

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 1457 OF 2015

Dimple Realty LLP

..... Petitioner

VERSUS

**Shree Sapna Co-operative Housing
Society Limited & Ors.**

..... Respondents

Mr.Kayval Shah for the Petitioner.

Mr.Vijay B.Dhingreja, a/w. Ms.Chaitra Rao for Respondent nos. 2 and 5.

Respondent nos. 2 to 5 are present in court.

Ms.Nayna J.Gandhi, Secretary of the Society present.

Mr.Haresh K.Gangar, Treasurer of the Society present.

Mr.Vinod Chhotalal Shah, Committee Member of the Society present.

CORAM : R.D. DHANUKA, J.

DATED : 4th AUGUST, 2015

P.C.

By this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, the petitioner seeks appointment of Court Receiver in respect of the flat bearing nos. 302 and 402 of the building described in prayer (a) of the arbitration petition and seeks other reliefs. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent no.1 society has entered into a development agreement with the petitioner on 28th February, 2014 which agreement is duly registered with the Sub-Registrar. The society is consisting of 13 members. Respondent nos. 2 to 5 claim interest in flat nos. 302 and 402 out of those 13 flats.

3. On 11th June, 2012, the respondent no.1 passed a resolution in the General Body Meeting and approved Memorandum of Understanding with the petitioner. It is the case of the petitioner that said MOU was approved by all the members including respondent nos. 2 to 5 present in the said meeting. In the said meeting, the society resolved to appoint the petitioner as the developers for redevelopment of the society building.

4. On 25th October, 2013, the petitioner on behalf of the respondent no.1 applied to the District Deputy Registrar Co-operative Societies for obtaining deemed conveyance which was granted and was registered in the office of the Sub-Registrar.

5. It is the case of the petitioner that the petitioner approached the society for registration and execution of the development agreement and sent a letter to all the members of the society seeking approval of the final carpet area and the floor plan. The said draft was enclosed with the statement of carpet area, floor plans. Except respondent nos. 2 to 5, all other members of the respondent no.1 society approved the said draft showing the statement of carpet area and floor plan.

6. The respondent no.2 thereafter through his advocate held various meetings with the managing committee members of the respondent no.1 society and also with the petitioner to sort out his grievances.

7. On 1st April, 2014, the respondent no.1 society sent a letter to all the members in order to take individual consent of flat members for receiving the letter of possession and intent letter for taking the flat and for the notice of handing over the premises for demolition. Respondent nos. 2 to 5 refused to sign the said

letter. All the other members signed and executed the said letter.

8. On 5th May, 2014 the petitioner through its advocate's letter to the respondent no.1 society requested to handover the premises for demolition and informed that the building was in a dilapidated condition. The petitioner made it clear that for any loss caused to the petitioner and also with the building and/or any person, the respondents would be held responsible for the same. The petitioner thereafter requested the committee members of the society to request the respondent nos. 2 to 5 to vacate their respective premises. Respondent nos. 2 to 5 refused to co-operate and to handover the premises in their possession.

9. The petitioner has already obtained IOD dated 7th November, 2014 from the Municipal Corporation. On 28th July, 2014, the petitioner and the society executed a deed of rectification which was duly registered.

10. The petitioner informed the society that the IOD was already obtained by the petitioner and informed that the petitioner intend to register a separate tripartite agreement for permanent alternative accommodation on or before 31st December, 2014. The respondent no.1 society through their advocates informed the petitioner that the majority of the members were willing to co-operate with the redevelopment project with the society except the members in respect of flat nos. 302 and 402.

11. On 21st December, 2014, the owners of flat nos. 1 to 5, 101, 102, 301 and 401 addressed to the respondent no.1 society and agreed to handover the vacant and peaceful possession of their premises to the developers.

12. On 29th June, 2015 the petitioner received a notice from the Municipal Corporation informing the petitioner that the petitioner would be responsible for all the loss if caused to the building and any persons, in the event the building collapses.

13. Learned counsel appearing for the petitioner invited my attention to various documents annexed to the petition and submits that out of 13 members, 11 members have already agreed to vacate their respective premises. He submits that IOD has been already granted by the Municipal Corporation. He submits that the petitioner has already spent substantial amount in furtherance of the development agreement entered into with the petitioner and respondent no.1 society. He submits that respondent nos. 2 to 5 are the only members who are not co-operating with the society as well as with the petitioner for carrying out redevelopment of the building. He submits that the building is in very dilapidated condition and may collapse. My attention is also invited to the notice issued by the fire brigade.

