
(2011) 03 BOM CK 0240
In the Bombay High Court
Case No : Arbitration Petition No. 109 of 2011

Heritage Lifestyles and Developers Pvt. Ltd. APPELLANT
Vs
Amarvilla Co-operative Housing Society Ltd., Mrs. Sandhya R. RESPONDENT
Rao and Mr. Navnitlal P. Shroff

Date of Decision : 10-03-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1, 9A

Citation : (2011) 7 ALLMR 754 : (2011) 6 BomCR 205 : (2011) 3 MhLj 865

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, Ashish Kamat and V.N. Tendulkar, for the Appellant; S.E. Kazi, for Respondent No. 1, Pooja Purandare, for Respondent No. 2, C.G. Gavnekar and B.R. Vishwakarma, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—Rule, returnable forthwith. Heard finally by consent of the parties.

2. This Petition is u/s 9 of the Arbitration and Conciliation Act, 1996 (for short, Arbitration Act) filed by the Petitioner, who is a developer, as recognised by the development agreement dated 15 December 2009 between Respondent No. 1 Housing Society (for short, the Society) and all its 12 members including Respondent No. 2, as Respondent No. 3, who, being a tenant of Respondent No. 2, is in possession of the premises owned by Respondent No. 2 landlord, not willing to vacate the premises for development.

3. Admittedly, Respondent No. 3 is not a party to this development agreement having arbitration clause between the Petitioner and Respondent Nos. 1 & 2. Admittedly, Respondents 1 and 2 have no objection to proceed with the development as per the agreement. Respondent No. 2 in fact, by a letter, already

submitted to the Petitioner, as well as, to the Respondent No. 1/Society that because of tenancy proceedings, it is difficult for her to hand over the physical possession of the property for the development.

4. The relevant clause in the development agreement with regard to the tenancy of the landlord/tenant dispute between Respondents 2 and 3 is recorded in Clause 30 which reads as under:

30 The Society will endeavor to shift all the existing members and hand over vacant possession to the Developer of the Society's building as stipulated in this agreement. It is clarified that flat No. 1 held by Smt. Sandhya Rao had been in possession of Navnitlal P. Shroff, Smt. Sandhya Rao has obtained a Decree of eviction against him vide judgment and order dated 31.3.2006 and 1.4.2006 passed by the Ld. Judge O. P. Jaiswal presided over Court Room No. 14 of the Court of Small Causes at Mumbai in RAE Suit No. 116/204 of 2005. The said Navnitlal P. Shroff has filed the Appeal No. 332 of 2006 before the Division Bench of the said Court and obtained the interim stay to the aforesaid Decree of eviction. The Appeal is pending final decision. Therefore, in case the said litigation does not reach the finality before the date of shifting to be scheduled by the parties hereto, the Developer will seek appropriate orders from the Court.

5. There is no dispute so far as the arbitration clause No. 93 which is as under:

93 All disputes, differences arising between the parties hereto in connection with this Redevelopment and/or terms of this Agreement to be executed in pursuance hereof, pertaining to the interpretation of any of the terms herein contained or the implementation thereof shall be referred to an Arbitration of one Arbitrator to be agreed upon by the parties hereto and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or its statutory modifications or Reenactment thereof for the time being in force. The Arbitrator shall have summary powers and will be entitled to make interim awards. The Arbitration proceedings shall be held in Mumbai and for any other dispute arising if any between the parties hereto, the Court in Mumbai alone will have exclusive jurisdiction in the matter.

6. The parties, based upon this, have already appointed an Arbitrator. An Application u/s 17 was moved before the Arbitrator for similar reliefs, but in view of the order so passed by the Arbitrator permitting the parties to invoke Section 9 of the Arbitration Act, the Petitioner has filed the present Petition for appropriate reliefs as prayed.

