
(2022) 11 BOM CK 0006

In the Bombay High Court

Case No : Commercial Arbitration Petition (L) No. 25612 Of 2021

Shahveer Padam Kapadia & Anr

APPELLANT

Vs

Omkar Realtors And Developers Pvt. Ltd. & Anr

RESPONDENT

Date of Decision : 04-11-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 38 Rule 1, Order 38 Rule 2
Arbitration And Conciliation Act, 1996 — Section 6.1, 9, 11(8), 12(1), 17, 37
Indian Contract Act, 1872 — Section 73, 74

Citation : (2022) 11 BOM CK 0006

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Haresh Jagtiani, Suprabh Jain, Vandana Kumavat, Mohammed Shariq Shaikh, Vandana Mehta Kumavat, Mayur Khandeparkar, Jamshed Master, Ashraf Diamondwala, Abhijit Patil, Kanchan Rane, Vijay Patil

Final Decision : Disposed Of

Judgement

G.S. Kulkarni, J

1. This petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "ACA") prays for interim measures in relation to disputes under a contract dated 20 June 2017 as entered between respondent (Builder/Developer) (for short "Omkar") and the petitioners for sale of flat in a high rise building known as "Omkar 1973, Worli." The petitioners have prayed for the following reliefs :-

"(i) that pending the Arbitral proceedings, making of the Arbitral Award and until execution of the Arbitral Award, the Respondents, their employees, servants and/or agents or otherwise howsoever, be directed by an order and mandatory injunction of this Hon'ble Court, do all that is required to make flat 6501 habitable for the Petitioners and pay the agreed compensation to the Petitioners;

(ii) that pending the Arbitral proceedings, making of the Arbitral Award and until

execution of the Arbitral Award, the Respondents, their employees, servants and/or agents or otherwise howsoever, be directed by an order and mandatory injunction of this Hon'ble Court to

a) Complete the lift shaft work and other related work in and remove the struts from flat 6501 and make it habitable for the Petitioners to use, occupy and enjoy the said flat in a time bound manner.

Or in the alternative,

the Petitioners be allowed to remove the strut from their flat 6501 with the help of independent architect/engineer to be approved by the Petitioner with prior approval of this Hon'ble Court and the Respondent be directed to pay the cost of the same to such architect/engineer;

b) deposit default interest @ 12% p.a. on Rs.22,41,00,000/- (Rupees Twenty Two Crores Forty One Lacs Only) for the period of 1st January, 2020 till the completion of the said lift shaft work I flat 6501 such that no inconvenience is caused to the petitioners while using, occupying and enjoying the said flat in this Hon'ble Court and the Petitioners to withdraw the said amount on such conditions as this Hon'ble Court may deem fit and proper, as per particulars of claim;

(c) deposit the costs of Rs.3,70,200/- (Rupees Three Lacs Seventy Thousand Two Hundred Only) incurred by the petitioner for completing the glass work in flat 6501 along with interest @ 18% p.a. in this Hon'ble Court and the Petitioners to withdraw the said amount on such conditions as this Hon'ble Court may deem fit and proper.

(iii) for ad-interim and interim reliefs in terms of prayer clauses (i) and (ii) above;

(iv) for costs of the Petition; and

(v) for such further and other reliefs as the nature and circumstances of the case may require."

2. Insofar as the reliefs as prayed for in regard to the flat being made habitable and/or the struts to be removed, this Court had passed orders in favour of the petitioners, which were confirmed by the Appeal Court.

This petition is now confined to prayer clause (b) and (c) as noted above.

3. As the litigation has some history it would be necessary to note the earlier orders passed by this Court, as also the orders passed by the Division Bench on an appeal arising from such orders.

4. Earlier this Court after hearing the parties on prayer clauses (i) and (ii) had passed a detailed order on 21 March 2022 making the following directions:-

"a) Respondents are directed to remove the struts in the petitioners' flat being Flat No.6501, within one week from today, failing which the Court Receiver, High Court, Bombay, is appointed as a competent officer who shall engage an agency,

who shall at the cost of the respondents undertake the work of removal of struts. Let a copy of this order be made available to the Court Receiver, if it becomes necessary for the Court Receiver to act accordingly in the event of the non-compliance of the direction by the respondents.

b) Respondents within a period of three months from today, are directed to make the lifts for the "O-1 Series" flats fully operational, as accepted in the Expert Reports of the SRA and that of the Petitioner. The respondents shall commence such work within 10 days from today. Failing which, the Court Receiver, High Court, Bombay stands appointed as the Receiver to undertake the completion of such work. The Court Receiver in that event, shall appoint a competent agency to undertake and complete the required work to make the lift operational, for which the Court Receiver, shall take possession of all the machinery and equipments on the site, so that the entire work of the special lifts for the "O-1 Series" flats can be completed. The Court Receiver within three days from today carry out the inventory of all the necessary lift materials on the respondents site/godowns and other places, the details of which be provided by the respondents to the Court Receiver on or before 23 March 2022. All this shall be done at the cost of the respondents. The Court Receiver is permitted to initially seek funds in that regard from the SRA who shall adjust the said amount from the payments which are either deposited by the respondent with the SRA and/ or recover the same from the respondents as permissible in law which shall be recovered as arrears of land revenue.

c) The Petitioners shall deposit with the office of the Court Receiver an amount of Rupees fifty thousand within two days from today to enable the Court Receiver to start the immediate work.

d) In so far as the contention of the petitioner that the admitted amounts as agreed to be paid by the respondents as damages to the petitioners is concerned, it is appropriate that the parties are heard on such issue on the adjourned date of hearing. For the parties to make submissions in that regard, stand over to 4 April 2022 at 2.30 p.m."

