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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.983 OF 2014
WITH
ARBITRATION PETITION NO.1167 OF 2014

Magic Properties Private Limited,
a company incorporated under the
Companies Act, 1956, having its
office at A/1, 352, Rajpipla,
Opp. Standard Chartered Bank,
Linking Road, Santacruz (W),
Mumbai – 400 054.

...Petitioner

....Versus....

Raj Pipla Co-operative Housing
Society Limited, a society registered
under the Maharashtra Co-operative
Societies Act, 1960, having its office
at 352 Rajpipla, Opp. Standard
Chartered Bank, Linking Road,
Santacruz (W), Mumbai – 400 054.

...Respondent

Mr.D.D. Madon, Senior Counsel with Mr.Simil Purohit and Ms.Sujata
More i/b Desai Desai Carrimjee & Mulla for the Petitioner.

Mr.Harinder Toor with Ms.Sheelang Shah i/b Mr.Prateik Parija for the
Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 1ST OCTOBER, 2015.

ORAL JUDGMENT :-

1. By consent of parties, both these arbitration petitions were
heard together and are being disposed of by a common order.

2. In Arbitration Petition No.983 of 2014 filed by the petitioner, the petitioner has prayed for an order and direction against the respondent to comply with the order dated 2nd October, 2012 passed by the arbitral tribunal and various other interim measures. In Arbitration Petition No.1167 of 2014, the petitioner has prayed for an appointment of the Court Commissioner with a direction to inspect the building and the premises of the respondent to ensure compliance of the order dated 30th June, 2014 passed by this Court and further direction to render assistance of the police authorities to ensure compliance of the order dated 30th June, 2014 passed by this Court. Some of the relevant facts for the purpose of deciding both these arbitration petitions are as under :

3. The petitioner and the respondent had entered into a development agreement on 15th October, 2005. It is the case of the petitioner that the petitioner duly fulfilled all its obligations under the said agreement and handed over the complete premises to the members of the respondent on 11th April, 2011. The Municipal Corporation issued a full occupation certificate for the new building. It was the case of the petitioner that the respondent society however, was not allowing the petitioner to have access to various portions of the building and was interfering with possession of the petitioner. The petitioner accordingly filed a petition under section 9 of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act") being Arbitration Petition (Lodging) No.528 of 2012 seeking an injunction against the respondent from preventing the petitioner from occupying and enjoying the car parking sold to the petitioner under the said development agreement.

4. This Court passed certain ad-interim order in the said

petition on 9th May, 2012 directing the members of the respondent to park their cars on their lawful basement floor. An appeal filed by the society against the said order was disposed of without granting interim reliefs in favour of the respondent. The dispute was referred to the learned arbitrator. The petitioner filed Arbitration Petition (Lodging) No.528 of 2012 for certain interim measures. By an order dated 3rd September, 2012 passed by this Court, the application filed by the petitioner was treated as an application under section 17 of the Arbitration Act and was directed to be pursued before the learned arbitrator. On 2nd October, 2012, the learned arbitrator after hearing the parties passed an order under section 17 of the Arbitration Act and granted various interim measures.

5. It was the case of the petitioner that despite of various undertakings rendered by the respondent before the learned arbitrator, which was recorded by him in the said order passed under section 17, the respondent did not comply with the said undertaking. The respondent was also not complying with the said order passed by the learned arbitrator under section 17. It was also the case of the petitioner that the respondent was also interfering with the access of the petitioner to various portions of the building. The petitioner thus filed a petition under section 9 (983 of 2014) before this Court *inter-alia* praying for various interim measures.

6. By an order dated 30th June, 2014, after hearing learned counsel for both the parties, this Court granted interim measures in terms of prayers (b) to (g). Being aggrieved by the said order dated 30th June, 2014, the respondent herein preferred an Appeal (Lodging) No.480 of 2014. By an order dated 19th August, 2014 passed by the Division Bench, the appeal filed by the respondent came to be

dismissed. The Division Bench did not interfere with the ad-interim order passed by this Court on 30th June, 2014.

7. Since the respondent had not complied with the ad-interim order passed by this Court, the petitioner filed Arbitration Petition No.1167 of 2014, inter-alia praying for appointment of the Court Commissioner to inspect the suit building and to submit a report as to whether the order dated 30th June, 2014, was complied with by the respondent or not and seeks further assistance of the local authorities to issue compliance of the said order. By an order dated 25th July, 2014, this Court appointed a Court Commissioner after taking a *prima-facie* view that the respondent had not complied with the *ad-interim* order passed by this Court. The Court Commissioner was directed to verify various issues which were placed before this Court by the petitioner in support of its grievances that the said order dated 30th June, 2014, was not complied with by the respondent.

8. Pursuant to the said order passed by this Court, the Prothonotary & Senior Master appointed an officer of this Court as the Court Commissioner. The learned Court Commissioner submitted the report on 30th July, 2014 after visiting the site when the representative of the petitioner as well as the Honorary Secretary of the respondent was present.

9. Mr.Madon, learned senior counsel for the petitioner invited my attention to various annexures to the petition and also interim order passed by the learned arbitrator under section 17 and would submit that the respondent has not complied with the ad-interim order passed by this Court. He submits that since the respondent has deliberately refused to comply with the order passed by the learned

arbitrator under section 17 and since the respondent has prevented the access of the petitioner to various portions of the building and has stopped water facilities, the petitioner has filed Arbitration Petition No.983 of 2014 for seeking interim measures in terms of the reliefs granted by the learned arbitrator.