7. The prayer clauses are as under:

(a) that pending the hearing and final disposal of the Arbitration proceeding stated herein above, this Hon"ble Court be pleased to appoint a receiver of the flat No. 1, situate at The Amar Villa Cooperative Housing Society Ltd., Plot No. 375, 9th Road, Chembur, Mumbai 400071 with all powers including the power to take over possession of the said Flat No. 1 from Respondent No. 3 subject to

handing over alternative accommodation to Respondent No. 3 in lieu of the said flat of an equivalent area in a nearby locality during the period of construction of the new building "Amar Villa" and after completion of such construction in Flat No. 101 in the newly constructed building "Amar Villa", for residence of Respondent No. 3 subject to orders that may be passed in Appeal No. 332 of 2006 pending between Respondents Nos. 2 and 3;

(b) that pending the hearing and final disposal of the Arbitration Proceeding stated herein above, this Hon"ble Court be pleased to direct Respondents Nos. 2 and 3 to hand over the possession of Flat No. 1, situated at the AmarVilla Cooperative Housing Society Ltd., Plot No. 375, 9th Road, Chembur, Mumbai 400 071 by a mandatory injunction to the Petitioner subject to handing over alternative accommodation to Respondents Nos. 3 in lieu of the said flat of an equivalent area in a nearby locality during the period of construction of the new building "Amar Villa" and after completion of such construction in Flat No. 101 in the newly constructed building "Amar Villa", for residence of Respondent No. 3 subject to orders that may be passed in Appeal No. 332 of 2006 pending between Respondents Nos. 2 and 3;

8. The basic events as averred as under:

(a) The Petitioner is a Builder and Developer. Respondent No. 1 is a registered Cooperative Housing Society and having its office at plot No. 375, 9th Road, Chembur, Mumbai - 400 071. Respondent No. 2 is a member of Respondent No. 1, through her Constituted Attorney Mr. Ramesh Deole. Respondent No. 3 is a tenant of Respondent No. 2 in respect of Flat No. 1, situated at Respondent No. 1's Building.

(b) On 15/12/2009 the Petitioner entered into Development Agreement (the agreement) with Respondent No. 1, wherein Respondent No. 2 is a confirming party. In the Agreement, it was specifically stated under Clause 17, that the Developer shall, after obtaining IOD and getting the new building plans approved, request the Society (Respondent No. 1) to quit and vacate the building within 60 days and Respondent No. 1, under Clause 19 of the said Agreement, was liable to hand over vacant and peaceful possession of the property to the Petitioner subject to the members being provided temporary transit accommodation, within 60 days of receipt of the notice from the Petitioner for facilitating the redevelopment of the same.

(c) On 8.09.2010 the Petitioner has given notice to the Respondent No. 1 for handing over vacant and peaceful possession of the said property to facilitate the redevelopment.

(d) The Petitioner has received a letter dated 13th September, 2010 from Respondent No. 1, showing their inability to hand over vacant and peaceful possession of the property as Respondent No. 2 has communicated her inability to handover possession of flat No. 1, since she has not yet secured possession from Respondent No. 3.

(e) The Petitioner in exercise of their rights, by sending a letter, dated 29th September, 2010 to Respondent No. 1 for itself and its members, invoked Arbitration, as per clause No. 93 of the Agreement. Copies of the said letter were marked and sent to all members of Respondent No. 1 including the Respondent No. 2.

(f) Respondent No. 1 accordingly by the letter dated 10th November, 2010 have communicated their agreement for appointment of the sole Arbitrator to adjudicate the disputes and differences relating to possession of Flat No. 1, and terms related thereto.

(g) As per order dated 30th December, 2010 passed by the learned sole Arbitrator, the Petitioner directed to apply u/s 9 of the Arbitration and Conciliation Act, 1996 to this Hon''ble Court for interim reliefs.

9. The relevant averments in the Petition in para 11 is reproduced as under:"

11 The Petitioner submits that the Petitioner has already offered to Respondents Nos. 2 and 3 to allot alternative accommodation in lieu of the present Flat No. 1 (held by Respondent No. 1 and claimed to be tenanted by Respondent No. 3) of comparable area in a nearby locality during the period of construction. The Petitioner has offered to house Respondent No. 3 in the said alternative accommodation during the period of construction and to bring back Respondent No. 3 to the newly constructed flat in the building "Amar Villa" in lieu of flat No. 1 occupied by him. It is made clear by the Petitioner to the Respondents that the alternative accommodation so offered to Respondent No. 3 shall be subject to the orders of the Hon''ble Small Causes Court where the Appeal in eviction suit of Respondent No. 2 is pending against Respondent No. 3 and will abide by the same. The Petitioner is still able and willing to abide by the said offer.