5. Thus, the petitioners are before the Court in the context of the observations as made in paragraph (d) above. It needs to be stated that the above order passed by this Court was carried in appeal by Omkar before the Division Bench (Commercial Appeal (L) No. 9850 OF 2022), which came to be confirmed by the Division Bench (G. S. Patel and Madhav Jamdar, JJ) dismissing the respondent's appeal by an order dated 30 March 2022. Justice G. S. Patel speaking for the Bench observed thus :-

"22. This is the clearest admission by Omkar Realtors that it is in total, blatant and flagrant breach of all its contractual obligations to the Kapadias – Including the subsequent 2019 supplementary agreement or covenant.

26. Omkar Realtors does not get to tell the Kapadias — or the Court — as it now does that "We cannot honour our commitments under our contracts with the

Kapadias, but that matters not at all. We will perform our contract as and when (and possibly if) we are able without making any kind of commitment. In the meantime, no order should be made by any Court against us.” That is the entirety of the argument canvassed in Appeal.

... ..

28. Is the impugned order actually in the form of a decree for specific performance as Mr. Madon contends? Let us consider what is actually being said when this submission is made. Omkar Realtors has not repudiated its flat-sale contract with the Kapadias. In fact, it has reaffirmed it in the second agreement of 2019. Omkar Realtors is in breach of both contracts. The Kapadias have not condoned the breach and extended time for performance. Omkar Realtors admits its breach. It has instituted no proceedings to absolve it of its contractual obligations. It does not even claim that either of these agreements is incapable of performance. It only says that Omkar Realtors should not be held to its obligations in contract for performance because it is presently most inconvenient to Omkar Realtors. The law admits of no such reason. It is plainly absurd. On this, Omkar Realtors says (a) there should be no order in equity made against it; and (b) the Kapadias should seek specific performance – to which there is no answer really – so that Omkar Realtors achieves its solitary purpose of buying time.

33. Should the argument be that the impugned order is ‘mandatory’ in nature and, for that reason, vulnerable, we would have hesitation in repelling the submission directly. Such an order, even as an ad-interim one, and even if described as ‘mandatory’, is always possible where strong circumstances indicate that the order would protect the rights and interests of both sides, and that refusing relief would be unjust: Hammad Ahmed vs. Abdul Majeed, (2019) 14 SCC 1.

6. On the above backdrop when the proceedings were listed before this Court on 4 April 2022, on behalf of Omkar, Mr. Nilesh Palande, the Director of Omkar, filed an affidavit dated 4 April 2022. The contentions as urged in such affidavit were considered by the Court to be objectionable, being a stand against the orders passed by this Court on 21 March 2022, as also against the observations made by the the Division Bench in the order dated 30 March 2022. The Court considering such affidavit, on 4 April, 2022 passed the following order:-

“On the backdrop of the order dated 21st March, 2022, the proceedings are listed today, to be heard on the reliefs as prayed for in prayer clause (b) of the petition, which reads thus :-

“(b) deposit default interest @ 12% p.a. on Rs.22,41,000/-(Rupees Twenty Two Crores Forty One Lacs Only) for the period of 1st January, 2020 till the completion of the said lift shaft work in flat 6501 such that no inconvenience is caused to the petitioners while using, occupying and enjoying the said flat in this Hon’ble Court and the petitioners to withdraw the said amount on such

conditions as this Hon'ble Court may deem fit and proper, as per particulars of claim."

2. The case of the petitioner in praying for the above reliefs is on the basis of a contract between the parties created under the letter dated 15th July, 2019 of respondent no.1, which is in the context of delay on the part of the respondent no.1 to give possession of the flat in question to the petitioner. By such letter respondent no.1 acknowledged the delay in granting of possession of 'one series flat' to the petitioner and a compensation arrangement was agreed by the respondent no.1 in the event, the possession of the flat was not to be handed over to the petitioner on or before 31st December, 2019, which is to the effect as agreed in paragraph 4.6 of the said letter of respondent no.1. Clause 4.6 and the other relevant clauses of the said letter required to be noted, which reads thus :-

"4.1 Today, on 15th July, 2019, the promoter and the confirming party have handed over to the purchasers the possession of the said flat along with the letter of possession dated 15th July, 2019 ("Possession date")

4.2 However, the lift shaft and other related work in the said flat is still not completed and therefore, the purchasers will not be able to completely occupy, use and enjoy said flat.

