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

COMMERCIAL ARBITRATION PETITION (L) NO. 278 OF 2017

Wallstreet Hospitality …Petitioner
vs.
Evertop Apartments Co-operative Housing Society Ltd. & Ors. ...Respondents

WITH
COMMERCIAL ARBITRATION PETITION (L) NO. 284 OF 2017

JBRL Hospitality …Petitioner
vs.
Evertop Apartments Co-operative Housing Society Ltd. & Ors. ...Respondents

WITH
COMMERCIAL ARBITRATION PETITION (L) NO. 286 OF 2017

Lotus Logistics and Developers Pvt.Ltd. …Petitioner
vs.
Evertop Apartments Co-operative Housing Society Ltd. & Ors. ...Respondents

Mr.Ravi Kadam, Senior Advocate with Mayur Khandeparkar I/b. AKS Legal Consultants for Petitioners in CARBPL 278-2017.
Dr.Birendra Saraf with Ms.Pooja Kshirsager, Prateek Kothari with Vikram Garewal, Rishav Jain I/b. IC Legal for Respondent No.1.
Mr.Pravin Samdani, Senior Advocate with Nivit Srivastava, Nakul Jain I/b. Maniar Srivastava Associates for Respondent Nos.3 in CARBP 278-2017 and for Petitioner in CARBPL 286-2017.
Mr.Prateek Sakseria I/b. Ashok Dhanuka for Respondent No.2 in CARBPL 278-2017 and for Petitioner in CARBPL 284-2017.

CORAM : S.C. GUPTE, J.

29 JUNE 2017

P.C. :

Heard learned Counsel for the parties. Commercial Arbitration Petitions, (Lodging) No. 284 of 2017 and 286 of 2017, which are not on board but which are connected matters, are mentioned, taken on board and called out by consent of parties.

2 These commercial arbitration petitions are filed by the Petitioners, who are original respondents before the arbitral tribunal in a pending reference, challenging under Section 37 of the Arbitration and Conciliation Act, 1996 ("Act") an interlocutory order passed by the arbitral tribunal under Section 17 of the Act. The original claimant in the reference is Evertop Apartments Co-operative Housing Society, who is Respondent No.1 to these petitions, whereas the respondents to the reference are the petitioners - Lotus Logistics and Development Pvt.Ltd., Petitioner in Commercial Arbitration Petition (Lodging) No.286 of 2007 (Respondent No.1 to the reference), Wallstreet Hospitality, Petitioner in Commercial Arbitration Petition (Lodging) No.278 of 2017 (Respondent No.2 to the reference) and JBRL Hospitality, Petitioner in Commercial Arbitration Petition (Lodging) No.284 of 2017 (Respondent No.3 to the reference). The parties are hereafter referred to by their designation in the array of parties in the arbitration reference.

3 The subject matter of controversy in the arbitration reference concerns redevelopment of the property owned by the claimant society by Respondent No.1. Under the redevelopment agreement, Respondent No.1 was to construct a building for the use of the members of the society and also a sale building with a right to sell units constructed therein to various third parties. The immediate controversy in the present arbitration petition

concerns a unit, which has been sold by Respondent No.1 to Respondent No.2 and which has been let out by Respondent No.2 to Respondent No.3 on leave and license and where Respondent No.3 is running a restaurant and bar in the name of “Drinking Kulture”. It is the case of the claimant society that this restaurant with bar running in the unit premises is contrary to a covenant contained in its agreement with Respondent No.1 developer by which the Respondent was duty bound not to sell any part of the free sale area to any purchaser for running of restaurant with bar. The learned arbitrator in the impugned order considered the arguments advanced by the parties before him. The arguments of the claimant society were on the footing *inter alia* that the particular clause of the development agreement containing the negative covenant (clause 29) ran with the land and was enforceable, since the covenant was for beneficial enjoyment of the property owned by the claimant society. It was also submitted that the claimant society was entitled to enforce clause 29 of the development agreement, despite the fact that the agreement had stood terminated as between the claimant society and Respondent No.1. The learned arbitrator held in favour of the claimant society on both counts.

