IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1337 OF 2015

Mrs. Saranga Anil Agarwal
Sole Proprietress of
M/s. Rockline Construction Company
having her place of Business at RNA Corporate Park
Near Enterprise Office, Kalanagar,
Bandra (East), Mumbai 400 051. ... Petitioner

versus

Navmujal Nagar Co-operative Housing Society
Ltd., a Society Registered under the Maharashtra
Co-0perative Societies Act, 1960 having its
Office at Munjal Nagar No.2, Chembur (West)
Mumbai 400 089. ... Respondent

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Mr. S. U. Kamdar, Senior Advocate with Advocates Parimal K. Shroff, D. V. Deokar, Sachin Pandy, Jehaan Mehta i/by Parimal K. Shroff and Co., for the petitioner.
Mr. Tushar Bhavsar a/w Ankit Rajput, R. Bhatt i/by Manoj Bhatt for the respondent.

Coram :- Smt. R.P. SondurBaldota, J.

6th January, 2016.

P.C. :-

1 This petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 for interim reliefs, pending the reference of the dispute between the parties to arbitration.

2 The petitioner is the widow of one, Anilkumar Agarwal who was carrying on business in the name and style of "M/s. Rockline Construction Company" (hereinafter referred to as "the Company") as its sole proprietor. The petitioner claims that, upon his death on 1st May, 2014, she became entitled to the business. The respondent is a Co-operative Housing Society registered under the Maharashtra Co-operative Societies Act. It had entered into Development Agreement dated 24th July, 2006 with the Company. Later, there was supplementary agreement dated 12th July, 2012 executed between the parties. The property of the Society consists of 2 buildings i.e. building-B and Building-C. Building-B comprises of Wing-A and Wing-B with ground plus 6 upper floors. Building-C comprised of stilts and 3 upper floors. The development proposed under the Development Agreement, was of only horizontal extension to Building-B and reconstruction of Building-C after it's demolition. For reconstruction, the Developer was entitled to utilise not just the balance FSI of 19,194 sq.ft available on the property of the Society but also TDR FSI not exceeding 60,000 sq.ft (built-up). The six occupants of the C-Building were to be provided with flats in the new construction, each flat admeasuring 430 sq.ft plus additional area of 175 sq.ft. Alongwith the extension to Building-B, the Company was to repair and renovate the existing structure of the building and also beautify the property of the Society. As regards the consideration, the Company was

to pay an amount of Rs.1,56,5,100/- as corpus fund and was to construct and sell on ownership basis, flats in the new building. Clause-69 of the Development Agreement, provided for resolution of the disputes, if any, between the parties by arbitration.

3 Pursuant to the Development Agreement the respondent had executed power of attorney dated 25th July, 2015 in favour of late Anilkumar and his nominees Anubhav Agarwal and the petitioner. The Company started the process of submitting proposal to Mumbai Municipal Corporation and other authorities. It paid the arrears of property taxes and water charges on behalf of the respondent and received the first IOD and Commencement Certificate dated 30th March, 2007 for building 'C'. Then on 7th November, 2007 the company obtained IOD for building 'B' in respect of wing 'B'. The proposal for extension 'A' wing was delayed as it was subject to actual loading of 630 sq. mtrs. of TDR FSI. In the year 2010 IOD for wing 'B' was amended and on 1st January, 2010 IOD for wing 'A' was received. The Commencement Certificate for wing 'A' was received on 18th January, 2011.

4 The petitioner claims that the company has constructed the outwardly plinth surrounding the building 'B' for erection of the extension for each floor. The construction of the plinth was completed in May, 2012. The Company had negotiations with the six occupants of the

"C" wing and entered into agreements for temporary rental accommodation to be provided to them. Thereafter the six occupants handed over the respective tenements to the Company and shifted to the alternate accommodation. Then the Company started the work of demolition of "C" wing by removing the doors and windows of the respective flats. The Company purchased 600 sq. mtrs. TDR FSI from the open market at a cost of Rs.2,58, 33,600/- and loaded the same for extension of Wing "A"/ Wing "B" under the revised I.O.D. for Wing "A" and Wing "B".

5 The petitioner alleges that there were internal disputes between the members of the respondent and some of the members were objecting to the development of the building of the respondent. The work of development was even disrupted by the dissenting members. There were special general body meetings held from time to time to overcome the difficulties. The new Managing Committee of the respondent on 5th October, 2012 raised new disputes with the Company by it's letter dtd. 24th December, 2012. Later by it's advocate's letter dtd. 21st July, 2014, it terminated the development agreement for alleged breaches on the part of the company of the development agreement and the supplementary agreement and the power of attorney. The respondent also claimed liquidated damages of Rs.25,00,00,000/- for non-completion of the redevelopment and damages of Rs.3,00,00,000/-

for harassment, trouble and mental torture caused to the members.

6 The respondent alleged in the notice that for eight years since the execution of agreements, the Company had not done anything in furtherance of redevelopment. For three years prior to the notice, the work was completely stalled and the property was left in a pathetic, scoured and damaged condition. As per Clause 28 of the agreement, the work of redevelopment was to be executed within 36 months from the loading of TDR. The notice specified further breaches of the agreement by the Company viz.- failure to secure mutation of the property in the revenue records of the Collector, failure to replace existing old lifts with new and and provide two additional emergency lifts, failure in demarcation of the property and it's subdivision, failure to contest the income-tax proceedings, failure in application of new Development Control Regulations, failure to adhere to the Schedule of Payment under Clauses 17 and 18 of the agreement, failure to renew Bank Guarantee amongst others. According to the respondent, the Company had in fact abandoned the site since November, 2011. The respondent referred to Clause 11 of the Development Agreement, under which failure to provide horizontal extensions to the existing members as provided in the agreement, within the prescribed time was to render the agreement null and void.