4.4 The promoter and the confirming party hereby undertake to the purchasers that the promoter and the confirming party will complete the said lift shaft and other related work in the flat no later than 31st December, 2019 such that on and from 1st January, 2020 no inconvenience is caused to the purchasers on account of said lift shaft work and they can use, occupy and enjoy the said flat.

4.5 The promoter and the confirming party also confirm that in carrying out the lift shaft and other work in the said flat, the promoter and the confirming party will be solely responsible and liable for any loss, damage, injury or destruction that may be caused to the said flat, any person or property; and the promoter and the confirming party, jointly and severally, undertake to indemnify and keep indemnified the purchasers against any and all losses, claims, demands, actions, damages, costs, liabilities, expenses or payments of any nature whatsoever arising in any way as a direct consequence of work carried out by the promoter and/or the confirming party.

4.6 If, for any reason whatsoever, the promoter and the confirming party are unable to complete the said lift shaft and/or the other work by 31st December, 2019, the promoter and the confirming party covenant to pay the purchasers default interest @ 12% p.a. on Rs.22,41,00,000 (Rupees Twenty Two Crores Forty One Lakhs only) paid by the purchasers with respect to the said flat, for the period commencing from 1st January, 2020 till the completion of the said lift shaft work in the said flat and they can use, occupy and enjoy the said flat."

(emphasis supplied)"

2. In the context of today's hearing, it needs to be noted that in the earlier order

passed by this Court dated 21st March, 2022, in paragraph 20(d), it had observed as follows :-

20(d) In so far as the contention of the petitioner that the admitted amounts as agreed to be paid by the respondents as damages to the petitioners is concerned, it is appropriate that the parties are heard on such issue on the adjourned date of hearing. For the parties to make submissions in that regard, stand over to 4 April 2022 at 2.30 p.m.

3. Accordingly the proceedings are listed today. An additional affidavit dated 4th April, 2022 is filed on behalf of the respondent no.1 by Mr. Nilesh Palande, who has described himself as the director of respondent no.1. The additional affidavit was served on the advocate for the petitioner just before the proceedings were called out at 3:30 p.m. today. It needs to be noted that when this Court passed an order dated 21st March, 2022, this Court had made serious observations on the conduct of the respondents considering inter-alia their glaringly dishonest conduct as recorded in paragraphs 17, 18 and 19 which read thus :-

17. From the reply affidavit, it appears to be absolutely clear that the intention, not to operationalize these lifts is keeping in mind the proposed construction above the 69th floor. This is more apparent from the reply affidavit as filed on 3 March 2022 by Mr. Nilesh Palande, one of the directors of respondent no.1. It is impossible to accept such plea as the same logic would then apply to the other five lifts which are already made operational. Another aspect pointed out in such affidavit relates to the financial difficulties and inability to mobilize the cost of Rs.1.15 crores. In fact, the whole attempt is that when the lenders release the requisite funds, only then, the work would be undertaken and the lift could be made operational, is the stand of the respondents, and till that time the petitioner who has parted such huge amounts to purchase the flat needs to wait.

18. Perusal of the respondents' affidavit in fact, in my opinion, would show the glaringly dishonest stand taken by respondent no.1 in regard to the feasibility of putting up lifts for the 'O1 series' flats as also on removing of the struts. These are the issues which were confronted to the respondents from the very beginning of the present proceedings. Although the respondents initially painted a rosy picture that when the ED/SRA would revoke the stop work notice qua the internal work, such work can be immediately undertaken and completed. This Court, at that point of time had believed such stand of the respondent to be bonafide and in the interest of the petitioner, and possibly other flat purchasers similar to the petitioners, who after having paid so heavily for their respective flats, were not in a position to occupy the same. The Court hence had passed orders, as noted above in pursuance of which, the ED/ SRA granted the respondents permission to undertake the internal work. Thus, the Court enabled the respondents to undertake such internal work only to realize later, that there is no real intention on the part of the respondents to complete the internal work as well as to remove the struts. This was not only clear from the affidavits of the respondents but the vehemence of the submissions made by the learned counsel for the

respondents justifying such intention. What was sought to be crept into by subsequent affidavits of the respondents is a bogey of false pleas and now a stand of financial difficulties which was never the case of the respondents when the initial orders were passed by the Court. This apart, coupled with a plea of financial difficulties, a false, dubious and a dismal picture is sought to be created, that installing of a lift in a building which has already been granted part occupation certificate upto 69th floor, is an impossibility. All these contentions appears to be a total eye wash, which are now completely exposed as a falsity from the reports which are submitted by the other experts. For these reasons the contentions as urged on behalf of respondents in the affidavits, so as to not grant the immediate necessary reliefs to the petitioners, cannot in any manner be accepted, as it would amount to accepting an unrealistic and a dishonest stand taken by the respondents, which in fact is an attempt to mislead the Court.

