
(2015) 06 BOM CK 0238

In the Bombay High Court

Case No : Arbitration Petition (Lodging) No. 219 of 2015

The Jal Ratan Deep Co-operative Housing Society Limited	APPELLANT
Vs	
Kumar Builders Mumbai Realty Private Limited	RESPONDENT

Date of Decision : 24-06-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Specific Relief Act, 1963 — Section 14

Citation : (2015) 06 BOM CK 0238

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Rohan Cama, Prakash Shinde and Chirag Bhavsar i/b MDP and Partners, for the Appellant; Amir Arsiwala and Sameer Khedekar, Advocates for the Respondent

Final Decision : Disposed off

Judgement

R.D. Dhanuka, J—By this petition filed under section 9 of the Arbitration & Conciliation Act, 1996 (for short the said "Arbitration Act"), the petitioner seeks permission to appoint a new developer to develop the property of the petitioner and/or to deal with the said property pursuant to the liberty granted by this Court vide order dated 23rd December, 2014 and also seeks an injunction restraining the respondent from advertising and dealing with in any manner pursuant to the development agreement and to advertise such redevelopment project of the petitioner in any manner whatsoever. Some of the relevant facts for the purpose of deciding this petition are as under:

2. The petitioner society was formed and registered in 1974 and comprises of 97 members in five buildings. The petitioner passed a resolution at the special general body meeting on 14th February, 2010 to carry out demolition of the existing buildings and for construction of the flats for the members through a professional developer. The petitioner and the respondent entered into an agreement on 12th January, 2011 for the purpose of redevelopment of the

buildings of the petitioner on the terms and conditions recorded therein. Under the said agreement, the respondent was required to take various steps such as obtaining IOD with full TDR FSI to be loaded within three months from the execution of the development agreement, to furnish the bank guarantee of Rs. 18.00 crores, indemnity bond and payment of hardship compensation, rent, brokerage and shifting/re-shifting charges etc. The respondent had agreed to complete the development project within 29 months from the date of execution of the development agreement. Several other obligations of the respondents were also recorded in the said development agreement.

3. It is the case of the petitioner that there was gross delay on the part of the respondent in obtaining IOD with 2 TDR FSI loaded by the end of August, 2011. The petitioner though, at the request of the respondent granted extension of 16 months on 12th June, 2011, the respondent however, could not obtain IOD with full FSI TDR within the extended period which expired on 12th September, 2011.

4. The respondent on 9th February, 2012 forwarded a proposal for reduction of an area offered to the petitioner i.e. proposal of 773 sq. ft. and 580 sq. ft. on the pretext of the amendment to the Development Control Rules and Regulations.

5. It is the case of the petitioner that only on 28th March, 2013, i.e. after 26 months from the execution of the development agreement and after 10 months from the approval of the revised plans by the petitioner, IOD was received by the respondent. According to the petitioner, the said IOD was defective as it covered only the flats for 56 members and not 97 members. The said IOD was in the name of Kumar Urban Development and not in the name of the society.

6. On 25th July 2013, the respondent requested the petitioner for further flexibility to load TDR. The petitioner agreed to the proposal made by the respondent in the special general body meeting held on 10th August, 2013 and approved the draft of supplementary agreement and Alternate Accommodation Agreement. The petitioner thereafter called upon the respondent to inform the dates for executing the Supplementary Agreement, Alternate Accommodation Agreement and the date of notice to vacate about the corpus, TDR and the bank guarantee. It is the case of the petitioner that the respondent served a notice on 30th September, 2013 to the petitioner asking the members to vacate the premises by 31st December, 2013 however, completely ignoring the conditions in clause 15 of the development agreement. It is the case of the petitioner that the representative of the respondent informed the members of the petitioner about the financial problem faced by the respondent. The respondent apologized to the petitioner for the delay and informed that the respondent would be sending the revised plans for approval by the first week of January, 2014.