10. The learned senior counsel appearing for the Petitioner, in view of the above facts and circumstances and a decision of this Court in Mahesh S. Mehta v. Harini Coop. Hsg. Soc. Ltd. and Ors. 1 and Girish Mulchand Mehta and Durga Jaishankar Mehta v. Mahesh S. Mehta and Harini Coop. Hsg. Society Ltd. 2 contended that the present Petition as filed is maintainable for the reliefs as prayed. This is in the interest of all the parties basically the Petitioner and Respondents 1 and 2 and other members. The reliefs so claimed is only with regard to the temporary dishousing of Respondent No. 3, who is admittedly the tenant of Respondent No. 2. They are not at all interested in the proceedings and/or order if any passed or it no way affect the right and/or even decide the dispute between the landlord and tenant. The whole object is to proceed with the development as agreed by all the parties including Respondent No. 2, but for Respondent No. 3, it is halted.

11. The learned Counsel for Respondent No. 2 submitted that there is a clear provision made in the development agreement with regard to the pendency of their dispute and they have even raised objection to the maintainability of the arbitration proceedings before the Arbitrator. As their application was rejected, a

petition is also pending 1 2009 (5) BOM. C.R. 89 2 2010 (1) BOM. C.R. 31 in the High Court about the jurisdiction of the Arbitrator in this regard. However, it is submitted that Respondent No. 2 has no objection, in view of the agreement itself, if the development is proceeding further as agreed.

12. Respondent No. 3 who is the tenant of Respondent No. 2 has objected to passing any order u/s 9 of the Arbitration Act and submitted that it will amount to deciding the landlord/tenant dispute which is pending in the Small Causes Court i.e. an Appeal against the order of eviction. The submission is also made that if the premises itself is extinguished and/or demolished, Respondent No. 3/tenant shall have no right whatsoever to claim tenancy under the landlord and tenant dispute and thereby he will lose all rights with regard to the premises for all the purposes. Further submission is also made that the landlord had already moved an application for appointment of a Receiver for the same purpose and prayed for appointment of a Receiver to get the premises vacated and the same was rejected. Respondent No. 2/landlord's petition is also pending in this regard against the said rejection. He has also submitted that the judgment so cited by the learned Counsel appearing for the Petitioner is totally distinguishable on fact and circumstances and cannot be the foundation to pass such drastic order basically when Section 9 nowhere contemplates the Court to pass such mandatory order.

13. Therefore, considering the above rival contentions, the basic issues are in the present Petition is; whether in the present facts and circumstances, the developer who is supported by the Society, as well as, the consenting members, are entitled to dislodge and/or dislodge Respondent No. 3/tenant, temporarily, subject to the agreement clause and para 11 of the Petition and whether the Court, u/s 9 of the Act can pass mandatory order/grant such other order. As prayed

14. Admittedly, there is an arbitration clause between the parties, and there exists an arbitrable dispute as raised. The scheme of Section 9 has been elaborated by the Apex Court in various judgments. It is now made clear that all the provisions of the CPC (CPC) which are necessary for passing an appropriate order u/s 9 need to be taken note of which includes Section 9A, Order 37, Order 38, Order 39, Rules 1 and 2, Order 40 of C.P.C.. Therefore, while passing any order u/s 9, apart from the facts and circumstances, the Court needs to consider all desired facets which are otherwise available for passing ad interim, interim and/or even mandatory order. There is no bar and if case is made out, I see there is no reason that the Court u/s 9, cannot pass such order, even against the person who is not the party to the agreement, but specially when such third person is claiming protection or right through the party who is consenting party to the arbitration agreement.