10. My attention is also invited to an order passed by the Division Bench on 19th August, 2014. He placed reliance on the submission made by learned counsel for the respondent herein before the Division Bench and more particularly in paragraph 3(ii) and submits that the respondent had urged before the Division Bench that prayers (b) to (f) of this petition were already part of the directions given by the learned arbitrator in the order passed under section 17 of the Arbitration Act. He invited my attention to various observations made by the Division Bench rejecting the submission made by the respondent. He however, invited my attention to paragraph 12 of the order passed by the Division Bench in fairness and submits that the Division Bench has kept all contentions on factual aspect opened.

11. My attention is also invited to various paragraphs of the affidavit in reply filed by the respondent and it is submitted that even in the affidavit in reply, the respondent has made it clear that it had not complied with the ad-interim order passed by this Court and would not comply with the said ad-interim order. He submits that thus the reliefs claimed in the arbitration petition be made absolute.

12. Mr.Toor, learned counsel appearing for the respondent on the other hand submits that the petitioner cannot seek enforcement of the order passed by the learned arbitrator under section 17 of the Arbitration Act by filing this petition under section 9 of the Arbitration

Act. He submits that though various undertakings recorded by the learned arbitrator in the order passed under section 17 of the Arbitration Act are being complied with and not breached by the respondent, the petitioner has sought same reliefs in the present proceedings under section 9 of the Arbitration Act. He submits that the petitioner though occupied various portions of the building constructed by the petitioner, has not applied for membership and has not paid various charges to the society. He submits that the society has already filed separate proceedings against the petitioner before various forum. It is submitted that only after proceedings came to be filed by the respondent against the petitioner, the petitioner has with ulterior motive filed the present proceedings under section 9 of the Arbitration Act for interim measures.

13. A perusal of the order passed by the Division Bench on 19th August, 2014 clearly indicates that the submission of learned counsel for the respondent made before this Court that the proceedings under section 9 of the Arbitration Act cannot be filed for enforcement of an order passed by the learned arbitrator under section 17 of the Arbitration Act has been dealt with by the Division Bench. The Division Bench has also dealt with the judgment of the Supreme Court in case of **MD. Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd. (2004) 9 SCC 619**. In paragraph 7 of the judgment of the Division Bench, it is held that the Supreme Court in case of **MD. Army Welfare Housing Organisation** (supra) was neither called upon nor it decided the issue of interim order passed under section 17 of the Arbitration Act. The Division Bench also held that in the present case, the respondent had invoked the provisions of section 9 of the Arbitration Act to seek interim measures consistent with those contained in the order made

by the learned arbitrator under section 17 of the Arbitration Act which clearly indicates that the petitioner herein was entitled to do in the wake of refusal on the part of the society to comply with or ad-hoc measures as directed by the learned arbitrator in its interim order dated 2nd October, 2012.

14. In my view, since the respondent has not complied with the order passed by the learned arbitrator under section 17 of the Arbitration Act, the petitioner is entitled to file the proceedings under section 9 of the Arbitration Act for similar reliefs which were granted by the learned arbitrator and not having been complied with by the respondent. In my view there is no substance in the submissions made by the learned counsel for the respondent that no such reliefs could be prayed for by the petitioner under section 9 of the Arbitration Act. In my view, the Court can pass interim measures under section 9 of the Arbitration Act on the basis of the order passed by the arbitral tribunal under section 17 of the Arbitration Act which are not complied with and not set aside or stayed.

15. The next submission of learned counsel for the respondent is that the petitioner has prayed for interim measures also for the period beyond the date of award, which cannot be prayed under section 9 of the Arbitration Act. The Supreme Court in case of **Sundaram Finance Ltd. vs. NEPC India Ltd., (1999) 2 SCC 479** has held that the reliefs under section 9 of the Arbitration Act can be prayed not only before invocation of the arbitration agreement and not only during the pendency of the arbitration proceedings but even after an award is made however, before it is enforced in accordance with section 36. In my view, there is thus no substance in this submission made by the learned counsel for the respondent that no

reliefs could be claimed in the petition filed under section 9 of the Arbitration Act for the period beyond the date of award.

16. A perusal of the affidavit in reply filed by the respondent clearly indicates that the respondent has taken an unreasonable stand that it would not comply with the ad-interim order passed by this Court for various excuses given in the affidavit in reply.

17. Insofar as prayer clauses (b) to (g) is concerned, in my view, Mr.Madon, learned senior counsel for the petitioner has rightly invited my attention to the statement made by the respondent herein before the Division Bench that those reliefs pertain to the directions given by the learned arbitrator under section 17 of the Arbitration Act. Learned counsel for the respondent has made a statement before this Court that the respondent has not committed any breach of undertaking recorded by the learned arbitrator in the said order. In my view, the respondent thus cannot oppose those reliefs.

18. Insofar the reliefs in terms of prayer clauses (g) to (l) are concerned, in my view, the respondent cannot be permitted to obstruct the petitioner from various activities as prayed for. Admittedly the petitioner also possessed substantial part of the property in the building of the society. The petitioner, in my view, has thus made out a case for grant of interim measures as prayed in prayer clauses (g) to (l) also. A perusal of the record indicates that the respondent has in fact caused various hindrances against the petitioner from using its property.

19. A perusal of the Court Commissioner's report clearly indicates that the respondent has committed various breaches of the

ad-interim order passed by this Court. In my view, the petitioner has thus made out a case for grant of interim measures as prayed in terms of prayer clauses (a) to (l) and it is ordered accordingly.

20. In view of the order passed by this Court in Arbitration Petition No.983 of 2014 and in view of the learned Court Commissioner having submitted his report, the reliefs prayed in Arbitration Petition No.1167 of 2014 need not be considered at this stage separately.

21. Both the arbitration petitions are disposed of in aforesaid terms.

No order as to costs.

(R.D. DHANUKA, J.)

“Certified to be true and correct copy of original signed Judgment.”