

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

ARBITRATION PETITION NO.241/2016

Mishal Construction Pvt. Ltd.

... Petitioner

V/s.

Jeevan Kendra chamber summons Ltd. & Ors.

... Respondents

Mr. A. S. Khandeparkar a/w. Mr. Prerak Sharma a/w. Mr. Rakesh Pathak
for the Petitioner

Mr. Amot K. Tembe a/w. Mr. Rohit Gulati for the Respondent No.1.

None for Respondent Nos.2 and 3.

CORAM: K.K. TATED, J.

DATED : FEBRUARY 15, 2016

PC. :

1. Heard the learned counsel for the parties. None appeared for Respondent Nos.2 and 3 though duly served. This matter was on board on 25/01/2016. At that time also none had appeared for the Respondent Nos.2 and 3, in spite of service. Hence, the advocate for the Petitioner was directed to serve the Respondents by personal notice, Speed Post and/or hand delivery. In compliance of the said order, the Advocate for the Petitioner filed Affidavit of service dated 01/02/2016 showing both the respondents are duly served. Same is taken on record.

2. This petition is filed u/s. 9 of the Arbitration and Conciliation Act, 1996 (said act) for appointment of a Court Receiver with full

powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 to take possession of property being CTS No.1415 of village Mulund (W) along with the building consisting ground plus two upper floors (said property) and on vacating the premises in occupation of the members of respondent No.1 society including respondent Nos.2 and 3, hand over the same to the petitioners as the agent of respondent No.1 society for development as per development agreement dated 12/06/2013 and supplementary agreement dated 01/10/2015.

3. The learned counsel for the petitioner submits that except respondent Nos.2 and 3 all the members of respondent No.1 are ready and willing to hand over vacant possession of the property. To that effect, they already filed consent affidavit. He seeks relief only against respondent Nos.2 and 3 in respect of flat Nos.1 and 4 respectively.

4. The learned counsel for the respondent No.1 submits that they have no objection if the petition is allowed.

5. In the present proceedings the petitioner entered into a development agreement dated 12/06/2013 with respondent No.1 for development of the said property on terms and conditions as narrated therein. He submits that as per clause 7 of the development agreement, the petitioner agreed to provide an alternate accommodation during development of the said property. Clause 7 of the said agreement reads thus:

“7. The Developer shall also before the flat owners/members vacate their respective Flats for the purpose of redevelopment of the

said property enter into individual agreements with the flat owners/members in respect of their existing flats, temporary alternate accommodation/compensation and permanent alternate accommodation in the new building as per Draft.”

6. The learned counsel for the petitioner submits that as per subsequent agreement dated 01/10/2015 the petitioner agreed to register the agreement for permanent alternate accommodation at his own costs. In support of this he relies on clause 2(a) of the agreement, which reads thus:

“(a) That the permanent alternative accommodation agreements/ individual agreements will be executed and registered by members prior to such members vacating their existing premises.”

7. The learned counsel for the petitioner, further submits that as per the said development agreement, the petitioner, by their letter dated 02/10/2015 called upon the respondent No.1 society to handover vacant and peaceful possession of the said property for development on compliance of terms and conditions of the same. He submits that in reply to the said letter, the society by letter dated 22/10/2015 stated that the respondent Nos.2 and 3 are not ready and willing to cooperate the society. Hence, it is not possible for them to handover vacant and peaceful possession of the entire property. In view of these facts, the learned counsel for the petitioner submits that they filed the petition u/s. 9 of the said Act for interim relief. He further submits that there is arbitration clause in the agreement dated 12/06/2013. Clause 60 of the said agreement reads thus:

“60. All questions or disputes except invoking bank guarantee which may at any time hereafter arise between the parties hereto or their respective representatives touching this Agreement or

interpretation or construction or meaning or effect of any clause thereof or as regards any right or liability of any party hereto shall be referred to Sole Arbitrator if parties agree upon one arbitrator or to three arbitrators, one to be appointed by each party and the two arbitrators so appointed to appoint a principal arbitrator and the arbitration shall be in accordance with and subject to the provisions of the Indian Arbitration and Conciliation Act, 1996 or its statutory modification or re-enactment thereof in force. The venue of Arbitration shall be at Mumbai only.”

