

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1357 OF 2015

Simal Mahesh Gaglani

..... Petitioner

VERSUS

**Shri Saibaba Co-operative Housing Society
Limited & Ors.**

..... Respondents

Mr.Vishal Kanade a/w. Mr.M.P.Vora, i/b. M/s.Pramodkumar & Co., for the
Petitioner.

Mr.Dharmesh S.Jain for Respondent No.1.

Mr.Prashant Chauhan for Respondent No.2.

Mr.Bhupendra Singh a/w. Mr.M.B.Jadhav, Mr.Vinayak S.Ghadge for Respondent
Nos. 4 and 5.

CORAM : R.D. DHANUKA, J.

DATED : 21st SEPTEMBER, 2015

P.C.

By consent of parties, this petition is disposed of finally at the ad-interim stage. By this petition filed under section 9 of the Arbitration and Conciliation Act 1996, the petitioner seeks appointment of the Court Receiver in respect of the property described in Ex.A to the petition with all powers including power to take physical possession of the subject premises of respondent nos. 2 to 6, their family members and/or any person found in possession thereof and if necessary with assistance of police.

2. The respondent no.1 society had acquired and purchased the property on 28th

March, 1996 and constructed a building thereon. On 7th August, 2011, all the members present in the Special General Body Meeting of the respondent no.1 including respondent nos. 2 to 5 unanimously approved the offer given by the petitioner in its letter dated 7th July, 2011 and resolved to appoint the petitioner for carrying out the redevelopment of the property of the society. On 15th January, 2012, the petitioner, respondent no.1 and 21 members of the respondent no.1 society executed a Memorandum of Understanding. On 7th October, 2012, the authorized officer of the Deputy Registrar, Co-operative Societies conducted a meeting of the respondent no.1 and submitted its report on 8th October, 2012. The Deputy Registrar confirmed the selection of the petitioner for the redevelopment of the respondent no.1 society. On 26th April, 2013, the respondent no.1 entered into a development agreement with the petitioner which is duly registered. It is the case of the petitioner that the petitioner has already paid part of the corpus fund as per the said development agreement aggregating to Rs.25,00,000/- on or before execution of the said agreement.

3. On 30th May, 2013, the respondent no.1 in its meeting with the consultation of the members and petitioner allotted flats to its members and passed a resolution accordingly. Respondent nos. 2 to 6 however did not attend the said meeting. On 23rd December, 2014, the Municipal Corporation issued IOD in favour of the petitioner for redevelopment of the said property. The petitioner showed copy of the original IOD in the plan to the members of the respondent no.1 society in the meeting held on 15th March, 2015 and called upon them to vacate and finalize the individual agreement. On 26th May, 2015, the petitioner informed the respondent no.1 about the procurement of the bank guarantee of Rs.1 crore.

4. On 8th July, 2015, the petitioner addressed a letter and showed its readiness to make all the payments envisaged in the agreement and further requested the respondent no.1 for vacating the entire building against the payment of all the amounts payable by the petitioner at the earliest to execute permanent alternate accommodation agreement with the members.

5. On 9th July, 2015, 20 members of the respondent no.1 society addressed a letter to the petitioner. The petitioner had complied with all the due formalities as contemplated in the agreement and confirmed that they were ready to vacate their respective premises and handover possession against payment by the petitioner of the amounts as stipulated in the agreement. The respondent nos. 2 to 6 however refused to sign the letter dated 9th July, 2015 and vacate their respective premises. On 31st July, 2015, the petitioner invoked the arbitration agreement. Since the respondent nos. 2 to 6 did not agree to vacate the premises, the petitioner has filed this petition under section 9 of the Arbitration and Conciliation Act, 1996.

6. Mr.Kanade, learned counsel appearing for the petitioner invited my attention to various agreements entered into between the parties and also the correspondence. He submits that out of 24 members, 20 members have agreed to vacate their respective flats on payment of the requisite amount. He submits that the Municipal Corporation has already issued IOD. The petitioner has already furnished bank guarantee of Rs. 1 crore though the same was not required to be furnished immediately. Learned counsel on instruction states that all the payments which are required to be made to the members of the respondent society would be made before the members vacate and handover the peaceful and vacant possession of their respective flats to the petitioner. He submits that the petitioner would also execute the requisite permanent alternate accommodation agreement with each of

the members of the respondent no.1 society.

7. Learned counsel also invited my attention to various objections raised by the members of the respondent no.1 society in their respective affidavits and submits that none of the members have disputed the redevelopment as such. He submits that the dispute raised by the respondents is with the society and not with the petitioner. He submits that petitioner has already spent substantial amount on the project.

