
(2012) 04 BOM CK 0124
In the Bombay High Court
Case No : Arbitration Petition No. 649 of 2011

Atul Resorts and Hospitality India Pvt. Ltd.	APPELLANT
Vs	
Lucky Developers and Others	RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 9
Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 —
Section 3

Citation : (2013) 1 ALLMR 362 : (2012) 3 BomCR 255

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Roop M. Vasudeo, for the Appellant; Ashish Kamat with Ms. Usha Rahi instructed by y Mayur Narendra and Co., for the Respondent

Judgement

Anoop V. Mohta, J.—Both these Petitions are u/s 9 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) filed by the common Petitioners against the common Respondents, based upon the arbitration agreement of development of the common properties as described in the Petition. The basic similar prayers are as under :

(a) Pending the hearing and final disposal of Arbitration proceedings this Hon''ble Court be pleased to grant injunction restraining the Respondents, their servants and agents and representatives from in any manner selling, alienating, encumbering, consuming, transferring, creating any rights title and interest in respect of salable FSI generate from the Slum rehabilitation in respect of the Slum property described in Exhibit "D" till making available of balance salable FSI of 2,78,973 sq.ft., which the Respondents have agreed to sell the Petitioners.

(b) Pending the hearing and final disposal of Arbitration proceedings this Hon''ble Court be pleased to grant injunction restraining the Respondents, their servants and agents and representatives from in any manner disturbing the possession of the Petitioner of the property all that piece of land bearing Survey No.70, Hissa

No. 2 Corresponding CTS No. 102, 102/1 to 81 of Village Pahadi, Taluka, Borivali situate at Goregaon (East), Mumbai totally admeasuring 7886.58 sq. mtrs or thereabout and more particularly described in the Schedule at Exhibit "G" to the Petition and shown in Green Wash colour in the Plan at Exhibit "H" hereto, except in accordance with the law.

(c) Pending the hearing and final disposal of Arbitration proceedings this Hon''ble Court be pleased to grant injunction restraining the Respondents, their servants and agents and representatives from in any manner obstructing the access of the Petitioner to the said plot of property more particularly described in the Schedule at Exhibit "G: in the Petition and shown in Green hatch colour in the Plan at Exhibit "H"" hereto, except in accordance with the law.

(d) Pending the hearing and final disposal of Arbitration proceedings this Hon''ble Court be pleased to grant injunction restraining the Respondents, their servants and agents and representatives from in any manner obstructing the construction of Auxiliary water tank by the Petitioner in the said plot of property more particularly described in the Schedule at Exhibit "G" in the Petition and shown in Green wash colour in the Plan at Exhibit "H" hereto.

2. The relevant common events for the different properties are as under :

By an order bearing No. SAA/MALADAVAD/IRANIWADI/85 dated 15th December, 1992 duly notified and published in Maharashtra Government Gazette Part Mumbai Division on 21st January, 1993 a part of the property bearing Survey No. 70, Hissa No. 2, corresponding CTS No.102, 102/1 to 81 and bearing CTS No. 59, 59 1 to 11 of village Pahadi, Taluka Borivali was declared as "Slum" u/s 3 of Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short, the Slum Act).

3. The Authorities under the Slum Act vide Letter of Intent bearing No. SRA/ENG/519/PS/PL/LOI/DTD. 08th January, 2002 sanctioned the said scheme with certain terms and conditions. The lay out plan submitted by Respondent No.1 to Slum Rehabilitation Authorities/Municipal Corporation Greater Mumbai was approved by; order No. SRA/ENG/RV/OC/AO dated 30 August, 2002.

4. Development Agreement dated 10 September, 2007 was entered into and duly registered by the Petitioners and Respondent No.1. The similar is the agreement in both the matters. Under the Development Agreement, the concerned Respondent had agreed to construct the rehab buildings. In lieu of such construction, the Respondents were entitled to the FSI of saleable buildings. It was further agreed that Respondent No.1 should sell to the Petitioners, the saleable building FSI.

5. In June, 2011, out of 3,55,000 sq.ft the Respondents made available to the Petitioners 76,027 sq.ft of FSI for saleable buildings to be constructed and the Petitioners were bound and liable to pay a sum of Rs.11,40,40,000/and have paid Rs.24,25,40,000/and therefore alleged to have paid excess amount of

Rs.12,84,99,500/. The Petitioners have so far constructed building namely Smarth Blue Mountain by consuming the said FSI of 76,027 sq.ft and have sold the entitled Flat/Premises to the Third parties. The building is ready but occupation certificate is not granted due to incomplete infrastructure by Lucky Developers i.e Respondent No.1. The concerned Respondents have stopped the construction of rehab building. The Petitioners have alleged that the concerned Respondents are negotiating with the third parties for a sale of rehab and saleable FSI, as consolidated package, which the Respondents are not entitled to.

6. In view of the dispute, the Petitioners through their Advocate's letter dated 7 July, 2011 intimated to Respondent No.1 to have appointed Shri A.K. Shende, Advocate, High Court, Bombay, as a sole Arbitrator. It was not duly responded. Therefore, this Petition.