7. On 31st December, 2013, the petitioner informed the respondent about the vicarious condition of the buildings and forwarded the photographs showing the cracks in the buildings.

8. On 9th May, 2014, the respondent sent an e-mail showing three plans thereby

proposing the size of the flats of 700 sq. ft., 710 sq. ft. and 810 sq. ft. for consideration of the members of the petitioner. On 17th October, 2014, the respondent came up with the feasibility report of the project claiming that the project was making loss of Rs. 16.00 crores if the petitioner was offered 773 sq. ft.

9. In the general body meeting of the petitioner held on 14th November, 2014, all the members of the petitioner unanimously agreed to invoke clause 26 of the development agreement for imposing liquidated damages on the respondent and recorded their dissatisfaction and hardship that had taken place due to gross delay in execution of the project by the respondent. The petitioner accordingly sent a notice on 16th November, 2014 to the respondent calling upon to pay the liquidated damages amounting to Rs. 18,80,00,000/- within seven days from the date of receipt of the said notice.

10. On 15th December, 2014, the petitioner issued a notice on the respondent calling upon to rectify the breaches enumerated in the said notice within 30 days making it clear that in case of non-compliance, development agreement shall stand automatically terminated.

11. The respondent filed a petition under section 9 of the Arbitration Act in this Court (Arbitration Petition (Lodging) No. 1892 of 2014). By an order dated 23rd December, 2014 this Court referred the disputes and differences between the parties arising out of the development agreement to the sole arbitration of Mr. Sanjay Kothari, advocate with a direction to make an endeavour to pass his award within a period of 12 weeks from the date of the first meeting held by him with the parties and their advocates. It was however, made clear that pending the arbitration proceedings, if the petitioner herein was desirous of appointing a developer to develop the property of the society and/or to deal with the said property in any manner whatsoever, the petitioner herein shall after giving 15 days clear notice to the respondent for the respondent herein move this Court and obtain permission of this Court in that regard. It was also clarified that the said direction would not preclude the society or its members to carry in sale/transfer of flat/s in the society premises. All the contentions of the parties are kept open. The said petition was disposed of.

12. On 7th January, 2015, the petitioner issued a notice to the respondent's advocate informing that the petitioner was desirous of appointing a new developer to develop the property of the society and to proceed in accordance with the order dated 23rd December, 2014. The petitioner called upon the respondent to forthwith stop advertising the redevelopment project of the petitioner through their website. The petitioner thereafter filed this petition on 2nd February, 2015, inter-alia praying for permission to appoint the new developer. By an ad-interim order dated 8th May, 2015, this Court permitted the petitioner to initiate and implement tender processing but not to appoint a new developer as a result of that process until a suitable direction in that behalf was sought from this Court. This Court continued orders passed by this Court on 23rd

December, 2014 subject to modification order by the said order dated 8th May, 2015. The respondent is also directed to maintain status-quo in respect of the property being subject matter of the petition until further orders.

13. Mr. Cama, learned counsel for the petitioner invited my attention to the various documents annexed to the petition, reply and re-joinder, including the photographs of the buildings showing dilapidated condition of the buildings. It is submitted that the parties are proceeding with the arbitral proceedings which would take time for final disposal. He submits that since the respondent did not show any progress for the last several years from the date of the execution of the agreement and there were no chances of such progress even in future, the members of the petitioner passed a resolution for termination of the development agreement after giving 30 days notice to the respondent to rectify the breaches. The respondent however, did not take any steps inspite of the said notice dated 15th December, 2014.

14. Learned counsel submits that there was no stay of the termination notice granted by this Court in the arbitration petition filed by the respondent. This Court thus granted liberty to the petitioner to apply for permission to appoint a developer to develop the property and/or to deal with the said property in any manner whatsoever after giving 15 days notice to the respondent. He submits that the members of the society have lost confidence in the respondent and considering the dilapidated condition of the buildings, it became absolutely necessary to take steps to appoint another developer to develop the property of the society.