8. Learned counsel appearing for the respondent no.2 submits that thought the existing flat occupied by the respondent no.2 was on the second floor of the existing building, the petitioner has offered him flat on the first floor. He submits that another occupant of the building who was occupying flat on the first floor has been offered accommodation on the fifth floor. He submits that the respondent no.2 has already made a complaint about the illegal acts of the society to the authorities.

9. Insofar as respondent no.3 is concerned, learned counsel appearing for the petitioner states that respondent no.3 has been served. None appeared for the respondent no.3. The petitioner undertakes to file affidavit of service within one week from today.

10. Learned counsel appearing for the respondent nos. 4 and 5 submits that the building of the respondent no.1 society is not in dilapidated condition. No notice has been issued by the Municipal Corporation or any other authority declaring the building as a dilapidated condition. He submits that the petitioner has offered rent in respect of the flat occupied by the respondent nos. 4 and 5 which is admeasuring

180 sq.ft. but the respondent nos. 4 and 5 are unable to locate any flat in the nearby locality on payment of such rent offered to the respondent nos. 4 and 5 by the petitioner. He submits that though the respondent nos. 4 and 5 were occupying flats on third floor, they have been offered flats on the first floor. He submits that the minutes of the meeting of the society are not furnished by the society to his clients.

11. The next grievance of the learned counsel is that the other members of the society has not vacated and thus the respondent nos. 4 and 5 cannot be asked to vacate by the petitioner at this stage. He submits that though the development agreement was executed in the year 2013 and the IOD was issued by the authority on 23rd December, 2014, the petitioner has not taken any steps to commence redevelopment. He submits that there is collusion between the petitioner and the respondent no.1 society. There are various blanks in the development agreement. He submits that the corpus fund has not been received by his clients.

12. The next grievance of the learned counsel is that the petitioner was required to submit the bank guarantee before the flats are vacated by the members, the petitioner has furnished the bank guarantee in advance for the reasons known to the petitioner.

13. Mr.Kanade, learned counsel appearing for the petitioner in rejoinder invited my attention to the letter addressed by the respondent no.2 to the society giving his no objection for the allotment of the flat on any floor having the same location. He submits that the respondent no.2 thus cannot make a grievance at this stage that he ought to have been given flat on the higher floor and not on the first floor. He submits that notice under section 164 of the Maharashtra Co-operative Societies

Act is not mandatory since the resolution passed by the society for redevelopment does not touch the business of the society. He submits that all the members of the society would be paid the requisite amount payable under the development agreement before the members vacate their premises. He submits that all the members may be directed to vacate at the same time.

14. Insofar as the grievance of the learned counsel for the respondent nos. 4 and 5 that the rent offered to him is not sufficient to get another alternate accommodation in the nearby vicinity is concerned, he submits that all the members have agreed to accept the rent as agreed under the development agreement. The respondent nos. 4 and 5 have to make arrangement for alternate accommodation on payment of the agreed rent under the development agreement.

15. A perusal of the record indicates that the society had passed a resolution in the Special General Body Meeting held on 7th August, 2011 in which all the members including respondent nos. 2 to 5 were present and had unanimously agreed to accept the offer given by the petitioner vide his letter dated 7th August, 2011. The petitioner had thereafter executed the MOU with the 21 members and the society on the terms and conditions recorded therein. On 26th April, 2013 the development agreement came to be executed. The petitioner has already made payment of Rs.25 lacs as and by way of corpus fund. The Municipal Corporation has already issued IOD in favour of the petitioner on 23rd December, 2014.

16. A perusal of the record indicates that the other members of the respondent no.1 society had agreed to vacate their respective premises upon the petitioner making payment of various amounts provided in the development agreement. The petitioner has already furnished bank guarantee of Rs.1 crore in advance.

17. Insofar as grievance of the respondent no.2 that he was offered flat on the first floor and not on the higher floor is concerned, a perusal of the letters addressed by the respondent no.2 clearly indicates that the respondent no.2 had though initially agreed for allotment of any flat on any floor of the building provided the same was on the identical location, the respondent no.2 addressed another letter that the allotment may be made according to the agreement. It is however not in dispute that the respondent no.2 did not challenge the resolution passed by the society in any court of law and the same are thus binding on all the members of the society.

18. Insofar as grievance of respondent no.2 that another occupant who was occupying the flat on the first floor has been offered accommodation on the fifth floor is concerned, in my view the same cannot be the ground for not vacating the flat in his occupation.

