Wander Ltd. & Anr. vs Antox India P. Ltd.*, 1990 (supp) SCC727 and judgment dated 21.10.2013 passed in Arb.A. No.18/2013 titled *Emaar MGF Land Limited vs kakade British Realities private Limited & Anr.*]. 10.1 In appeal, this court would not interdict the discretion employed by the learned arbitrator and substitute the same with its own view. As correctly reasoned by the learned arbitrator, the case of the appellant did not fall in any of the exceptions carved out by the courts in India for grant of injunction qua a bank guarantee. This aspect has been discussed in detail by the learned arbitrator in paragraphs 41 to 67 of the impugned order. In order to avoid prolixity I do not intend to repeat the same. 10.2 The fact that the appellants allegation of delay, qua the respondent, requires trial, is reflected in paragraph 62 of the impugned order. The averments gleaned from the reply filed by the respondent are noticed by me hereinabove, only to put the matter beyond doubt that the issue of delay, amongst others, requires a trial on merits.

11. For the foregoing reasons, I find no merit in the appeal, the same is, accordingly, dismissed. Needless to say, any observation made hereinabove by me being prima facie in nature, would have no impact on the merits of the matter, pending before the learned arbitrator. Dasti under the signatures of the court master. RAJIV SHAKDHER, J OCTOBER29 2013 kk

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