15. Learned counsel for the petitioner submits that the respondent has been facing financial problems and has committed gross delay in taking steps under the said development agreement which resulted in gross hardship to the members of the petitioner society. The respondent kept on requesting the petitioner for granting permission for various changes proposed to be made by the respondent and for extension of time to comply with the obligations of the respondent. He submits that though the petitioner had granted such indulgence, the respondent still could not show any progress.

16. Learned counsel submits that since this Court has not granted any stay on termination of the development agreement, the petitioner is entitled to appoint another developer for the purpose of carrying out redevelopment of the buildings. He submits that if the respondent ultimately succeeds before the learned arbitrator in proving that the termination effected by the petitioner was illegal and unlawful, the respondent can be compensated by awarding damages by the learned arbitrator. There is no question of granting any specific performance of such contract in favour of the respondent.

17. Learned counsel for the petitioner submits that pursuant to the liberty granted by this Court for seeking permission to appoint a new developer, the petitioner had invited tenders. 20 developers had collected the tender. 5

developers have submitted their tender. He submits that this Court thus be pleased to grant permission to the petitioner to proceed with awarding of the contract to a new developer and to proceed with the construction in the interest of justice. He also presses prayer (b) of the petition.

18. In support of this submission, learned counsel for the petitioner relied upon the following judgments:

"i). In the case of Maytas Infra Limited Vs. Utility Energytech and Engineers Pvt. Ltd. and Others, (2009) 4 BomCR 143 ,

ii). Order dated 25th July, 2013 in Notice of Motion No. 595 of 2013 in Suit No. 265 of 2013 in the case of M/s. Rushab Developers & Ors. v. Mahavir Chhaya CHS Ltd. & Ors.

iii). Judgment of this Court dated 29th November, 2013 in Arbitration Petition (Lodging) No. 1999 of 2013 in the case of Chaurangi Builders & Developers Pvt. Ltd. v. Maharashtra Airport Development Company Ltd.

iv). Judgment of this Court delivered on 21st January, 2014 in Arbitration Petition No. 600 of 2013 in the case of M/s. Heritage Lifestyle & Developers Ltd. v. M/s. Cool Breeze Co-operative Housing Society Ltd. & Ors.

v). Judgment of this Court delivered on 1st December, 2014 in Notice of Motion No. 961 of 2013 in Suit No. 262 of 2012 and other connected matters in the case of Vaidehi Akash Housing Pvt. Ltd. v. New D.N. Nagar Co-operative Housing Society Union Ltd. & Ors."

19. Learned counsel for the respondent on the other hand opposed this petition on the ground that the reliefs claimed in this petition for permission to appoint the new developer to develop the property of the petitioner and/or to deal with the said property cannot be granted under section 9 of the Arbitration Act, 1996. He submits that the respondent has already filed a statement of claim before the learned arbitrator and has prayed for grant of specific performance of the development agreement executed between the parties and also in the alternate for damages. He submits that if reliefs as claimed in the petition is granted, the prayer for specific performance of the development agreement claimed by the respondent would become infructuous. He submits that the arbitral proceedings are going on before the learned arbitrator and are at the evidence stage. In support of his submission that no relief under section 9 can be granted the effect of which would make the reliefs claimed by the respondent infructuous, learned counsel placed reliance on the judgment of the Supreme Court in the case of N. Srinivasa Vs. Kuttukaran Machine Tools Ltd., AIR 2009 SC 2217 : (2009) 4 JT 440 : (2009) 3 SCALE 762 : (2009) 5 SCC 182 : (2009) 2 SCR 852 and in particular paragraphs 25 to 28.