4 In his challenge to the impugned order in the present commercial arbitration petition, Mr.Kadam, learned Senior Counsel appearing for Respondent No.2 (purchaser of the unit from Respondent No.1 developer), submits that neither Section 11 nor Section 40 of the Transfer of Property Act, 1882 protects the negative covenant. Learned Counsel submits that the agreement between the parties, i.e. between the claimant society and Respondent No.1, is not transfer of property creating any interest in the property absolutely in favour of Respondent No.1. It is submitted that accordingly, there is no question of the restrictions contained

in the agreement concerning enjoyment of the suit premises being protected under the second part of Section 11. Learned Counsel submits that the negative covenant contained in clause 29 of the development agreement is a personal covenant given by Respondent No.1 to the claimant society and this covenant cannot be enforced against a third party, namely, Respondent No.2 or its licensee, namely, Respondent No.3. It is submitted that in the facts of the present case if the covenant is breached by Respondent No.1, at the most, a claim for damages may lie against Respondent No.1 and not for any injunctive relief against either Respondent No.2 or Respondent No.3. Learned Counsel submits that in view of the fact that in an earlier arbitration between the claimant society and Respondent No.1, the former having actually claimed damages against the latter for breach of the covenant, no enforcement of the negative covenant ought to be ordered. Learned Counsel, in the premises, submits that the interim injunction granted by the arbitral tribunal cannot be sustained.

5 Dr.Saraf, learned Counsel appearing for the claimant society, submits that the covenant to restrain the enjoyment in a particular manner of the transferred property having been made for beneficial enjoyment of the vendor’s own immovable property in the present case, it is a right or obligation, which may even be enforced against the transferee with notice thereof. Learned Counsel submits that the transferee in the present case, namely, Respondent No.2, had a clear notice of the document by which the right or obligation was created. Learned Counsel, alternatively, submits that even as a negative covenant, clause 29 is clearly enforceable in the present case. Learned Counsel submits that in pursuance of the restraint contained in clause 29, Respondent No.1, whilst agreeing to transfer the suit premises to Respondent no.2, has restricted the use of the suit premises merely as

office premises and forbidden Respondent No.2 from making any other use thereof, except with the prior consent of the claimant society. Learned Counsel submits that the licensee of the suit premises, namely, Respondent No.3, also had a notice of the documents between the parties and understood the negative covenant contained in clause 29 as a restriction on the use of the suit premises. Learned Counsel submits that the arbitrator having taken a possible view, which is based on material before him, this court anyway ought not interfere with the impugned order.

6 Clause 29 of the redevelopment agreement is clearly a negative covenant restricting the developer's right to deal with the free sale component of the project, including the suit premises. Whilst considering whether or not to enforce this restriction, it also needs to be borne in mind that the restriction is being prescribed by a society of flat / unit holders for use of the flats / units in its building. The society is clearly within its right to regulate the use of flats / units within its premises. It is also important to note that the developer, whilst exercising his right of sale of premises, has, after understanding the purport of the negative covenant, laid down a specific clause in his agreement with Respondent No.2 purchaser as to the user of the premises. The agreement between the developer and the purchaser clearly stipulates that the suit premises would be used only as office and for no other purpose. In case the premises are to be used for any purpose other than as office, there is a clear stipulation that the purchaser would be required to obtain a prior consent of the claimant society. On these facts, it was clearly impermissible on the part of Respondent No.2 to have permitted anyone to use the suit premises for any purpose other than as office. At any rate, even if the other purpose, namely, for running of a restaurant was permissible within the framework of the development

agreement between the society and the developer (the redevelopment agreement only forbidding the use of the suit premises as a restaurant with a bar), the use of the suit premises as a restaurant with a bar is clearly impermissible at least as a *prima facie assessment,* within the framework of the documents between the parties.

7 In the backdrop of these facts, it is not really necessary for me to consider at this stage as to whether the negative covenant contained in clause 29 is a covenant running with the land and the transaction between the society and the developer is a transfer of property creating simultaneously an absolute interest in favour of the developer and a restriction in the manner of the user of the property for the beneficial enjoyment of the society's property. Learned Arbitrator has taken a *prima facie* view on this matter, which cannot be termed as perverse, and I am anyway of the view that order proposed by the learned arbitrator is within the framework of law and the documents executed between the parties. The learned arbitrator, in any event, has also alternatively considered as to whether clause 29 of the redevelopment agreement could be enforced as a negative covenant in the light of the fact that the redevelopment agreement has been terminated by the claimant society.

8 As for the enforcement of the negative covenant in the face of termination of the subject redevelopment agreement, there is no apparent error in the impugned order of the arbitral tribunal so as to call for interference at the hands of this court within the framework of law of challenge to an interlocutory order under Section 37 of the Act. Learned arbitrator, in his impugned order, has held that clause 29 of the development agreement contained a restriction which was of a permanent

nature and was incorporated in the development agreement for better enjoyment by the society of its building for all times to come and as such, it would be absurd to suggest that the restriction would operate only during the subsistence of the development agreement and not thereafter. This is also clearly a possible view and no interference is warranted under Section 37.

9 In the light of the above discussion, there is no merit in the arbitration petitions. The petitions are dismissed. No order as to costs.

10 At the request of learned Counsel for the Petitioners, it is ordered that the impugned order of arbitral tribunal shall not come into operation for a period of four weeks from today.

(S.C. GUPTE, J.)