8. The learned counsel for the petitioner submits that during pendency of the present petition, this Hon'ble Court be pleased to appoint a Court Receiver to take formal possession of flat Nos.1 and 4 which are in possession of respondent Nos.2 and 3 respectively. He submits that respondent Nos.2 and 3 may be directed by mandatory order to hand over vacant and peaceful possession of their flats to the petitioner on compliance of development agreement dated 12/06/2013 and supplementary agreement dated 01/10/2015. In support of this contention, the learned counsel for the petitioner relies on the judgment of this court in the matter of ***Bharat Infrastructure and Engineering Pvt. Ltd. Vs. Park Darshan CHS Ltd. & Ors.*** MANU/MH/0252/2013. Paragraph 16 and 21 read thus:

“16. The petitioner submitted that in view of the society not willing to hand over possession of all 41 flats, dispute had arisen between the parties and thus, an arbitrator has been already appointed and the present petition under Section 9 for interim measure cannot be considered as premature. It is submitted that respondent Nos.5 and 6a to 6c are actually not occupying their respective flats and have shifted somewhere else. Only respondent Nos.2a and 2b have occupied their flats and are deliberately not handing over them to the society with a view to obstruct the redevelopment work. It is submitted that the petitioner has already spent substantial amount on this project and any further delay

would cause further loss to the petitioner and also to the society as well as other 38 members who have already vacated their respective flats and they would have to be put back in possession of new flats on reconstruction of the building. Mr Vashi, the learned counsel appearing for the petitioner has no objection to pay compensation as are already paid by the petitioner to other 38 members in accordance with the development agreement and tripartite agreements entered into between the petitioner and respondents. Mr Vashi also submits that he has no objection if the said respondents also appear before the learned arbitrator.

17.

18.

19.

20.

21. As far as submission of the said respondents that they are not party to the arbitration agreement and therefore arbitration clause, if any, contained in the agreement between the petitioner and the society would not bind them and they could not have been impleaded as party respondents to the present proceedings is concerned, reference to the decision of the Division Bench of this Court in case of Girish Mulchand Mehta (supra) would be relevant. Paragraphs 15, 16, 18, 19 and 20 of the said Judgment read thus :

15. The Appellants would then rely on the decision of the Apex Court in Ramesh Himmatlal Shah v/s. Harsukh Jadhavji Joshi reported in AIR 1975 SC 1470 to contend that the flats in question occupied by them have been allotted to them by the Housing Society which allotment is coupled with the right to transfer their shares of the Society and interest in the said flat which is the property of the Society. In the said decision, the Apex Court has observed that the right so enjoyed by the member is the species of the property namely the right to occupy a flat of this type, which assumes significant importance and acquires under the law a stamp of transferability in furtherance of interest of commerce. It

went on to observe that there is no fetter in any of the legal provisions against such a conclusion and for which reason the attachment and sale of the property of the member in execution of the decree are valid under the law. The legal position expounded by the Apex Court in the said decision will be of no avail to the case on hand. The crucial question is whether the members can be heard to say that their rights in the flats occupied by them were *dehors* the rights of the Society therein and that they were not claiming under the Society at all. In our considered opinion such stand of the members (Appellants herein) cannot be countenanced.

16. In the present case, it is not in dispute that the General Body of the Society which is supreme, has taken a conscious decision to redevelop the suit building. The General Body of the Society has also resolved to appoint the Respondent No.1 as the Developer. Those decisions have not been challenged at all. The Appellants who were members of the Society at the relevant time, are bound by the said decisions. The Appellants in the dispute filed before the Cooperative Court have only challenged the Resolution dated 27/4/2008, which challenge would merely revolve around the terms and conditions of the Development Agreement. As a matter of fact, the General Body of the Society has approved the terms and conditions of the Development Agreement by overwhelming majority. Merely because the terms and conditions of the Development Agreement are not acceptable to the Appellants, who are in minuscule minority (only two out of twelve members), cannot be the basis not to abide by the decision of the overwhelming majority of the General Body of the Society. By now it is well established position that once a person becomes a member of the Cooperative Society, he loses his individuality with the Society and he has no independent rights except those given to him by the statute and Byelaws. The member has to speak through the Society or rather the Society alone can act and speaks for him *qua* the rights and duties of the Society as a body (see *Daman Singh & ors. v/s. State of Punjab* reported in AIR 1985 SC 973). This view has been followed in the subsequent decision of the Apex Court in the case of *State of U.P. v/s.*

Chheoki Employees Cooperative Society Ltd. reported in AIR 1997 SC 1413. In this decision the Apex Court further observed that the member of Society has no independent right qua the Society and it is the Society that is entitled to represent as the corporate aggregate. The Court also observed that the stream cannot rise higher than the source. Suffice it to observe that so long as the Resolutions passed by the General Body of the Respondent No. 2 Society are in force and not overturned by a forum of competent jurisdiction, the said decisions would bind the Appellants. They cannot take a stand alone position but are bound by the majority decision of the General Body. Notably, the Appellants have not challenged the Resolutions passed by the General Body of the Society to redevelop the property and more so, to appoint the Respondent No.1 as the Developer to give him all the redevelopment rights. The propriety rights of the Appellants herein in the portion (in respective flats) of the property of the Society cannot defeat the rights accrued to the Developer and/or absolve the Society of its obligations in relation to the subject matter of the Arbitration Agreement. The fact that the relief prayed by the Respondent No. 1 in Section 9 Petition and as granted by the Learned Single Judge would affect the propriety rights of the Appellants does not take the matter any further. For, the propriety rights of the Appellants in the flats in their possession would be subservient to the authority of the General Body of the Society. Moreso, such rights cannot be invoked against the Developer (Respondent No.1) and in any case, cannot extricate the Society of its obligations under the Development Agreement. Since the relief prayed by the Respondent No.1 would affect the Appellants, they were impleaded as party to the proceedings under Section 9 of the Act, which was also necessitated by virtue of Rule 803E of the Bombay High Court (Original Side) Rules. The said Rule reads thus:

R803E. Notice of Filing Application to persons likely to be affected.