19. Insofar as respondent nos. 4 and 5 are concerned, their grievance that the building is not in a dilapidated condition or no notice has been issued by any authority to that effect is concerned, the society has already passed a resolution resolving that the building was in a dilapidated condition and requires redevelopment of the building. A perusal of the photographs annexed to the petition also clearly indicates that the building of the respondent no.1 society is in dilapidated condition.

20. Insofar as grievance of respondent nos. 4 and 5 that they are unable to locate any flat in the nearby vicinity on payment of rent by the petitioner is concerned, in my view Mr.Kanade learned counsel appearing for the petitioner is right in his submission that since the rent was offered according to the development agreement

entered into between the parties, respondent nos. 4 and 5 have to make alternate arrangement for finding a suitable accommodation. Be that as it may, the same cannot be a ground for not vacating the flat.

21. Insofar as submission of the learned counsel for the respondent nos. 4 and 5 that respondent nos. 4 and 5 were not issued any notice of the meeting or the copy of the minutes of the meeting were not furnished is concerned, respondent nos. 4 and 5 always make such grievance with the respondent no.1 society. It is not the case of the respondent nos. 4 and 5 that they were not aware of the development agreement entered into between the parties.

22. Insofar as submission of the learned counsel for the respondent nos. 4 and 5 that there are various blanks in the development agreement or that there is delay on the part of the petitioner in commencing the redevelopment of the project is concerned, the society has not raised any dispute about any alleged blanks in redevelopment agreement nor any other 20 members of the society have raised any grievance. If the members of the society do not vacate their flats, the petitioner obviously can not be in a condition to start any redevelopment process. A perusal of the record however clearly indicates that the petitioner has already taken several steps in furtherance of the development agreement entered into between the parties and have incurred various expenditure. In my view notice under section 164 of the Maharashtra Co-operative Societies Act is not required to be issued since the redevelopment of the building of the respondent no.1 does not touch the business of the society.

23. Insofar as grievance of the respondents that other members of the society have not vacated their respective flats and thus respondent nos. 2 to 5 shall not be

called upon to vacate their flats is concerned, in my view this grievance can be met with if all the members of the society are directed to vacate within six weeks from today. Learned counsel for the respondent nos. 4 and 5 has requested for 8 weeks time to vacate.

24. Mr. Vishal Kanade, learned counsel for the petitioner on instructions states that the payment obligation of the petitioner recorded in clause 8 of the development agreement would be paid within five weeks from today and the draft of the permanent alternate accommodation agreement would be furnished to all the members simultaneously. In my view respondent nos. 2 to 6 who are in minority cannot install the project.

25. At the request of the learned counsel for the respondent no.2, all the members of the respondent no.1 society are granted liberty to vacate within six weeks time from today. All the members of the respondent no.1 society are directed to execute the permanent alternate accommodation agreement with the petitioner before they hand over peaceful, vacant and exclusive possession of the premises in their occupation to the petitioner within the time prescribed aforesaid.

26. In my prima facie view thus there is no substance in any of the submissions made by the respondent nos. 2, 4 and 5.

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

- (a) The petitioner shall pay the amount as contemplated under clause 8 of the development agreement to the members of respondent no.1 society including respondent nos. 2 to 5 within four weeks from today and shall furnish a draft of the

permanent alternate accommodation agreement to each of the members for execution. The members of the respondent no.1 society are directed to execute such permanent alternate accommodation agreement with the petitioner before handing over their respective possession as directed aforesaid.

(b) If any members have any grievance about execution of such agreement, they may execute such agreement without prejudice to their rights and contentions which would be subject of the outcome of the arbitral proceedings.

(c) If the members of the respondent no.1 society do not handover the peaceful, vacant and exclusive possession of their respective flats to the petitioner within eight weeks from today, the Court Receiver, High Court, Bombay shall stand appointed and shall take forcible possession of the flats from each of the members of the society and/or other occupants found in possession of the premises and shall handover the same to the petitioner for redevelopment.

(d) By consent of parties, Mr.A.K.Saxena, Advocate, having his address at Room No.56, High Court Library, High Court, Bombay is appointed as a sole arbitrator.

(e) Parties at the first instance agree that 50% of the fees and expenses of the learned arbitrator shall be borne by the petitioner and remaining 50% shall be borne by all the

respondents in their respective proportion.

(f) Till the respondents vacate their respective flats, ad-interim order passed by this court on 3rd September, 2015 to continue.

28. Arbitration petition is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]

CERTIFICATE

Certified to be true and correct copy of the original signed order.