19. Respondents appear to have completely abused their contractual position in dealing with the petitioners as is clear from the record. The petitioners have been meted out an unjust, unjustifiable and unscrupulous treatment qua the possession of their flat. In fact, the submissions as made on behalf of the respondents shocks the conscience of the Court, as the submissions are totally oblivious to the factual and realistic position. The photographs of the flat not only show the huge iron struts inside the petitioners flat, but also, debris and other scrap materials. Respondents in their dominant position against the flat purchaser also have the audacity to offer possession of the flat which is in such an inhabitable state to the petitioners. The flat purchasers who have fully parted with valuable consideration, under no circumstances can be meted out with such treatment by any developer. However, this case appears to be somewhat different as ostensibly the directors of respondents appear to have a total disconnect as to what is happening on the site and of the arbitrariness and illegalities of those who are now at the helm of affairs, whose actions are causing a serious prejudice to the flat purchasers like the petitioners. There is no justification whatsoever for the respondents not to put the petitioners in the same position as the other flat purchasers, and to make the flat ready in all respect including operationalizing the lift and also removing the struts. If the respondent and its directors and those who are currently managing the affairs of respondent no.1 are of the opinion that they can overreach law and are above law and that they can wantonly defy contractual obligations, they are completely under a false and mistaken belief/notion. The strong arms of law need to reach to such developers, who abuse their position of trust which they enjoy in the capacity as developers and who deceive the flat purchasers after receiving the full consideration for the flats they sell. The respondents in the present case have acted contrary to several laws under which they are under an obligation not only to hand over the completed flats within a time bound manner, but also, that all obligations under the contract entered into with the flat purchasers are fulfilled. Also the jugglery of words and inconsistencies of the different pleas of the respondents is required to be firmly dealt with. Such approach of the litigants

who have intention to mislead the Court and cause abuse of the process of law cannot be taken lightly. The law would required to be applied firmly to those who carry the impression that they can get away committing brazen breach of their contractual obligations.

4. It is informed by Mr. Jagtiani, learned Senior Counsel for the petitioner that the order dated 21st March, 2022 passed by this Court was carried in appeal by the respondents (Comm. Appeal (L) No. 9850 of 2022) and the same came to be dismissed by the Division Bench by its judgment and order dated 30th March, 2022. The said judgment has been placed on record as annexed to the additional affidavit filed on behalf of the respondent no.1. The judgment of the Division Bench has confirmed the order passed by this Court. Mr. Jagtiani, learned Senior Counsel, has drawn my attention to the observations made by the Appeal Court which according to him deprecates the conduct of the respondents. Mr. Jagtiani has drawn, my attention to paragraph nos. 22, 26, 28 and 33 of the said order, which reads thus :-

22. This is the clearest admission by Omkar Realtors that it is in total, blatant and flagrant breach of all its contractual obligations to the Kapadias – Including the subsequent 2019 supplementary agreement or covenant.

26. Omkar Realtors does not get to tell the Kapadias — or the Court — as it now does that “We cannot honour our commitments under our contracts with the Kapadias, but that matters not at all. We will perform our contract as and when (and possibly if) we are able without making any kind of commitment. In the meantime, no order should be made by any Court against us.” That is the entirety of the argument canvassed in Appeal.

28. Is the impugned order actually in the form of a decree for specific performance as Mr Madon contends? Let us consider what is actually being said when this submission is made. Omkar Realtors has not repudiated its flat-sale contract with the Kapadias. In fact, it has reaffirmed it in the second agreement of 2019. Omkar Realtors is in breach of both contracts. The Kapadias have not condoned the breach and extended time for performance. Omkar Realtors admits its breach. It has instituted no proceedings to absolve it of its contractual obligations. It does not even claim that either of these agreements is incapable of performance. It only says that Omkar Realtors should not be held to its obligations in contract for performance because it is presently most inconvenient to Omkar Realtors. The law admits of no such reason. It is plainly absurd. On this, Omkar Realtors says

(a) there should be no order in equity made against it; and

(b) the Kapadias should seek specific performance — to which there is no answer really — so that Omkar Realtors achieves its solitary purpose of buying time.

33. Should the argument be that the impugned order is ‘mandatory’ in nature and, for that reason, vulnerable, we would have hesitation in repelling the

submission directly. Such an order, even as an adinterim one, and even if described as 'mandatory', is always possible where strong circumstances indicate that the order would protect the rights and interests of both sides, and that refusing relief would be unjust: *Hammad Ahmed v Abdul Majeed*, (2019) 14 SCC 1, explaining and clarifying the ratio in *Samir Narain Bhojwani v Aurora Properties and Investments*, (2018) 17 SCC 203.

5. On the above conspectus, attention of the Court was drawn to additional affidavit of Mr. Nilesh Palande as tendered by Mr. Master on behalf of the respondent no.1 and more particularly, the statements made in paragraphs 3 and 4. The said paragraphs of the affidavit are required to be noted, which read as follows:-

"3. I further say that the petitioner's claim for alleged compensation is based on surmises that petitioner's Flat No. 6501 is not habitable which is entirely incorrect and wrong as Part Occupation Certificate dated 28th July, 2017 is issued till 69th floors by Slum Rehabilitation Authority and not only petitioner's Flat No. 6501 but entire 01 series of the flats in the building are certified habitable with permission to occupy by the Statutory Authority and 29 owners are occupying the 01 series flats in the Tower A building at present.