Upon any application by petition under the Act, the Judge in chambers shall, if he accepts the petition, direct notice

thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted.”

18. We have no hesitation in taking the view that since the Appellants were members of the Society and were allotted flats in question in that capacity at the relevant time are bound by the decision of the General Body of the Society, as long as the decision of the General Body is in force. As observed earlier, the Appellants have not challenged the decisions of the General Body of the Society which is supreme, in so far as redevelopment of the property in question or of appointment of the Respondent No.1 conferring on him the development rights. The Appellants have merely challenged the Resolution which at best would raise issues regarding the stipulations in the Development Agreement. The General Body of the Society has taken a conscious decision which in this case was after due deliberation of almost over 5 years from August 2002 till the Respondent No. 1 came to be finally appointed as Developer in terms of Resolution dated 2nd March, 2008. Moreover, the General Body of the Society by overwhelming majority not only approved the appointment of Respondent No. 1 as developer but also by subsequent Resolution dated 27th April, 2008 approved the draft Development Agreement. Those terms and conditions have been finally incorporated in the registered Development Agreement executed by the Society in favour of Respondent No.1. That decision and act of the Society would bind the Appellants unless the said Resolutions were to be quashed and set aside by a forum of competent jurisdiction. In other words, in view of the binding effect of the Resolutions on the Appellants, it would necessarily follow that the Appellants were claiming under the Society, assuming that the Appellants have subsisting proprietary rights in relation to the flats in their possession. It is noticed that as of today the Appellants have been expelled from the basic membership of the Society. Their right to occupy the flat is associated with their continuance

as member of the Society. It is a different matter that the decision of expelling the Appellants from the basic membership of the Society will be subject to the outcome of the decision of the superior authority where the appeals are stated to be pending. If the decision of the Society to expel the Appellants is to be maintained, in that case, the Appellants would have no surviving cause to pursue their remedy even before the Cooperative Court much less to obstruct the redevelopment proposal. As a matter of fact those proceedings will have to be taken to its logical end expeditiously. Even if the Appellants were to continue as members, they would be bound by the decision of the General Body whether they approve of the same or otherwise. In any case, keeping in mind that the Development Agreement does not absolutely take away the rights of the Appellants in the flats in question, as after demolition of the existing building, the Appellants would be accommodated in the newly constructed flats to be allotted to them in lieu of the existing flats, on the same terms as in the case of other members, provided the Appellants continue to remain members of the Society. Under the Development Agreement, the Respondent No. 1 is obliged to complete the project within 18 months from the date of receipt of full Commencement Certificate from the Corporation. The full Commencement Certificate would be issued only upon the vacant possession of the entire building is delivered to the Respondent No.1 who in turn would demolish the same with a view to reconstruct a new building in its place. Significantly, out of twelve (12) members, ten (10) members have already acted upon the Development Agreement as well as have executed separate undertakings with the Respondent No. 1 Developer. They have already vacated flats in their occupation to facilitate demolition of the existing building and have shifted to alternative transit accommodation as back as in February 2009. The project has been stalled because of the obstruction created by the Appellants herein who are in minuscule minority. The said ten members of the Society who have already shifted their premises, they and their family members are suffering untold hardship. At the same time, the Respondent No. 1 who has already spent huge