14. Learned counsel appearing for the petitioner invited my attention to the notice issued by the Deputy Registrar dated 16th July, 2015 to the respondent no.1 society and also to the petitioner asking the petitioner as well as the society to make the building vacated from the members and to proceed with the redevelopment of the project.

15. Pursuant to the liberty granted by this court, the respondent nos. 2 to 5 have filed their affidavit in reply on 1st August, 2015 bringing to the notice of this court grievances against the petitioner and also the respondent no.1 society and seeks consideration thereof before passing any interim measures in favour of the petitioner.

16. Learned counsel appearing for respondent nos. 2 to 5 invited my attention to the some of such allegations made in the affidavit in reply. It is submitted by the learned counsel for the respondent nos. 2 to 5 that the petitioner has not complied with the guidelines under section 79(A) of the Maharashtra Co-operative Societies Act, 1960 and there is no transparency in the redevelopment of the building of the society.

17. The next allegation of the respondent nos. 2 to 5 is that though the petitioner has agreed to give the bank guarantee for an amount equivalent to 20% of the total project cost, the petitioner has furnished the bank guarantee only of Rs.30 lacs which amounts to less than 20% of cost of construction of flats to be allotted to the members of the society and it would amount only to 14% of the project cost.

18. It is submitted that the petitioner has not allotted the flats on the higher floors to the respondent nos. 2 to 5. It is submitted that the petitioner has not acquired any TDR which is required to be loaded on the property of the society at its own costs and expenses. Learned counsel appearing for respondent nos. 2 to 5 submits that even if the undertaking rendered by the petitioner in the affidavit in rejoinder is accepted that the TDR would be loaded after members of the respondent no.1 society vacates their respective flats, the petitioner should be directed to load such TDR in the name of the respondent no.1 society within three months from the date the members of the respondent no.1 society vacates their respective premises.

19. The next allegation of the respondent nos. 2 to 5 is that the respondent nos. 2 to 5 are being deprived of the fungible area free of cost.

20. The next submission of the learned counsel for the respondent nos. 2 to 5 is

that if the petitioner does not complete the construction of the entire building and possession of the flats is not handed over to the members of the society beyond the period of 24 months, adequate safeguard should be provided in the development agreement entered into between the petitioner and respondent no.1 society for payment of penalty and/or for payment of increase amount of rent.

21. The next grievance made in the affidavit in reply is that the complaint report relied upon by the petitioner to demonstrate before this court that the condition of the building is dilapidated is issued by the Fire Brigade Office and not by the concerned department of the Municipal Corporation.

22. The next grievance of the learned counsel for the respondent nos. 2 to 5 is that on perusal of a copy of Proforma B of the sanction plan shown to the respondent nos. 2 to 5, it would be clear that the petitioner would actually provide lesser area than what was agreed under the development agreement entered into between the petitioner and respondent no.1 society.

23. The next grievance of the learned counsel appearing for respondent nos. 2 to 5 is that though under clause 9(d) of the development agreement, the petitioner had agreed to provide the extra area over and above the existing area at the cost of Rs.17,500/- per sq.ft. carpet area and respondent nos. 2 to 5 are agreeable to opt for extra area, the petitioner has not provided the same to the respondent nos. 2 to 5.

24. Learned counsel appearing for the petitioner in rejoinder submits that the petitioner has already complied with the directives issued by the Government under section 79A of the Maharashtra Co-operative Societies Act, 1960 and invites

my attention to the recent letter addressed by the Deputy Registrar of Societies calling upon the society as well as the developer to get the building vacated from the members and to proceed with redevelopment without any further delay. I am prima satisfied with this explanation rendered by the learned counsel for the petitioner.

25. Insofar as grievance about the bank guarantee is concerned, learned counsel for the petitioner submits that though under the directives issued by the Government, the petitioner is liable to submit the bank guarantee of the amount equal to 20% of the total project cost, the petitioner has given bank guarantee which would be equivalent to 30% of the total project costs. In support of this submission the learned counsel invited my attention to annexure to the development agreement and submits that the project cost provided under the said agreement is Rs. 99,24,000/- and the bank guarantee furnished by the petitioner for Rs.30 lacs would be equivalent to 30% of the total costs. I am therefore of the prima facie view that the petitioner has complied with this obligation under the development agreement.

26. Insofar as the grievance of the respondent nos. 2 to 5 that they ought to have been given flats on the higher floor in the proposed building is concerned, learned counsel for the petitioner states that the petitioner has already communicated to the members of the society about the flats being allotted in the proposed building. He submits that the owner of flat no.302 would be allotted flat no.2 on the 3rd floor and the owner of flat no.402 would be allotted flat no.2 on the 4th floor. He submits that the allotment of flats is as per the present conditions floor wise and as per guidelines/directives. In my prima facie view there is substance in the submission made by the learned counsel for the petitioner on this issue.