4. I further say that to support his claim of alleged compensation, petitioner also tried to canvas before this Hon'ble Court incorrect picture as if there is no lift in the building and petitioner cannot access his flat, when there are 7 lifts i.e. A1, A2, A3, A4, A5, AF1 and AF2 are operational in the building and used by the owners of the respective flats including 01 series flat owners and petitioner also can access his flat using the same lifts."

(emphasis supplied)

6. In my opinion, the above statements as made in paragraphs 3 and 4 of Mr. Nilesh Palande's affidavit would shock the conscience of the Court when he says that Flat No. 6501 is habitable and secondly, when he says that the petitioner is canvassing an incorrect picture that there is no lift in the building and the other lifts are operational by which the petitioner can access his flat. These statements are in the teeth of the observations as made by this Court in the order dated 21 March, 2022 and further order dated 30 March, 2022 passed by the Division Bench dismissing the respondents' appeal. In both such orders, the Court has categorically observed that the petitioner's flat is not habitable as also the concerned lift which was agreed to be provided is not operational. By making such statement, the entire attempt of Mr. Nilesh Palande appears to overreach the observations as made by this Court in order dated 21 March, 2022 as also the order dated

30 March, 2022 passed by the Division Bench when a contrary position to what was observed is being canvassed by Mr. Nilesh Palande, This would certainly amount to assertion of a false plea and in the teeth of such orders passed by the Court when the Court in categorical terms had held that the flat of the petitioner

is not habitable. In my opinion, the above statement in the affidavit of Mr. Nilesh Palande certainly are of the nature which are ex-facie false, misleading and interfering in the administration of justice, for which appropriate orders would be required to be passed.

7. At this stage, Mr. Master states that he would intend to take instructions as to whether his clients would nevertheless be inclined to maintain the said affidavit of Mr. Nilesh Palande be to part of the proceedings and/or take appropriate position in that regard. Be that as it may, such additional affidavit is already tendered on record.

8. Let Mr. Master take instructions and inform the Court of his clients stand on the adjourned date of hearing, when appropriate orders can be passed.

9. On the adjourned date, the deponent of the affidavit shall remain present in the Court.

10. Stand over to 8th April, 2022.”

(emphasis supplied)

7. Accordingly, on the adjourned day, when the proceedings were being heard on 8 April 2022, on behalf of Omkar, it was stated that an affidavit was being filed on its behalf in the light of the observations made by the Court in its order dated 4 April 2022 (supra) interalia contending that steps were being taken to comply the orders dated 21 March 2022 passed by this Court and as confirmed by the appeal Court. This Court accordingly passed the following order:-

1. In the order dated 04 April, 2022, on page 7, paragraph 6, 3rd line, the word “not” be deleted. The said order be accordingly corrected.

2. On the backdrop of the order dated 04 April, 2022 the parties are before the Court today.

3. Mr. Khandeparkar, learned counsel for the respondents would submit that an affidavit is being filed on behalf of the respondents in the Registry during the course of the day which is in the light of the observations as made by the Court in the order dated 04 April, 2022. As also a copy of the same would be served on the petitioners. Let such affidavit be filed as prayed for.

4. Mr. Khandeparkar has briefly explained on the scheme of the proposed affidavit namely that his client intends to comply with the order dated 21 March, 2022 passed by this Court and as confirmed by the appeal Court. He states that steps are already being taken by the respondents in as much as the struts are partially removed. Also in regard to the lift work, the necessary steps as proposed to be taken, are stated to be incorporated in the affidavit proposed to be filed.

5. The parties would now be heard on the above issues in the light of the observations as made by the Court in the order dated

4 April, 2022.

6. Stand over to 11 April, 2022 at 02.30 p.m.”

(emphasis supplied)

8. As noted in the above order dated 8 April 2022 passed by this Court, on behalf of Omkar Mr. Nilesh Palande has placed on record an affidavit dated 8 April 2022, interalia referring to the steps being taken to comply with the orders dated 21 March 2022 passed by this Court.

9. It is on such conspectus, I have heard Mr. Jagtiani, learned Senior Counsel for the petitioners and Mr. Khandeparkar, learned Counsel for Omkar, on the reliefs as prayed by the petitioners in terms of prayer Clause (b) namely that a default interest @ 12 % p.a. on Rs. 22,41,00,000/- for the period 1 January 2020 till the completion of the lift shaft be deposited in this Court.

