IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1035 OF 2015

Hilton Co-operative Housing Society Limited .... Petitioner

Vs.

Vardhaman Developers Limited .... Respondent

Mr. Kaushal A. Tamhane alongwith Ms. Meenakshi Dhanuka-Rungta i/by Dhanuka & Partners for the Petitioner.

Mr. Pravin Samdani, Senior Counsel alongwith Mr. Birendra Saraf alongwith Mr. Vatsal Merchand i/by Kishore Thakordas & Co. for the respondent.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 23rd October, 2015

P.C. :

1 This petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 is for setting aside the arbitral award dtd. 20th March, 2015 by which the petitioner is directed to specifically perform the agreement between the parties, which will include modular kitchen below the kitchen platform and pay to the respondent Rs.12,00,000/- being the petitioner's share of the costs of the arbitration that had been paid by the respondent.

2 The facts giving rise to the petition, stated in brief, are as follows:

The petitioner is a registered co-operative housing society and has three buildings consisting of 19 commercial and 43 residential premises. By the resolution passed in the General Body Meeting held on 1st April, 2007, it decided to re-develop it's property and invited offers for the purpose. The offer of the respondent was accepted and it was appointed as the Developer by the Resolution of the Special General Body Meeting dtd.12th January, 2008. The then managing committee of the petitioner intimated the respondent, by the letter dtd.22nd January, 2008, that it's offer of redevelopment had been approved by the Redevelopment Committee and the Managing Committee, subject to execution of the development agreement. The respondent then submitted draft of the development agreement, which was approved by the petitioner in it's General Body Meeting held on 22nd July,2008 and pursuant to the Resolution, development agreement dtd. 28th July, 2008 came to be executed. But thereafter there were further negotiations for giving certain additional benefits to the petitioner and it was agreed that the additional area to be provided for residential premises would be enhanced by 30% usable carpet area. In order to give effect to the additional benefits, fresh agreement dtd.15th January, 2009 came to be executed, substituting the earlier agreement dtd. 28th July, 2008. Simultaneous to execution of the agreement, the petitioner executed irrevocable power of attorney in favour of the respondent. Under the agreement, the petitioner was to obtain consent of minimum 70% of it's members and the respondent was to obtain consent of the remaining 30% members. On 10th February, 2009, the respondent forwarded to the petitioner 40 consent affidavits to be executed by it's members and also furnished typical floor plan as per request of the petitioner. However, the petitioner suddenly by it's letter dtd. 30th November, 2009 informed the respondent that the former Managing Committee had been replaced by the new Managing Committee, which by it's Resolution dtd.4th November, 2009 resolved to terminate development agreement dtd.15th January, 2009. The letter was accompanied by a cheque in the sum of Rs.9,00,000/- that had been paid towards the corpus fund by the respondent at the execution of the first agreement of development dtd.28th July, 2008. The respondent replied the petitioner's notice by it's letter dtd.28th December, 2009 and returned the cheque to the petitioner. It also placed on record the various steps taken by it towards redevelopment of the petitioner's property. Then, by it's letter dtd.22nd April, 2011, the advocate for the petitioner informed the respondent that the development agreement dtd.15th January, 2009 was invalid as the objects of society did not include powers to demolish and reconstruct the building utilising F.S.I. and T.D.R.. This led to the arbitral proceedings for specific performance of the development agreement dtd.15th

January, 2009 and in the alternative damages in the sum of Rs.19,92,52,000/- being the potential loss in profits.

3 The petitioner, in it's written statement alleged that the agreement dtd.28th July, 2008 executed between the respondent and earlier Managing Committee was a result of collusion between the two. The draft agreement forwarded by the respondent was approved subject to vital modifications and changes by the general body of the petitioner in it's Special General Body Meeting held on 22nd July, 2008. But that Resolution was a manipulated resolution arrived at by the previous Managing Committee in connivance with the respondent. The petitioner alleged that substitution of the agreement dtd.28th July, 2008 by the agreement dtd.15th January, 2009 was not informed to the members of the petitioner by the earlier Managing Committee. When the new Managing Committee take over the charge of the petitioner, it realised the major defects, deletions and variance in the subsequent development agreement. According to the petitioner, the resolution of the General Body was manipulated and modified. Majority of members of the petitioner had refused the consent affidavits and it was resolved unanimously in the Special General Body Meeting held on 15th November, 2009 to terminate the second agreement. It was contended that the second agreement was not backed by the resolution of the Managing Committee and hence was a fraud. It resulted into

unjust enrichment for the respondent. The agreement was not properly stamped and was not registered as required mandatorily. The second agreement used the term "usable carpet area" though it had been suggested by the members of the petitioner that the word "usable" was required to be removed. Some of the members of the petitioner had written letters complaining about the agreements.

4 On the pleadings between the parties, the learned Arbitrator framed 14 issues. The parties led their evidence and also filed written submissions. On appreciation of the evidence before him, the learned Arbitrator allowed the proceedings with costs and directed the petitioner to specifically perform the agreement dtd. 15th November, 2009 with an addition thereto of including a modular kitchen below the kitchen platform.

5 The reasons given by the learned Arbitrator to arrive at the findings in the award are that the agreement dtd. 15th January, 2009 was entered into, pursuant to the resolution of the General Body dtd.22nd July, 2008. Such an agreement does not require registration under any provision of law. As regards the complaint of the agreement being unsufficiently stamped, no evidence had been brought on record of deficiency in the stamps by the petitioner. There was also no evidence as regards any manipulation or modification of the agreement. Similarly, no evidence had been produced of any unjust benefit or

enrichment of the respondent by previous Managing Committee in connivance with the respondent. As regards the complaint of use of the expression “usable carpet area” for both the residential and commercial premises, the learned Arbitrator found that the subsequent agreement executed between the parties in fact was beneficial to the members of the petitioner and gave them better facilities. The additional usable carpet area to be made available to the members had increased from 27% to 30%. Therefore, the term “usable carpet area” did not cause any prejudice to the petitioner.

6 The petitioner alleges that the arbitral award is perverse and contrary to fundamental policy of Indian Law. It is contended on behalf of the petitioner that the learned Arbitrator could not have held that the second agreement was not required to be backed by the resolution of the Managing Committee. According to the petitioner, the second agreement was not a substitute agreement but an altogether new agreement, which needed sanction by the General Body of the petitioner. It also alleged that the learned Arbitrator committed patent illegality by not accepting submissions of the petitioner that it's members were entitled to new tenement of new carpet area plus additional carpet area and use of the word “usable” showed malafides on the part of the respondent. The petitioner apprehended that the respondent proposed to treat the area as the super built-up area of the premises instead of the carpet area.

7 The challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act has a limited scope as provided under Section 34 of the Act, unlike appellate jurisdiction of the court where the entire evidence and the pleadings can be reconsidered by the court. The main objection of the petitioner is seen to the use of the term “usable carpet area” in the agreement. The petitioner, however, has not been able to demonstrate as to how and what prejudice is caused to the members by use of the term. In the absence of such evidence, any objection to the use of the word would be without substance. Similarly, the petitioner has not been able to point out that there have been any major or material change to the prejudice to the members of the petitioner in the second agreement. In fact as has been observed by the learned Arbitrator the second agreement gives better facilities to the members of the petitioner. The petitioner has also not produced any evidence of collusion between the members of the earlier Managing Committee and the respondent. As regards the contention of the petitioner that the objects of the society do not empower the Managing Committee to agree for demolition of the building, the same only needs to be rejected. Thus, there is no merit in the challenge to the arbitral award. Hence, the petition is dismissed.

(Smt. R.P. SondurBaldota, J.)