

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

APPEAL (L) NO.540 OF 2015
WITH
NOTICE OF MOTION (L) NO.1846 OF 2015

Kumar Builders Mumbai Realty Pvt.Ltd.	Appellant
versus	
The Jal Ratan Deep Co-op. Housing Society	Respondent

Mr.Janak Dwarkadas, Sr.Advocate with Mr.Snehal Shah,
Mr.Parag Sharma and Kinshule Kislaya i/by Udwadia & Udeshi
for Appellant/Applicant.

Mr.D.J.Khambata, Sr.Advocate with Mr.Rohaam Cama, Mr.Nishit
Dhruva with Mr.Prakash Shinde, Mr.Chirag Bhavsar i/by MDP
and Partners for Respondent.

CORAM : MOHIT S. SHAH, C.J. AND
A.K.MENON, J.

DATE : 20 July 2015

PC :

The appeal is directed against the judgment and order dated 24 June 2015 of the learned Single Judge of this Court allowing the petition of the Respondent Jal Ratan Deep Co-op. Housing Society ('the Society') under Section 9 of the Arbitration & Conciliation Act, 1996 ('the Act').

2. The appellant-developer had earlier filed a petition under Section 9 petition of the Act. After hearing the learned advocates for the parties, the learned Single Judge passed the following order, by consent, on 23 December 2014 :

"i. The disputes and differences between the parties arising out of the Development Agreement dated 12 January 2011 are referred to the sole Arbitration of Mr.Sanjay Kothari, Advocate.

ii. The learned Arbitrator shall 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.

iii. The parties shall appear before the learned Arbitrator in his chambers, on 24 December, 2014 at 5.00 p.m. and obtain necessary directions.

iv. Pending the arbitration proceedings, if Respondent no.1 - The Jal Ratan Deep Cooperative Housing Society Limited is desirous of appointing a Developer to develop the property of the society and/or to deal with the said property in any manner whatsoever, Respondent no.1 shall after giving 15 days clear notice to the Advocate for the Petitioner move this Court and obtain permission of this Court in this regard. It is clarified that this direction will not preclude the Society or its Members to carry of sale/transfer of flat/s in the society premises.

v. The cost of arbitration shall initially be borne by the parties equally.

vi. All contentions of the parties are kept open.

vii. The venue of Arbitration shall be at Mumbai."

3. Pursuant to the aforesaid liberty granted to the society to move the learned Single and obtain permission of the Court for appointment of new developer, the society filed Arbitration Petition (L) No.219 of 2015 seeking permission to appoint a new developer. The petition was opposed by the appellant. After hearing the learned counsel for the parties, by Judgment dated 24 June 2015, the learned Single Judge has allowed the arbitration petition and permitted the society to appoint a new developer to develop the property of the respondent society and to deal with the said property as the respondent desires. The learned Single Judge also allowed the prayer of the society restraining the appellant herein from advertising and dealing with in any manner in respect of property in question pursuant to the development agreement and restrained the appellant from advertising the said redevelopment project in any manner on their website or anywhere in the newspapers or pamphlets.

4. Learned counsel for the appellant-developer has made submissions on the merits of the controversy between the

parties and submitted that the impugned order has made the arbitral proceedings being conducted before the sole Arbitrator infructuous. It is submitted that the appellant has already examined three witnesses and cross-examination of two witnesses is also over. The third witness of the appellant is presently being cross-examined after which no further evidence is to be led by the appellant.

5. It is further submitted that the respondent is going to examine two witnesses. Therefore, the arbitral proceedings would be over within about a month's time. It is, therefore, submitted that till the arbitral proceedings are concluded, the society should not be permitted to appoint a new developer; otherwise the appellant will suffer irreparable loss. It is also submitted that the appellant has already invested more than Rs.12 crores as per the particulars given in the affidavit-in-reply to Arbitration Petition (L) No.219 of 2015, which includes a sum of Rs.2,43,50,000/- paid to the members of the respondent society and about Rs.3.60 crores paid to the Municipal Corporation of Greater Mumbai.

On the other hand, the learned Senior Advocate appearing for the respondent has opposed the appeal and submitted that there is ample evidence to show that the appellant has not been ready and willing to perform its part of the contract. It is submitted that the flats in occupation of the

members of respondent society, are in dilapidated condition and, therefore, it is necessary to appoint a new developer, who will redevelop the property after his appointment. It is further submitted that if the appointment of a new developer is stayed, during pendency of the arbitral proceedings and even if the award is rendered in favour of the society, there will be further challenge to the award under Sections 34 and 37 of the Act and the society will not be able to redevelop its property for some years, putting the members of the society to grave and irreparable hardship apart from risk to their property and life.

6. In rejoinder, the learned counsel for the appellant disputes the case of the society that the building is in a dilapidated condition. Reliance is sought to be placed on the outside photographs of the building to show that the building is in dilapidated condition. The learned counsel for the respondent society has, however, placed reliance on the photographs of the interior of the flats to show the condition of flats.

7. Having heard the learned counsel for the parties, we are not inclined to express any opinion on the merits of the controversy as the same is already pending before the sole Arbitrator. Having regard to the fact that evidence of the appellant is on the verge of completion as cross-examination of last witness of the appellant remains and the respondent society

is going to examine only two witnesses, it will be reasonable to expect that the arbitral proceedings would be concluded within a short time. We record the statement being made by the learned Senior Advocate for the parties that the parties will co-operate for expeditious conclusion of the arbitral proceedings and in view of this assurance, we direct that recording of evidence be completed by 31 August 2015 and we request the learned sole Arbitrator to render the award as expeditiously as possible, preferably by 15 September 2015 and in any case by 30 September 2015.

8. In view of the above, we are inclined to restrain the respondent society from appointing a new developer but we clarify that it will be open to the society to receive tenders pursuant to the advertisement already issued by the society and to negotiate with the parties who have submitted their bids, but the contract shall not be awarded in favour of a new developer till pronouncement of the award by the learned sole Arbitrator.

9. Having regard to the condition of the property about which there is some dispute on which we do not express any opinion but to allay the apprehension of the prolonged litigation following the award, we make it clear that in case the arbitral award is in favour of the respondent society, the respondent society will be at liberty to award the contract. If the learned sole Arbitrator does not make any award for specific

performance of the contract in favour of the appellant, the respondent society will be at liberty to enter into a new development agreement without waiting for any challenge to the arbitral award under Section 34 of the Act.

10. The appeal is accordingly allowed in the aforesaid terms and Arbitration Petition (L) No.219 of 2015 shall be treated as having been disposed of in terms of this order. Notice of Motion (L) No.1846 of 2015 does not survive and stands disposed of as such.

11. It is clarified that this order substitutes the order of learned Single Judge insofar as prayer clause (a) in Arbitration Petition (L) No.219 of 2015 is concerned. However, the order of the learned Single Judge granting prayer (b) of Arbitration Petition (L) No.219 of 2015 is confirmed.

(CHIEF JUSTICE)

(A.K.MENON, J.)