10. Insofar as the such relief is concerned, the petitioners’ case is premised on Omkar’s acceptance of the gross delay in completion of the works in respect of the said flat, namely, removal of struts and making the lift shaft operational so as to put the petitioners in peaceful possession of the flat for its regular occupancy. Omkar under its letter dated 15 July, 2019 while acknowledging that in the event of any further delay in granting possession of the flat, Omkar would agree to make payment of interest to the petitioners on the amount of Rs.22,41,00,000/- for a period after 31 December, 2019 as set out and agreed by Omkar in paragraph 4.6 of Omkar’s said letter dated 15 July, 2019 addressed to the petitioners, which was accepted by the petitioners (for short, “the interest agreement”). Paragraph 4.6 reads thus:-

“4.6 If, for any reason whatsoever, the promoter and the confirming party are unable to complete the said lift shaft and/or the other work by 31st December, 2019, the promoter and the confirming party covenant to pay the purchasers default interest @ 12% p.a. on Rs.22,41,00,000 (Rupees Twenty Two Crores Forty One Lakhs only) paid by the purchasers with respect to the said flat, for the period commencing from 1st January, 2020 till the completion of the said lift shaft work in the said flat and they can use, occupy and enjoy the said flat.”

(emphasis supplied)

11. Mr. Jagtiani, learned senior counsel for the petitioners has submitted that it is clearly observed by this Court in its order dated 21 March 2022 that the flat in question was not made habitable as also the lifts were not installed. He submits that on these factual aspects, there is no dispute whatsoever, as the record of this Court and the orders passed in the present proceedings makes the position crystal clear on such issues. Mr. Jagtiani submits that in so far as the relief in terms of prayer clause (b) as prayed by the petitioners is concerned, the concern of the petitioners is on the basis of the interest agreement (supra) dated 15 July 2019, wherein Omkar having accepted the delay in handing over possession of the flat to the petitioners, is under an unequivocal obligation to make such

payment of interest as agreed in clause 4.6 (supra) of the interest agreement. It is his submission that as contained in the interest agreement dated 15 July 2019 Omkar having failed to handover possession of the flat to the petitioners in the manner as agreed under clause 4.6 of the interest agreement, the petitioners had become entitled for the interest amounts as agreed between the parties. It is his contention that Omkar also pleads financial difficulties when it is urged by Omkar that the project itself is in control of the lenders. It is thus submitted that unless protective orders are passed, there is no guarantee that the amounts as agreed to be paid to the petitioners under Clause 4.6 of the interest agreement would not be secured to the petitioners. It is thus Mr. Jagtiani's contention that the payment of such amounts being not in dispute, even considering the reply affidavits which are filed on behalf of Omkar, the petitioners have become entitled to interim measures. The petitioners contend that the interest agreement is applicable with full force as Omkar could not complete the lift shaft and/or the other works by 31 December, 2019, hence the petitioners had become entitled for payment of the amounts as agreed in the interest agreement. On such premise, the petitioners pray that the reliefs in terms of prayer (b) be granted. Mr. Jagtiani, in support of his contentions has placed reliance on the following decisions:- (i) Baker Hughes Singapore Pte. vs. Shiv-Vani Oil and Gas Exploration Services Ltd. (supra), (ii) Valentine Maritime Ltd. Vs. Kreuz Subsea Pte.Ltd. & Anr. decided on dated 21 January 2021(Division Bench of this Court).

12. On the other hand, Mr.Khandeparkar, learned Counsel for respondent No.1 would submit that the petitioners are not entitled to the reliefs in terms of prayer clause (b) inasmuch as the reliefs are in the nature of a claim for damages and such reliefs cannot be granted unless the damages are proved and this can only happen in the arbitral proceedings. Relying on the reply affidavit, it is his submission that the provisions of Sections 73 and 74 of the Contract Act,1972 become clearly applicable inasmuch as the petitioners would be required to prove that the amounts which have been agreed between the parties in Clause 4.6 of the interest agreement being the default interest, is the correct measure of damages. Thus according to him, unless the damages are proved, there is no question of the petitioners seeking any interim reliefs in terms of prayer clause (b). In support of his contention Mr.Khandeparkar has placed reliance on the decision of the learned Single Judge of this Court in E-City Media Private Limited vs Sadhrta Retail Limited, 2009 SCC OnLine Bom 1813.

13. Having heard the learned counsel for the parties, in my opinion, there is much substance in the contention as urged on behalf of Mr. Jagtiani in supporting the petitioners case for a relief which is based on the interest agreement. The record is replete with facts in regard to the gross delay on the part of Omkar in not handing over the possession of the flat in question and admittedly the same was not handed over upto 31 December, 2019, being the date relevant for Omkar to remain committed in regard to what was set out in clause 4.6 of the interest agreement. Thus as Omkar was unable to complete the lift shaft and/or the other works by 31 December, 2019, Omkar was certainly under an obligation

to pay the petitioners default interest at the rate of 12% p.a. on Rs. 22,41,00,000 (Rupees Twenty Two Crores Forty One Lakhs only) as a large amount was already parted/paid by the petitioners to Omkar towards consideration for purchase of the flat. Such interest had become due and payable from the period commencing 1 January, 2020 till the completion of the lift shaft work, after which the petitioners can occupy/enjoy the said flat.