7. This Court (S. J. Vazifdar, J.) on 10 August 2011 by an interim order directed "The Respondents shall not in any manner deal with FSI referred to in Exhibit "G" to the petition till 26th August 2011" and "The Petitioner shall be entitled to maintain status quo regarding its possession of the property as on date till 26th August 2011". The said interim order has been in force till this date.

8. By order dated 14 November, 2011, a Chamber Summons was allowed and thereby one M/s. Techno Trade Impex India Pvt.Ltd has been added as new Respondent.

9. It is recorded on 14 March 2012 that the parties are considering to appoint an Arbitrator to settle the matter as there exists the arbitration clause in the agreement between the parties. The same is in progress. By consent of the parties as already directed, heard finally on 16 March 2012, and, therefore, this common judgment.

10. The Respondents opposed the contention of the Petitioners by its reply dated 14 September 2011. The Petitioners filed rejoinder to the same.

In slum development project, the Developer has obligation and right to claim interest in the property.

11. The basic contention raised by the learned counsel appearing for the Respondents by relying on Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Others, and contended that the agreement for development in question creates no interest in the land and, therefore, would not be specifically enforceable. The reliefs so claimed may not be granted in favour of the Petitioners. The facts and circumstances are totally distinct and distinguishable. In the present case, the interests have already been created in favour of the Petitioners. Admittedly, the agreement in question is for the development of the slum area/project. Both the parties are not the owner of the property. Their right is only to develop the property, but the fact that the development is arising out of the slum scheme, the developer has definite right/interest in the property. Apart from his investment and his obligations to construct the portion for the

slum dwellers but in view of rights in the free sale component goes to show that such developers, in such scheme, have interest in the property also. This is not a simple development of property only for construction work. Here added rights and interests have been created in favour of the developers. That was a case of private agreement/contract between the parties. Here is the case of development of the slum under the provisions of the Slum Act. The Petitioners/builders, therefore, having once agreed for such development and considering the scheme and the purpose of such agreements, I am not inclined to accept the case of the Respondents that such application u/s 9 is not maintainable. Admittedly, there exists the arbitration agreement between the parties to settle the disputes arising out of and/or relating to the development agreement in question.

The subsequent developer or partners are bound by the arbitration clause.

12. The Respondents (the Lucky Developers) received a commencement certificate on 24 March 2006 from SRA for the project which was extended further on 27 April 2006 and 14 September 2009 for further height/floors. The commencement certificate dated 28 July 2010 in favour of the Respondents shows that from time to time, for various reasons, there were various changes/developments and fact remains that the project is not yet developed as agreed. This Court, as recorded, by taking note of subsequent development including of Deed of Admission/Retirement of Partnership dated 1 April 2011, change in the constitution of the firm. Therefore, the liabilities, as well as, obligations have also been changed, partially. Those partners and firms have been joined as Respondents.

13. The fact remains that as the original arbitration clause remained intact, all these subsequent or newly added parties are bound by the basic clause of arbitration. Therefore, any dispute arising out of these partners, past and existing, arising out of the agreements, Partnership Deed and the transactions, need to be resolved as early as possible, through the arbitration mechanism.

The affected third party can give consent for the early settlement of the disputes through the arbitration mechanism.

14. By letter dated 13 July 2011, Vaman Realtors Private Limited with whom the development agreement was entered into for sale of FSI invoked arbitration clause and by Advocate's notice to the Respondents, appointed the Arbitrator also. The dispute so arose between the parties because of various changes. The earlier plans and/or agreements definitely require restructuring and rearrangement on area aspect and by all parties concerned with the project, as well as, with the development agreements.

15. By legal notice dated 5 September 2011 addressed to the Petitioners, agreement dated 2 May 2007 in question is terminated. The Respondents also opposed the named Arbitrator and suggested to invoke Section 11 of the Arbitration Act for an appointment of Arbitral Tribunal. The statement is also made that the Petition is still pending. The ultimate result is that the SRA project

in question is halted. Therefore, there is an urgent need where parties must take steps to settle their dispute so that the project can be completed as early as possible. All the slum dwellers/occupants and the Authorities have been affected by this alleged dispute between the developers and the parties. More the time they take to decide and settle their dispute, all the third parties, as referred above will suffer and will be affected.

Early constitution of the arbitral tribunal is a must.

16. The delay in appointment of Arbitrator defeats the early settlement of dispute. Such tardiness tarnishes the arbitration system also. Considering the scope, purpose and object of Arbitration Act, in my view, the Petition u/s 9 for interim measure can be filed pending the settlement of the dispute to avoid third party rights and/or further complication in their settlement process, but just by invoking Section 9 of the Arbitration Act, the parties just cannot sit idle and not taking steps to appoint Arbitral Tribunal. The interim order and/or protection so granted u/s 9 is always subject to and/or pending constitution of arbitration proceedings and/or in a given case, till the enforcement of the award if case is made out. But in no way it can be stated that once Section 9 Petition is filed and the interim order obtained and/or got the protection from the Court, the parties should not bother to take immediate steps to appoint Arbitral Tribunal. The whole arbitration proceedings and its purpose will be frustrated and traduce the arbitration system, the moment the parties avoid and/or deliberately delay, even to constitute the Arbitral Tribunal.