amount towards consideration of the Development Agreement and incurred other incidental expenses to effectuate the Development Agreement in addition will have to incur the recurring cost of paying monthly rent to the ten members who have already shifted to transit accommodation. The learned Single Judge has noted that the Appellants are not in a position to secure the amount invested and incurred including the future expenses and costs of the Respondent No.1 herein in case the project was to be stalled in this manner. Even before this Court the Appellants have not come forward to compensate the Respondent No.1 herein and the other ten members of the Society for the loss and damage caused to them due to avoidable delay resulting from the recalcitrant attitude of the Appellants. Considering the impact of obstruction caused by the Appellants to the redevelopment proposal, not only to the Respondent No. 1 Developer but also to the overwhelming majority of members (10 out of 12) of the Society, the learned Single Judge of this Court opined that it is just and convenient to not only appoint the Court Receiver but to pass further orders for preservation as well as protection and improvement of the property which is subject matter of Arbitration Agreement. We have already noticed that the Court's discretion while exercising power under Section 9 of the Act is very wide. The question is whether in the fact situation of the present case it is just and convenient to appoint Court Receiver coupled with power conferred on him to take over possession of the entire building and hand over vacant and peaceful possession thereof to the Respondent No. 1 who in turn shall redevelop the property so as to provide flats to each of the members of the Society in lieu of the existing flats vacated by them as per the terms and conditions of the Development Agreement, as ordered by the learned Single Judge. For the reasons noted by the Learned Single Judge which we have reiterated in the earlier part of this decision, we find that it would be just and convenient to not only appoint Court Receiver to take over possession of the property but also pass further order of empowering the Court Receiver to hand over vacant possession of the suit building to the Respondent No. 1 to enable him to complete the redevelopment work according to

the terms and conditions of the Development Agreement. 19. Our attention was invited to the decisions of our High Court in the case of Raja Construction Co. v/s. Sahara Cooperative Housing Society Ltd. & ors. in Notice of Motion No. 2753/2007 decided on August 31, 2007 and another decision of the Division Bench in the case of Whiz Enterprise Private Ltd. v/s. State of Maharashtra & ors. in WP (L) No. 28/2009 decided on 30/7/2009. We are conscious of the fact that in both these decisions the member who was in minority did not bother to challenge the decision of the General Body of the Society. Even in the present case, the Appellants have not challenged the relevant decisions of the Society to redevelop the suit property and to appoint the Respondent No.1 as the Developer. At best, the Appellants have challenged the Resolution dated 27th April, 2008 which in turn relates to the approval of the Development Agreement, which has already been executed between the Respondent No. 1 Developer and the Respondent No. 2 Society. Indeed, in those cases the relief was not on an Application under Section 9 of the Act, but for the reasons recorded hitherto the relief to be granted in this petition would nevertheless be the same.

20. It was also argued that the property was in good condition and there was no need to redevelop the existing building. In the first place, as noted earlier, the decision of the General Body of the Society to redevelop the suit property has not been challenged at all. Besides, no provision in the Cooperative Societies Act or the rules or any other legal provision has been brought to our notice which would curtail the right of the Society to redevelop the property when the General Body of the Society intends to do so. Essentially, that is the commercial wisdom of the General Body of the Society. It is not open to the Court to sit over the said wisdom of the General Body as an Appellate Authority. Merely because some members in minority disapprove of the decision, that cannot be the basis to negate the decision of the General Body, unless it is shown that the decision was the product of fraud or misrepresentation or was opposed to some statutory prohibition. That is not the grievance made before us. In the

present case, the General Body took a conscious decision after due deliberations for over five years to redevelop its property. Even with regard to the appointment of the Respondent No.1 as the Developer, the record shows that it was decided by the General Body of the Society after examining the relative merits of the proposals received from the developers and interviewing them. Even the proposed development agreement to be entered with the Developer(Respondent No.1) was approved by the General Body. The Appellants raised untenable pleas to cause obstruction and have belatedly filed proceedings in the Cooperative Court as a counter blast only to protract the redevelopment work to be carried out by the Respondent No.1 herein.”

9. It is to be noted that, in the present proceedings the petitioner and respondent No.1 executed development agreement dated 12/06/2013 and thereafter supplementary agreement dated 01/10/2015. As per the development agreement, the petitioner agreed to provide an alternate as well as permanent accommodation to the members of the society. There are in all 12 members of respondent No.1. Out of 12 members, 10 have already agreed and executed consent affidavits in favour of the petitioner to hand over vacant and peaceful possession of their flats for development, except respondent Nos.2 and 3. As the petitioner is ready and willing to comply with the terms and conditions of the development agreement dated 12/06/2013 and supplementary agreement dated 01/10/2013 and as the advocate for respondent No.1 submits that they have no objection if the petitioner is allowed and considering the judgment cited supra, I am satisfied that the petitioner has made out a case for allowing the petition.

10. Hence, following order is passed:
- a. The Court Receiver, High Court, Bombay is appointed under Order XL Rule 1 of the Code of Civil Procedure, 1908 to take formal possession of the flat No.1 and 4 which is in possession of respondent Nos.2 and 3 respectively, situated at Jeevan Kendra CHS Ltd. Walij Ladha Cross Road, Off Vithalbhai Patel Road, Mulund West, Mumbai – 400 080.
 - b. Respondent Nos.2 and 3 are restrained by an order of injunction from creating any third party right interest in respect of flat Nos.1 and 4 in the “said property”.
 - c. If the present order is not lodged in the Office of the Court Receiver within 6 weeks, interim reliefs shall stand vacated without further reference to the court.
 - d. Petition stands disposed of accordingly.

(K.K. TATED, J.)