15. I have in Mahesh S. Mehta (supra) already observed as under:

13 There is agreement between the parties the Petitioner seeking basic relief

against Respondent No. 1 who is main contesting party. Merely because some other members like Respondents No. 2 & 3 will be affected by only order, if passed, that itself cannot be the reason not to grant any relief u/s 9 of the Act. Any consequential order in a given case if affects the third person but basically the order is against main contesting party, in my view that in no way sufficient to overlook and to deny the relief as prayed in favour of the deserving party, basically when all the averments as required under the provisions of law and the CPC (C.P.C.) Order 40 Rule 1 and Order 39 Rule 1 and Specific Relief Act, 1963, are made out. The Apex Court in the matter of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., has observed while considering to grant any relief u/s 9 of the Act, that the Court must take note of these basic element.

14. The submission that there is no case made out under Order 40 Rule 1 in the present facts and circumstances is also unacceptable. This Court has power to appoint a Receiver to take possession of the premises, if necessary, by breaking lock. Respondent No. 1 is under obligation to handover the vacant premises / plot for development. The Petitioner / builder is under obligation to complete the project within stipulated period.

16. The Petitioner in this case by the prayer clause asking the court to order directing the Court Receiver to take possession and hand over to the Petitioner to complete the project as the Petitioner and Respondent No. 1 are bound to provide newly constructed accommodation/premises to all members including Respondents No. 2 & 3 with prescribed time. As agreed it is in the interest of all the members to shift for the time being to get the project / building completed so that they will be provided with the new flats. This in my view in no way can be stated to be deprived them of their right to occupy the premises as contended. The parties need to comply with the agreed terms considering the scheme and object of entering into such agreement. It is just a temporary displacement with specific purpose to complete the project in time.

16. The Division Bench in Girish Mulchand Mehta (supra) has affirmed above reasoning and observed as under:

12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers u/s 9 of the Act only against a party to an Arbitration Agreement or Arbitration proceedings. As is noticed earlier, the jurisdiction u/s 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition u/s 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration proceedings does not affect the jurisdiction of the Court u/s 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

13. ...Thus, understood, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The Appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 Society who is party to the Arbitration Agreement. In absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the Appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration proceedings.

17. One important facet in the present matter is that there is a clear agreement between the Petitioner/builder, Respondent No. 1 society and individual members including Respondent No. 2, whereby, they agreed for development of the property, firstly by demolishing the presenting existing premises subject to the builders providing them alternative accommodation and/or providing them all the facilities as agreed and lastly to provide all the members newly constructed flats/premises on the same plot. All the members including Respondent No. 2 have already signed and agreed for the same. Respondent No. 2 unable to give vacant possession of the flat as Respondent No. 3 is not ready and willing to hand over the possession. That resulted into halting of the present project in question. Respondents 2 and 3 have a landlord/tenant relationship. There was a decree passed in favor of Respondent No. 2 and against Respondent No. 3, but the Appeal against the same is still pending.

18. In *Girish Mulchand Mehta (supra)*, The developer and the Society had entered into a development agreement and not individually by the members. As one of the member objected to the development, as there was an arbitration clause, Section 9 proceedings was invoked.

In the present case, the Petitioner/developer has entered into an agreement with the Society along with the members also. Therefore, all these members and the Society who are parties to the arbitration proceedings, are agreed for the development in all respects, except the tenant, Respondent No. 3.

19. One can not overlook the object and purpose of such development, while passing orders u/s 9 Petition. The issue of landlord/tenant dispute is definitely an important aspect. Normally, it is difficult for the Court to pass any eviction order without following due process of law. Though there is a decree in favour of Respondent No. 2/landlord, still she is unable to get eviction and/or vacant possession because of pendency of Appeal filed by the tenant, Respondent No. 3. Here, we are not concerned with the dispute between them. The Petitioner is in no way seeking to interfere with the dispute, neither the society nor Respondent No. 2. If vacant possession is necessary as agreed for the development, keeping in tact the relationship of the landlord and tenant and in a situation like this, I see there is no reason that the Court cannot pass order to dishouse Respondent

No. 3 temporarily, subject to Petitioner/developer providing Respondent No. 3 alternative accommodation of similar size/area in the nearby locality, along with other consenting members of the society.