20. Learned counsel for the respondent then submits that the respondent had modified the plan only once when the petitioner had agreed to accept lesser area. The respondent had forwarded all the requisite documents to the petitioner

from time to time. He submits that the allegations of the petitioner that the submission of the plans by the respondent was in breach of the Development Control Rules is totally vague. Since the petitioner agreed to accept the lesser area than what was agreed under the development agreement, there was no breach committed by the respondent. He submits that since the members of the petitioner did not vacate their respective tenements, the respondent who had agreed to provide the bank guarantee in favour of the petitioner before vacating the flats by the members of the petitioner was not submitted by the respondent. There was thus no breach insofar as the submission of the bank guarantee is concerned.

21. Insofar as the payment of the hardship compensation is concerned, it is submitted that the respondent had already paid all the installments of such compensation to the members of the petitioner. He submits that the copy of the IOD obtained by the respondent had been already provided to the petitioner. Insofar as the issue of indemnity bond raised by the petitioner is concerned, it is submitted that the form of such indemnity bond was already provided in the agreement at page 52 and in any event no such issue was raised earlier by the petitioner.

22. Learned counsel for the respondent then submits that since the petitioner had by conduct granted extension of time to the respondent to comply with its all the obligations, the time was not an essence of the contract. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, AIR 1979 SC 720 : (1979) 2 SCC 70 : (1979) 2 SCR 1147 .

23. Learned counsel for the respondent submits that the learned arbitrator has power to consider the reliefs for specific performance claimed by the respondent. Since the said relief is already claimed in the arbitration proceedings, this Court cannot permit the petitioner to appoint another developer to carry out redevelopment and to create third party rights in respect of the properties in favour of a third party. He submits that the respondent has already spent huge amount in taking various steps under the said development agreement and if the petitioner is allowed to redevelop the said property through some other developer and to sell the property in question, the respondent would not be able to recover any amount from the petitioner or its members. He submits that no case is made out for grant of any interim measures as prayed by the petitioner.

24. In rejoinder, learned counsel for the petitioner submits that the Municipal Corporation of Greater Bombay had already rejected the application for IOD submitted by the respondent in the month of March, 2011. The respondent obtained an IOD much later and not in accordance with the provisions of the development agreement. The respondent had assured the petitioner to give the bank guarantee and load TDR before the members of the petitioner vacating the premises. He submits that the members of the petitioner were ready and willing

to vacate their respective premises however, since the respondent did not comply with its various obligations, the stage of the members of the petitioner vacating their premises did not arise. He submits that though the petitioner agreed for various concessions requested by the respondent such as to load limited TDR, the respondent could not load even the limited TDR.

25. Learned counsel for the petitioner distinguished the judgment of the Supreme Court in the case of N. Srinivasa (supra) on the ground that the facts before the Supreme Court in the said judgment are totally different. In this case the petitioner has already terminated the development agreement. There is no stay granted by this Court in favour of the respondent and as against the petitioner from taking any steps pursuant to the said letter of termination. On the contrary, this Court has permitted the petitioner to invite tenders and to take further steps however, not to appoint a new developer until a suitable direction that behalf is sought from this Court. Even the respondent has been directed to maintain status-quo until further orders. He submits that the respondent has not challenged the ad-interim order passed by this Court directing the respondent to maintain status-quo and permitting the petitioner to initiate tendering process.

26. A perusal of the record indicates that the development agreement was executed between the parties on 12th January, 2011. It is not in dispute that prior to the date of termination of the development agreement, the respondent had not commenced the construction on the plots. The respondent had not furnished the bank guarantee and had not taken various steps required to be taken before the members of the petitioner could be asked to vacate their respective tenements. The status-quo order is granted by this Court against the respondent which is not challenged by the respondent. While disposing of Arbitration Petition (Lodging) No. 1892 of 2014 which was filed by the respondent herein, this Court did not grant any stay of the termination effected by the petitioner. On the contrary, this Court granted liberty to the petitioner herein to move this Court and obtain permission from this Court if the petitioner was desirous of appointing a developer to develop the property of the society and/or to deal with the said property in any manner whatsoever. It was also clarified by the said order that the said direction would not preclude the society or its members to carry on sale/transfer of the flats in the society premises.