No question of unilateral appointment of an Arbitrator by one party, except through the Court.

17. Section 11 of the Arbitration Act itself provides, if a party, as per the arbitration agreement, nominates its Arbitrator by invoking arbitration clause, as there arose dispute between the parties, the other party if fail to accept the named Arbitrator and/or appointment of the Arbitrator suggested by other party, the right to nominate its Arbitrator only get lost. The parties thereafter have no choice but to invoke Section 11 of the Arbitration Act to appoint the Arbitral Tribunal. The parties cannot insist, unless consented, to nominate their selected nominated Arbitrator. The parties must, by consent, appoint Arbitrator. If one party disputes and/or resists the named Arbitrator for appointment and/or nomination, the other party cannot insist for the same nomination. The parties have no option but to get the Arbitrator appointed through the Section 11 procedure. In my view, there is no question of appointing Arbitrator by one party unilaterally basically when other party is not consenting and/or not consented for the said appointment. The unilateral appointment of Arbitrator is in breach of the provisions of the Arbitration Act itself, apart from the scheme and purpose of Arbitration Act. The fact that Arbitration Act itself takes away the rights of parties, if not consented within 30 days, to appoint their named Arbitrator and further that other side loses its right to nominate the named Arbitrator unless consented by both the parties, this itself shows that it is mandatory for the other

side to give consent within prescribed period. If not given, the parties have no option, but to invoke Section 11 of the Arbitration Act as early as possible.

Section 9 and Section 11 of the Arbitration Act are to be invoked simultaneously.

18. Section 9 if read with Section 11 of the Arbitration Act, it provides early steps by the concerned parties. Both these sections need to be invoked simultaneously to achieve the purpose of early disposal of disputes or differences. The tardy steps traduce the arbitration system. By and by the developing trend is to invoke Section 9, but avoid to take effective steps to nominate or appoint the Arbitrator, even by overlooking Section 11 of the Arbitration Act. The interim measure available u/s 9 is for such pending time but cannot be interpreted and mean to just delay the appointment of Arbitrator, by one way or the other, after obtaining the interim order and/or measures through the Court, on the foundation that there is no limitation period prescribed in the Arbitration Act. The immediate and/or reasonable time to appoint the Arbitrator and/or to take the steps to appoint the Arbitrator is definitely serve the purpose and object of arbitration. The situation like present one where the parties unable to continue with the development project of the occupiers/slum dwellers, though the necessary certificate and agreements were obtained in the year 2007. The third parties thereby have been affected by such intentional and/or unintentional delay. The available remedy is to get the matter decided as early as possible by taking effective steps to appoint the Arbitrator by all the concerned. The deliberate delay will hamper the whole project and all will be affected by the same.

Interim measures with liberty.

19. In the present case, considering the facts and circumstances and in view of the fact of various developments, even after obtaining the basic commencement certificate and execution of the agreements, the subsequent changes even in the demarcated area for the occupants and the change in the policies, including dispute between the parties affecting the whole project, as well as, the rights of the parties. Therefore, to avoid further complication, it is necessary to pass reasonable and appropriate order pending the constitution of the arbitral Tribunal. The parties thereafter to move application for a modification of the orders, pending the arbitration proceedings. All the parties, therefore, as bound by the arbitration clauses, are entitled to make their respective submissions to make the project more effective and useful at the earliest, are at liberty to appear and apply for such reliefs/measures.

20. All the elements which are required for the grant of appropriate interim measures and protection, pending the arbitration proceedings and/or subject to modification by the Arbitral Tribunal, have been made out. The balance of convenience, equity and conduct, fair play and all other elements which are necessary to pass interim measures/order u/s 9 have been made out. There will be irreparable injury and complications if at this stage the orders so passed are not continued.

21. The contract, though terminated, the arbitration clause does survive. All the parties, concerned or otherwise, interested in the agreement and the transactions and the project, may consent for settlement of dispute, through the arbitration. The liberty is granted to the parties to join and/or to apply for proper adjudication of the issues/disputes in accordance with law in the interest of justice and to avoid further delay in the development project.

22. In the result, the following order :

ORDER

(a) All orders, including dated 10.08.2011 to continue till the constitution of the Arbitral Tribunal and six weeks thereafter, enabling all the parties to apply for appropriate order.

(b) All points are kept open.

(c) The liberty is granted to all the concerned to give consent for arbitration, to settle the arbitrable disputes and differences.

(d) The parties to take early and effective steps to appoint the Arbitral Tribunal.

(e) Both the Petitions stand disposed of accordingly. No costs.

The learned counsel appearing for Respondents, 1, 7, 11 and 12 seeks stay of the effect and operation of this judgment. The learned counsel appearing for the Petitioners oppose the same. Considering the fact that the interim orders already passed have been in force till this date, I am also not inclined to accept the same, as this is nothing, but just a continuation of the orders already passed, pending the constitution of the tribunal, with liberty. The request is accordingly rejected.