

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

NOTICE OF MOTION NO. 1133 OF 2017

IN

ARBITRATION PETITION NO. 199 OF 2013

Padma Vishnu Khandelwal and Ors ...Applicants

IN THE MATTER BETWEEN

Bharat Infrastructure and EngineeringPetitioner
Private Limited

Versus

Park Darshan Co-operative Housing ...Respondents
Society Limited and Ors.

Ms. Prachi Khandge I/b. M.P. Vashi and Associates
for the Petitioner.

Mr. Uday Sankar Samudrala for the Respondent No.1.

Mr. Zal Andhyarujina a/w. Ms. Ankita Singhania I/b.
Kanga & Co. for Respondent Nos. 6A, 6B & 6C.

Mr. Mayur Khandeparkar a/w. Mr. Amar Datta I/b. Tex Services
for Respondent nos. 2a, 2b, 2c and 5.

CORAM: G.S. KULKARNI, J.

DATED: 07th August, 2017

PC:-

1. This is a motion taken out by the applicants/original respondent nos. 6A to 6C. For the sake of convenience the parties are referred as they stand in the arbitration petition. The

applicants are the members of respondent no.1-Park Darshan Co-operative Housing Society. By an agreement dated 08/04/2011 entered between the petitioner-Bharat Infrastructure and Engineering Private Ltd and respondent no.1, the petitioner was appointed as a developer to undertake redevelopment of the premises of respondent no.1-society. Disputes had arisen between the petitioner and respondent no.1-society. The case of the petitioner is that, the handing over of the premises for the purpose of redevelopment was delayed by respondent no.1, on account of non vacating of the premises by respondent no.2 to 6. The development agreement entered between the petitioner and respondent no.1 society contained an arbitration clause in pursuance to which the disputes as would arise under the agreement were to be referred for arbitration.

2. On this background, the petitioner approached this Court, in the above petition invoking Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking protective reliefs pending the arbitration proceedings. By an order dated 18/03/2013 passed by this Court, the petition was allowed in terms of prayer clause (a). The Court Receiver, High Court Bombay, was appointed as the receiver to take physical possession of the flats from respondent nos. 2, 2a, 2b, 5, 6a to 6c (legal heirs

of respondent no.6). In para 32 of the said order, the Court recorded a statement as made on behalf of the petitioner whereby, the benefits such as compensation etc., and what has been paid to the other flat buyers would be also paid to the respondent nos.2 to 6. A further statement was made on behalf of the petitioner that the petitioner is ready and willing to execute a 'Tripartite Agreement' with the said respondents in the terms already agreed upon between the petitioner and respondent no.1-society. These statements came to be accepted.

3. It is not in dispute that in pursuance of the said orders and accepting the stand of the petitioners, respondent no.2 to 6 vacated their respective premises. Thereafter the redevelopment progressed the construction was completed and the occupation certificate has been granted on 28/08/2016. It is not in dispute that the redeveloped premises entitled to the members of respondent no.1 have been handed over by the petitioner, on 02/04/2013.

4. This Notice of Motion in the above circumstances is moved on behalf of the applicants-respondent nos. 6a to 6c (the legal heirs of respondent no.6) for a direction that the petitioner needs to comply with its statement as made before this Court and as

recorded in the order dated 18/03/2013 that a Tripartite agreement be entered between the petitioner, respondent nos. 6a to 6c and respondent no.1 society. The applicants pray for the following reliefs:

“(a) That this Hon'ble Court may be please to order and direct the Respondents to execute and register the Permanent Alternate Accommodation Agreement in respect of the re-developed flat in the redeveloped building, situate at TPS VI, opposite Lallubhai Park, Andheri (West), Mumbai 400 058 (“the said Flat”) with the Applicants along with such other or further deeds, documents, letters or writings as may be necessary to be executed I that regard and to pay the Stamp Duty and Registration charges thereof in terms of the said Development Agreement dated 8th April 2011;

(b) That this Hon'ble Court may be pleased to order and direct the Respondent No.1 to hand over vacant and peaceful possession of the said Flat to the Applicants;

(c) That this Hon'ble Court may be pleased to order and direct the Respondents to pay to the Applicants, the rent payable, corpus fund and other charges that are payable, as per the terms of the Development Agreement dated 8th April 2011, on the basis whas has been paid to all other members of the Respondent No.1 Society, along with interest thereon at 18% per annum till payment/realization thereof, till the Applicants are put in possession of the said new Flat;.”

5. Mr. Andhyarujina, learned counsel for the applicants has drawn my attention to the order dated 18/03/2013 passed by this Court, whereby the Court considering the rival pleas, had allowed

the Section 9 petition filed by the petitioner, however recording the following statements as made on behalf of the petitioner and noted in para 32 of the order. The statement read thus:

32. “-----. Mr Vashi states that all the other benefits such as compensation etc. what has been paid to the other flat buyers would be also paid to the said respondents. The petitioner is also ready and willing to execute tripartite agreement with the said respondents on the terms already agreed upon between the petitioner and the society. Statement is accepted.”