27. Insofar as the submission of learned counsel for the respondent that no relief as claimed in this petition under section 9 can be granted is concerned, in my view there is no merit in this submission of learned counsel for the respondent. The present petition is filed pursuant to the liberty granted by this Court on 23rd December, 2014 in arbitration petition filed by the respondent itself under section 9. The said order has not been impugned by the respondent. In my view, the reliefs claimed in this petition inter-alia praying for permission to appoint another developer is thus maintainable and can be considered under section 9 of the Arbitration Act.

28. A perusal of the record prima-facie indicates that the respondent has made

various suggestions from time to time for various changes in the plan, including reduction in the area of the flats though the respondent had agreed to provide the flats of larger area. The IOD was obtained by the respondent after a period of more than two years and that also partial. The respondent itself had submitted feasibility report on 17th October, 2014 of the project claiming that the project was making loss of Rs. 16.00 crores if the petitioner was offered 773 sq. ft. as agreed under the development agreement. It is not in dispute that the buildings of the petitioner are in dilapidated condition. The members of the petitioner society in my prima-facie view have lost confidence in the respondent. The members of the petitioner society have therefore, passed a unanimous resolution initially to recover the liquidated damages from the respondent and thereafter by terminating the development agreement after giving 30 days notice for rectification of projects.

29. In my prima-facie view the petitioner has good chances of succeeding in the arbitral proceedings. The respondent not having been able to obtain any relief from this Court in its favour in the petition filed under section 9 of the Arbitration Act of stay of the termination and of stay restraining the petitioner from inviting any fresh tenders for the appointment of the new developer, the petitioner has rightly applied for permission to appoint a new developer pursuant to the liberty granted by this Court. Even if the respondent succeeds in the arbitration proceedings and if it is held that the termination of the agreement was illegal, the respondent would be entitled to claim compensation. The judgment of the Supreme Court thus relied upon by learned counsel for the respondent in the case of N. Srinivasa (*supra*) does not apply to the facts of this case and would not assist the respondent.

30. Insofar as several other submissions made by the respondent about the respondent not having committed any breaches as canvassed by the petitioner is concerned, in my prima-facie view, there is no substance in any of those submissions made by the respondent. A perusal of the record prima-facie indicates that the respondent has committed various breaches on its part and committed gross delay. Though the letter of intent was issued in favour of the respondent by the petitioner, as far back as on 16th May, 2010, till the said agreement was terminated, no steps were taken by the respondent to get the respective flats of the petitioner vacated by complying with its part of obligation. In this situation, in my prima-facie view, the respondent even otherwise would not be entitled to seek specific performance in view of section 14 of the Specific Relief Act, 1963.

31. This Court has taken a consistent view, including in the judgments referred to and relied by Mr. Cama, learned counsel for the petitioner, that if a society has lost confidence in the developer, the society cannot be forced to continue the contract with such developer. I am respectfully bound by the judgments of this Court which are relied upon by Mr. Cama, learned counsel for the petitioner which squarely applies to the facts of this case.

32. In view of the fact that the buildings of the petitioner are in dilapidated condition, it would be in the interest of justice and the balance of convenience being in favour of the respondent, that before any untoward incident takes place, the petitioner be permitted to take steps to appoint another developer and to go ahead with the redevelopment of its properties. On the other hand, if the respondent succeeds in the arbitration proceedings, the respondent would be entitled to compensation. No prejudice thus would be caused to the respondent.

33. I, therefore, pass the following order:--

"a). The arbitration petition is made absolute in terms of prayer clauses (a) and (b). The petitioner is permitted to appoint a new developer to develop the property of the petitioner and to deal with the said property as the petitioner desires.

b). The arbitration petition is disposed of in the aforesaid terms. There shall be no order as to costs."

Oral application of learned counsel for the respondent for stay of operation of this order is rejected.