14. It is not Omkar's case that it was not committed to make such payment. However, what is urged by Mr. Khandeparkar, learned counsel for Omkar is that such amount as agreed to be paid by Omkar is in the nature of damages. He has submitted that unless such claim which is in the nature of damages is proved by the petitioners, the petitioners are not entitled for such reliefs. This is the only submission as urged on behalf of Omkar. In my opinion, such case of Omkar and the submission in that regard is more in desperation. This is also seen from the overall conduct of the respondents as also the conspectus of the present proceedings which is clear from the order passed by this Court and the orders of the Division Bench (*supra*).

15. It may be observed that when the parties agree to payment of interest of such nature and more particularly when the relation between the parties is of a developer/builder on one hand and the flat purchaser on the other hand, such condition as contained in a contract is required to be understood in the context and the nature of such contract as entered between the parties.

16. It not only appears, but it is as clear as the sun light, that an unequivocal commitment was made by Omkar to the petitioners to make such interest payment as agreed in Clause 4.6 of the interest agreement. Such agreement is subsisting, however, Omkar continued to act in breach of the main agreement and its obligation by not completing the shaft work and other aspects and hand over the possession of the flat but also has persisted in not making payment of the interest on the amounts received by it from the petitioners obligated under the interest agreement. In fact, the order passed by this Court as also the Appeal Court would clearly show the hardship and the struggle the petitioners were required to face and ultimately approach this Court to seek orders against Omkar for Omkar to take appropriate steps and complete the lift shaft work, so that the petitioners are put in possession in the manner as agreed in the agreement(s). It needs to be observed that Omkar cannot take a position that the interest agreement remains only a paper agreement and cannot create any right in the petitioners, much less on a specious plea as taken in the present proceedings.

17. In my opinion, this is a clear case wherein the rights of the petitioners who are innocent flat purchasers having parted with valuable and substantial consideration have landed up in a situation only to realise that Omkar would breach all its obligations under the agreement(s) in question. It cannot be so easy for developers having received substantial amounts to brazenly defy their contractual obligations towards the flat purchasers. There can be no tolerance to a regime of any lawlessness and illegality on this front. Thus, the petitioners

need to be protected qua the interest agreement as well.

18. The position in law in such context can be discussed. In *Baker Hughes Singapore Pte. vs. Shiv-Vani Oil and Gas Exploration Services Ltd.* (supra), a co-ordinate Bench of this Court was considering an appeal under Section 37 of the ACA against an order passed by an arbitral tribunal rejecting an application under Section 17 of the Act filed by the petitioners for interim measures of protection. The petitioner therein had prayed for an order and direction against the respondent therein, to deposit monies to the extent of the outstanding amounts payable to the petitioner, or in the alternative to provide security in regard to that claim. The petitioner contended that the invoices sent by the petitioner were never returned disputed or challenged on any ground. The respondent even failed to pay invoices on opening letter of credit. The respondent, in fact, assured the petitioner that the payment would be released to the petitioner. The Court held that under section 6.1 of the contract in question, the respondent had agreed to pay the undisputed invoices to the petitioner within sixty days from the date of submission of such invoices. The Court discussing the principles of law as applicable in such context and considering the case of the respondent that the relief of seeking protection in that regard is in fact a "claim for damages", rejected such contention and allowed the appeal. The Court accordingly granted protection by issuing directions to the respondents therein to provide security by furnishing a bank guarantee. The principles of law as discussed in the above judgment would certainly become applicable in the facts of the present case. Following are the observations made by the Court in paragraphs 53, 58 and 59:

"53. In my view the arbitral tribunal could not have compared the claim made by the petitioner under undisputed invoices with the counter claim for damages. A perusal of the correspondence on record prima facie indicates that till the petitioner had invoked the arbitration agreement, the respondent had not raised any such dispute about the merits of the invoices issued by the petitioner. The arbitral tribunal could not have ignored such material on record for the purpose of taking a prima facie view and considering an application for interim measures.

.....

58. In my view even if the counter claim made by the respondent was for amount higher than the claim made by the petitioner, fact remains that the said counter claim was a speculative claim for damages whereas the claims made by the petitioner was in my prima facie view under undisputed invoices, which claim was admitted and liability was acknowledged in the correspondence by the respondent.

59. In my view a party who had made application under section 9 of the Arbitration and Conciliation Act, 1996 for interim measures in case of a monetary claim whose application was converted into an application under section 17 can not be put to any disadvantageous position. In my view, even in case of money claim which is subject matter of dispute before the arbitral tribunal, the arbitral tribunal has power to order the opponent party to furnish a security so as to

secure the claim of other party if a prima facie case is made out by the applicant.”

19. The Division Bench of this Court in *Valentine Maritime Ltd. Vs. Kreuz Subsea Pte Ltd. & Anr.* (supra), taking a review of the law in such context, the Division Bench has taken a similar view as in *Baker Hughes Singapore Pte. vs. Shiv-Vani Oil and Gas Exploration Services Ltd.* (supra), while confirming the orders of the learned Single Judge and directed security to be furnished by the appellant therein.