7 The Company denied the allegations by it’s reply dtd. 3rd September, 2014 and invoked arbitration under Clause 69 of the Development Agreement. In it's reply, the Company did not specifically deal with the allegations of the respondent. It however, claimed that it had fulfilled it's obligations under the agreements and in the process incurred substantial expenses, including the payments made under the agreement towards the fees of Architect engaged, payment to Mumbai Municipal Corporation and other authorities for obtaining I.O.D., commencement certificate etc., expenses incurred in connection with construction of plinth around the building-B and payment made to the six members of building “C” towards the rent for shifting them to temporary accommodation. The Company alleged that the work of redevelopment had been obstructed, time and again by the members of the respondent and also members of the Managing Committee.

8 Later the petitioner gave fresh notice of arbitration dtd. 13th June, 2015 informing the respondent of nomination of Mr. Justice F.I. Rebello (Retired) as Arbitrator on it's behalf and calling upon the respondent to nominate Arbitrator on it's behalf, in accordance with the arbitration clause. Within a week thereafter i.e. on 18th June, 2015, the present petition was filed. The respondent, by it's reply dtd. 25th June, 2015 disputed receipt of the letter dtd. 3rd September, 2014. By the same letter, it also claimed that the business of M/s Rockline Construction

Company came to an end on the death of Mr. Anil Agarwal and disputed the authority of the petitioner herein to act on behalf of the firm. The petitioner is yet to take steps under Section 11 of the Arbitration Act.

9 The petitioner seeks two interim reliefs in the present petition. The first interim relief is of a preventive injunction and the second is of appointment of Court Receiver, High Court, Bombay as Receiver of the property of the society. The injunction sought is in the following terms :

> "That pending the arbitral proceedings between the Petitioner and the Respondent and passing of the award, the Respondent, it's office bearers, servants and agents be restrained by an Order and injunction of this Hon'ble Court from in any manner dealing with, or disposing of, alienating or encumbering including entering into any agreement or arrangement for development of the said property more particularly described in Exhibit "A" hereto or any part thereof or parting with the possession or occupation of the said property or any part thereof or inducting any person or party in the possession or occupation of the said property or any part thereof more particularly descried in Exhibit "A" hereto in any manner whatsoever"

10 Mr. Kamdar, the learned Senior Counsel appearing for the petitioner submits that the Company has incurred extensive expenses in the redevelopment work. He also submits that under the Development Agreement and the Supplementary Development Agreement, an interest has been created in favour of the Company in the property of the

respondent. The Company was entitled to 33% of the F.S.I. to be taken as general T.D.R. at the time of applying for I.O.D. for the new building and 35% of the profit of the redevelopment. Since an interest has been created in favour of the company, in the immovable property of the respondent, the company would be entitled to it's specific performance. According to him, the respondent made false, frivolous and vexatious allegations to terminate the Development Agreement. He submits that the very fact that the Company had incurred extensive expenses in the process of redevelopment would indicate that the Company was always ready and wiling to perform it's part of contract and as such is entitled to it's specific performance. He further submits that the petitioner has learnt that the respondent is attempting to invite tenders and allot the work of development of the said property to a third party. If this is permitted, heavy loss would be caused to the petitioner.

11 The present petition is for interim relief, pending the parties proceeding for adjudication by arbitration of the dispute between them. Therefore, it's consideration would be governed by the same principles as for grant/refusal of interim reliefs in any civil proceedings. They are (i) making out a prima facie case, as regards it's contention, (ii) establishment of irreparable loss by refusal of interim relief and (iii) balance of convenience lying in it's favour.

12 Even if the case of the petitioner is accepted as correct on a prima facie view of the matter as regards the expenses incurred by the company and the alleged interest created in the property to be redeveloped, the question is whether the other two requirements stand satisfied. Undisputedly redevelopment of the property includes strengthening one of the buildings and horizontal extension to it. Grant of interim relief to the petitioner would mean that the members of the respondent will be compelled to live in the building that needs strengthening. This will most likely cause inconvenience, undue hardship and also irreparable loss to them. Besides the occupants of Building 'C' have already shifted from their respective tenements, which have subsequently been made inhabitable by removal of the doors and windows. But the same can not be said about the petitioner. Refusal of interim relief would not cause irreparable loss, damage and injury to the petitioner. For the petitioner, the transaction with the respondent is a purely commercial transaction. The petitioner can always seek damages against the respondent. The loss caused to the petitioner is capable of monetary compensation. Next for the same reason, it cannot be said that the balance of convenience would be in favour of the petitioner. If the interim relief as sought by the petitioner is granted, it would undoubtedly cause more hardship to the members of the respondent than to the petitioner. Besides, even if the petitioner seeks

specific performance of the Development Agreement and the Supplementary Agreement against the respondent, since the relief of grant of specific performance is a discretionary relief , there is a chance of only damages being awarded to the petitioner. Therefore, even if the case of the petitioner is to be accepted purely at it's face value, there can be no interim relief in favour of the petitioner. Hence, the petition is dismissed. The statement made by the respondents shall continue for a period of six weeks from today.

(SMT. R.P. SONDURBALDOTA, J)