27. Insofar as grievance in respect of the alleged non-compliance of the circular issued by the Government of 15th April, 2013 is concerned, it is submitted by the learned counsel for the petitioner that since the proposal for present development has been filed on 15th February, 2013, said circular issued by the government on 15th April, 2013 would not apply. Be that as it may, the petitioner has rendered an undertaking in paragraph (12) of the rejoinder to abide by the said circular and to apply to the Deputy/Assistant Registrar, Co-operative Society for necessary approvals and permissions. Undertaking rendered in paragraph (12) of the affidavit in rejoinder is accepted and the petitioner is directed to comply with the same.

28. Insofar as grievance in respect of the TDR made by respondent nos. 2 to 5 is concerned, the learned counsel appearing for the petitioner submits that full TDR would be loaded in the name of the society within six months from the date of members of respondent no.1 including respondent nos. 2 to 5 vacating the premises. The statement of the learned counsel for the petitioner is accepted.

29. Insofar as grievance in respect of the fungible FSI made by respondent nos. 2 to 5 is concerned, the learned counsel for the petitioner states that the petitioner has already rendered an undertaking in paragraph (14) not to utilize the available fungible FSI of one rehab member for any other rehab member. It is submitted that the fungible FSI of one member, which is available without payment of premium, cannot be utilized for any another member. Undertaking rendered in paragraph (14) of the rejoinder is accepted.

30. Insofar as grievance of the learned counsel for the respondent nos. 2 to 5 that the respondent nos. 2 to 5 may get lesser area than what is stated in the development agreement is stated, in paragraph (15) of the rejoinder, the petitioner

has clarified this issue that as per development agreement, respondent nos. 2 to 5 would be provided area of 394 sq.ft which would be inclusive of door jambs and column off set area. Statement is accepted.

31. Be that as it may, if the petitioner does not provide in terms of the development agreement, the area agreed to be given to respondent nos. 2 to 5 or any other member of the society, the said grievance can be raised before the arbitral tribunal by the members.

32. Insofar as suggestion of the respondent nos. 2 to 5 that the penal provisions should be provided in the development agreement against the petitioner in case of the petitioner not completing the construction within 24 months is concerned, this court cannot re-write the contract between the parties and thus there is no substance in this submission of the respondent nos. 2 to 5.

33. A perusal of paragraph (16) of the affidavit in rejoinder clearly indicates that the petitioner has given an assurance that the construction would be completed within the time agreed under the development agreement and in the event of any delay, the petitioner would provide increment at the rate of 10% of the rent. Statement made in paragraph (16) of the rejoinder is accepted. In any event, if the petitioner does not complete the construction or commits any breach of the development agreement, the respondent can always redress their grievance by adopting appropriate proceedings as agreed under the development agreement.

34. It is submitted by the learned counsel for the petitioner that till the members of the respondent no.1 society signs agreement for permanent alternate accommodation and other writings as may be required, the petitioner would not be

able to get any commencement certificate and submits that for the purpose of completion of the construction under the development agreement, the members of the respondent society are also required to provide co-operation, otherwise there would be unnecessary delay in completing project which would not be in the interest of members as well as the petitioner.

35. Insofar as grievance of the learned counsel for the respondent nos. 2 to 5 that the documents relied upon by the petitioner to show that the condition of the building is dilapidated is signed by the Fire Brigade Officer and not the Municipal Corporation is concerned, in my view there is no merit in this submission of the learned counsel. The Fire Brigade Department is also part of the Municipal Corporation and has rightly brought to the notice of the petitioner as well as the society the prevailing condition of the building. The petitioner has also annexed the photographs of the building showing the dilapidated condition of the building.

36. Insofar as last grievance of the learned counsel for the respondent nos. 2 to 5 that though respondent nos. 2 to 5 are agreeable to take additional area on payment of consideration amount mentioned in the development agreement and in response thereof the petitioner has not offered the additional area is concerned, the learned counsel for the petitioner submits that the said option was available to the members of the society before the petitioner applied for sanction of the plan and at this stage no such proposal can be accepted.

37. Learned counsel appearing for the petitioner also invited my attention to page 214 of the arbitration petition in which the respondent nos. 3 and 4 have confirmed the area allotted and not to opt for any additional area. In my view the learned counsel appearing for the petitioner is right in his submission that after

sanction of the plan, the respondent nos. 2 to 5 could not have exercised such option.

38. In my prima facie view, the petitioner has complied with their part of the obligation and has spent substantial amount on the project.