20. From the correspondence and the agreement on record further shows that Respondent No. 2 has no objection, if alternative accommodation is provided to Respondent No. 3. Respondent No. 2 will be entitled to take possession from Respondent No. 3 subject to final decision of their litigation. The Petitioner, as well as, the society have also no objection as they themselves agreed and permitted the developer to provide alternative accommodation to Respondent No. 3, pending the decision/dispute between Respondents 2 and 3.

21. If this aspect is taken note of, then in my view, the submission as raised by the learned Counsel for Respondent No. 3 that his right to occupy the premises in question which is subject matter of the landlord/tenant dispute will be extinguished, is duly protected. The developer as well as the society and the landlord has no objection and if an alternative accommodation is provided to Respondent No. 3 for the time being, in my view, there is no reason that the prayer so made in the Petition can be granted by the Court u/s 9. It is in the interest of all basically the Petitioner, society and its members. One tenant of one of the member, in my view, cannot object and/or halt the project.

22. The landlord if has already filed petition for eviction and his Appeal is already pending against the order of eviction already passed, just cannot invoke Order 40, Rule 1 of CPC for appointment of Receiver to get the premises vacated, even for the purposes of development based upon the agreement in question. The application even if so filed and/or decided, in my view, cannot be the reason to overlook the averments so made in the present arbitration petition. Therefore, that contention of Respondent No. 3, in my view, is not acceptable.

23. The objection so raised by the landlord (Respondent No. 2) to the arbitration proceedings pending before the Arbitrator, for whatever may be the reason, and/or pendency of the writ petition in this regard cannot affect the power of the Court u/s 9 of the Arbitration Act. The fact that there is development agreement between the parties read with arbitration clause and the existence of disputes, the arbitration proceedings, as invoked by the developer and as submitted by the society and all the other members, in my view, is maintainable. Every landlord has right to develop or repair his tenanted, old and/or dilapidated building/premises. Conceptually, such provisions are available even under the Rent Statutes. Therefore also the reliefs so sought are well within the frame of law.

24. The tenancy rights and/or occupation of Respondent No. 3 since 1967 in the premises owned by Respondent No. 2 and the pendency of the dispute, in view of the above, shall remain intact. The right of Respondent No. 3 to continue to occupy the flat unless evicted by following the due process of law, and is not more than that. Therefore, subject to occupation right either in the flat and/or alternative accommodation so provided and/or newly constructed premises are

subject to the agreement and the litigation. Therefore, such person/tenant cannot be permitted to halt such project where landlord/owner of the property along with all members of the society have already consented and entered into a development agreement.

25. In view of above, I am of the view that all the necessary ingredients which are available under the law for passing appropriate order including mandatory order of this kind are in favour of the Petitioner and the Respondent/society and its members. It is necessary for the Court to consider not only the interest of the Petitioner and/or developer, but also of the society, as well as, all the members. Merely because the Petition is filed by the Petitioner developer, who is party to the arbitration agreement, that itself cannot be the reason not to grant the reliefs which ultimately goes in favour of the society and its members. In the present case, as noted, Respondent No. 3 tenant who is only objecting and not the owner of the property. Therefore, the conduct, equity and balance of convenience also lies in favour of grant of interim reliefs.

26. Resultantly, the Petition is allowed in terms of prayer (a). However, it is subject to the finality of the proceedings between Respondents 2 and 3. It is made clear that the Petitioner shall offer alternative accommodation to Respondent No. 3 within two weeks with all facilities and all other charges in accordance with the agreement. Respondent No. 3 shall vacate the premises within six weeks thereafter.

27. There shall be no order as to costs.

28. The learned Counsel for Respondent No. 3 is seeking stay of this judgment. Considering the above facts and circumstances and in view of the opposition of learned senior counsel for the Petitioner, I am not inclined to grant the stay, as time is already granted of six weeks to vacate the flat.