20. A useful reference can also be made to a decision of the Division Bench of this Court in *Jagdish Ahuja & Anr. Vs. Cupino Ltd.* Comap/12/2020 with IA/1/2020 decided on 3 August 2020 in which the Court observed that there was practically no defence to the payability of the amounts. It was held to be in the interest of justice to secure the amounts, which formed part of the subject matter of the proposed arbitration reference, even if, no case strictly within the letter of Order 38 Rule 1 or 2 was made out. It was held that it was certainly within the power of the Court to order a suitable interim measure of protection, and accordingly, confirmed the order passed by the learned Single Judge passed on the Section 9 proceedings, which had directed deposit of the amounts by way of interim reliefs by exercising jurisdiction under Section 9 of the Act.

21. In so far as Mr. Khandeparkar’s reliance on the decision of the co-ordinate Bench of this Court in *E-City Media Private Limited vs. Sadhrta Retail Limited* is concerned, the same is an order passed on a Company Petition wherein payments were not made by the respondent-company to the petitioner despite statutory notice under Section 433 and 434 of the Companies Act, 1956 being issued by the petitioners therein. Hence, a petition for winding up of the respondent-company was filed. The case of the respondent in defence was to the effect that substantial part of the debt or dues as alleged in the petition was for loss or damages sustained on an alleged breach of the agreement by the respondent. It was contended that the determination of loss or damages would require evidential proof which was beyond the summary nature of proceedings for winding up. It was contended that no debt can be held to be due and payable unless the extent of loss or damages were ascertained. It is in such context, noting the relevant clauses in the contract which provided that the respondent was to pay a sum as stated in the said clause as and by way of a non-refundable royalty on yearly basis, the Court observed that the petition for winding up could not be maintained upon a claim for damages. It was observed that the damages would become payable only when they were crystallized upon adjudication, and until and unless an adjudication takes place with a resultant decree for damages, there was no debt due and payable. On such observations, the Court held that the petition for winding up would manifestly not be maintainable and dismissed the company petition. There can be no dispute on such proposition as applicable in the facts of the said case. However, certainly these principles of law as discussed in the said decision are not applicable in the facts of the present case.

22. In the above circumstances, in so far as the present case is concerned,

Omkar in no uncertain terms under the interest agreement has agreed to make interest payment to the petitioners in the event the possession of the premises was not to be handed over by 31 December 2019. Certainly, the petitioners have a valid monetary claim in this regard. It cannot be that such claim of the petitioners remain to be a paper claim and/or in the event the petitioners succeed in their claim, the award remains to be a paper award, this more particularly when Omkar is purporting to contend financial difficulties. Thus, such amounts as manifestly obligated and committed to be paid by Omkar to the respondents are required to be secured, keeping at the forefront, the arbitral interest of the petitioners. Accordingly, it would be in the interest of justice that till the disputes between the parties are adjudicated in the arbitral proceedings, the following order is passed:-

ORDER

(i) The respondents are directed to deposit in this Court the amounts as agreed by the respondents in terms of Clause 4.6 of the Interest Agreement/letter dated 15 July, 2019 and/or in terms of prayer clause (b) of the petition, which reads thus:-

b) deposit default interest @ 12% p.a. on Rs.22,41,00,000/- (Rupees Twenty Two Crores Forty One Lacs Only) for the period of 1st January, 2020 till the completion of the said lift shaft work I flat 6501 such that no inconvenience is caused to the petitioners while using, occupying and enjoying the said flat in this Hon'ble Court and the Petitioners to withdraw the said amount on such conditions as this Hon'ble Court may deem fit and proper, as per particulars of claim;

(ii) Let such amount be deposited within a period of four weeks from today.

(iii) The petition is accordingly disposed of in the above terms.

23. It is clarified that the observations as made in this order are in the context of the present proceedings only. All contentions of the parties on merits of any proposed arbitral proceedings are expressly kept open.

(iv) No costs.

24. At this stage, Mr. Jagtiani, learned Senior Counsel appearing for the petitioners has suggested that the parties can be referred to arbitration by appointing an arbitral tribunal. Mr. Master, learned Counsel appearing for respondent no.1-Omkar states that his client would also be agreeable for the disputes being referred to arbitration.

25. There being no dispute in regard to the existence of the arbitration agreement between the parties and considering the consensus between the parties to refer the disputes to arbitration by appointing an arbitral tribunal, the following order is passed:-

ORDER

(i) Mr. Justice R. M. Savant, Former Judge of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Contract dated 20 June 2017 and the Letter (Interest Agreement) dated 15 July, 2019;

(ii) The learned prospective sole arbitrator, before entering the reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this petition with a copy to be forwarded to both the parties;

(iii) The fees payable to the arbitral tribunal shall be fixed as may be mutually agreed;

(iv) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties on merits of the matter are expressly kept open;

(vi) Office to forward a copy of this order to the learned Arbitrator on the following address:

"Office : Unit No. 32, 3rd Floor, "Shanti" Building, 6, Banaji Street, Fort, Mumbai – 400 001.

Mobile: 9619555152

rajendramsavant07@gmail.com".