39. I have also heard the managing committee members of the respondent no.1 society who are present in court who states that their members would vacate within 30 days from today and shall handover vacant possession of the flats to the petitioner for demolition and redevelopment provided the petitioner developer hands over payment of rent before the members handing over their respective premises. Statement is accepted as undertaking to the Court.

40. Learned counsel appearing for the petitioner on instruction states that all such rents which are payable to the members of the respondent no.1 society including respondent nos. 2 to 5 under the development agreement would be paid within a period of one week from today. He states on further instruction from his clients that even the brokerage amount and 50% of the corpus fund would be also paid to the respective members of the respondent no.1 society. Statement is accepted.

41. In my view since the other members of the society have agreed to co-operate with the petitioner in redevelopment of the project and in view of the fact that the condition of the building is dilapidated as it apparent from the notices issued by the authority and from the photographs annexed to the petition, respondent nos. 2 to 5 who are in minuscule minority cannot stall the project of the petitioner society. Whatever grievances are made by the respondent nos. 2 to 5 in their affidavit in

reply are prima facie met with by the petitioner in their rejoinder. If any further grievance remains to be met with according to the respondent nos. 2 to 5, the same can be agitated before the learned arbitrator.

42. At this stage, learned counsel appearing for respondent nos. 2 to 5 on instruction undertakes that his client would vacate and handover vacant and peaceful possession of the premises in their occupation to the petitioner within four weeks from today. Respondent nos. 2 to 5 who are present in court and are identified by their learned counsel confirms the undertaking rendered to the court. Undertaking is accepted.

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

(a) The members of the respondent no.1 society including respondent nos. 2 to 5 shall handover the peaceful and vacant possession of the flats within four weeks from today, failing which the Court Receiver, High Court stands appointed and shall take forcible possession from all the members and occupants found in possession of respective flats and if necessary, with assistance of police and shall handover the same to the petitioner for demolition and re-development.

(b) The petitioner as well as respondent nos. 2 to 5 as well as the society shall comply with the statement made before this court recorded as undertaking to the Court as aforesaid.

(c) By consent of parties, Mr.Naushad Engineer, advocate is appointed as the sole arbitrator to adjudicate upon the disputes between the parties arising under the development agreement.

(d) Learned arbitrator is requested to dispose of the arbitral proceedings within three months from the date of the first meeting.

(e) All the parties shall co-operate with each other and with the learned arbitrator in expeditious disposal of the arbitral proceedings and shall bear the costs, charges and expenses of the learned arbitrator equally at the first instance.

(f) Till the members of the society hands over their respective flats to the petitioner and if they continue to occupy their respective tenaments, it would be at their own risk and costs and the petitioner as well as the managing committee members of the society would not be responsible in case of any untoward incident.

(g) The members of the society are also restrained from creating any third party rights in respect of their respective flats to in favour of anybody else till they hand over the possession of their respective flats to the petitioner.

(h) Learned counsel appearing for the respondent nos. 2 to 5 on instruction states that respondent nos. 2 to 5 would enter into agreement for permanent alternate accommodation with the petitioner on receipt of the amount as directed aforesaid and would remain present in the office of the Sub-Registrar for the purpose of registration of the agreement when called upon by the petitioner. Statement is accepted. Managing committee members of the society also have made similar statement that such agreement for permanent alternate accommodation would

be signed with the petitioner upon receipt of the payment as directed aforesaid and such members will remain present in the office of the Sub-Registrar for registering their respective documents. Statement is accepted.

(i) Learned counsel appearing for respondent nos. 2 to 5 on instruction states that the entire payment as directed aforesaid shall be paid to respondent no.2 insofar as flat no.302 is concerned and agreement for permanent alternate accommodation shall be executed between the petitioner and respondent nos.2 to 5 in respect of the said flat. Learned counsel for the petitioner has no objection to execute such agreement in favour of respondent nos.2 to 5 jointly in respect of the said flat and to pay the amount as directed aforesaid to respondent no.2.

(j) Insofar as flat no.402 is concerned, learned counsel for the respondent nos. 2 to 5 on instruction states that the permanent alternate accommodation shall be executed between the petitioner and respondent nos. 2 to 5 jointly in respect of the said flat and the payments as directed aforesaid shall be paid to respondent nos. 2 to 5 in 1/4th share each. Learned counsel appearing for the petitioner has no objection to this suggestion of the respondent nos. 2 to 5 and agrees to execute the agreement with them jointly and to pay the amount as aforesaid in the ratio of 1/4th each.

(k) Arbitration petition is disposed of in the aforesaid terms. No order as to costs.

(l) Parties as well as Court Receiver to act on the authenticated copy of this order.

[R.D. DHANUKA, J.]