6. Mr. Andhyarujina would submit that, once the above statement is made on behalf of the petitioner and accepted by the Court, the petitioner cannot be heard to say that the petitioner would not comply with the statements. Mr. Andhyarujina therefore submits that, the petitioner and the respondent no. 1-society would be under an obligation to enter into a tripartite agreement and also to hand over the possession of the permanent alternate premises to the applicants. It is submitted that by an order dated 18/04/2017, the Court Receiver was discharged and four flats as entitled respondent no. 2 to 6 are today in possession of respondent no.1-society. It is pointed out by Mr. Andhyarujina that by an order dated 30/10/2014, the amount of compensation which the petitioner undertook to deposit and as recorded in the order dated 18/03/2013 passed by this Court, now stands deposited with the Prothonotary and Senior Master of this Court as

recorded in para 3(c) of the said order. The amounts are directed to be kept in a fix deposit by the Prothonotary and Senior Master. Respondent no.1-society is not disputing these basic facts and that the premises which required to be allotted to the applicants are in possession of the respondent no.1-society.

7. It is not in dispute that, the arbitration proceedings are between the petitioner and respondent no.1-society and that the applicants and the other respondents members of the society are not parties to the arbitration proceedings. Mr. Samudrala answering the query of the Court would submit that respondent no.1 is ready and willing to execute a Tripartite Agreement. Mr. Samudrala's submission clearly shows that in reality there is no issue between the respondent no.1-society and the applicants.

8. The resistance however is seen from the petitioner, and the same appears to be without any foundation as can be instantly seen. The submission on behalf of the petitioner is that an opportunity be granted to resolve the issues and for that matter the petitioner is willing to have a meeting with respondent no.1 and other members who are parties to this arbitration petition, which includes the applicants. However what is astonishing is that when the petitioner has no privity with the applicants and the dispute in

arbitration is solely between the petitioner and respondent no.1 society, in such circumstances which are the issues to be negotiated and to be settled, is not forthcoming from the petitioners. It may be rightly so because considering the orders which are passed by this court from time to time, it appears that, there is hardly anything which can be sought to be resolved by the petitioner independently with the members when the dispute of the petitioner is with respondent no.1. Respondent no.1-society also cannot hold to ransom the premises of the applicants for any settlement it intends to have with the petitioner.

9. Considering the statements which are made on behalf of the petitioner and as recorded by this Court in Para 32 of the order dated 18/03/2013 as noted above, it would be a bounden obligation of the petitioner to abide by the said statement and enter into a tripartite agreement with the applicants. From the tenor of the submissions as made on behalf of the petitioner, it appears that, the premises of the applicants and the other respondent members, as also the interim compensation amount which has been deposited by the petitioner is sought to be utilized as some consideration, to negotiate the dispute between the petitioner and respondent no.1. In my opinion, such a course of action on the part of the petitioner and a supportive approach to

this *modus operandi* by the respondent no.1-society in such a situation is not acceptable. This for the reason that the applicants and the other respondent members were required to be considered on a equal footing with the other members as accepted by the petitioner and as recorded by this Court in the order dated 18/03/2013 including compensation to be paid as paid.

10. It is not in dispute that, except for the redeveloped premises of the applicants and of the other respondent members, all the other members have received possession. It may be that, because of the conduct of these applicants and the other respondent members, the handing over the premises to the petitioner for the purpose of redevelopment was delayed. However, in view of the order dated 18/03/2013 passed by this Court and the petitioner accepting the position as recorded in Para 32 of the order, there cannot be any reason for the petitioner, as also respondent no.1-society to delay the execution of the tripartite agreement and to hand over the possession of the premises to the applicant members. It cannot be over looked that, there was no privity of contract between the applicants and the petitioner. It was respondent no.1-society which was wholly responsible for any obligation towards the petitioner under the development agreement which it had entered into with the petitioner. The

respondent no.1-society was not precluded at any point of time from taking appropriate steps in accordance with law against any of the members including the applicants, for any conduct on their part which was not acceptable, to respondent no.1-society. It is also significant that it was at the behest of the petitioner and although there was no privity of contract between the petitioner and the applicants, the petitioner had impleaded the applicants in the Section 9 arbitration petition. Thus at the petitioners behest the applicants are before the Court. If this be the position, then certainly neither the first respondent society nor the petitioner can delay the execution of the tripartite agreement and handing over the premises to the applicants as also the other respondents. Mr. Andhyarujina would be right in his contention that, the petitioner is in breach of the statement as made to this Court and recorded in the order dated 18/03/2013 that the petitioner is willing to execute a tripartite agreement with the applicants and other respondents (parties to the petition). The statement came to be accepted as a undertaking to the Court. Mr. Andhyarujina submits that, thus there is a clear defiance of the said orders, by the petitioner and apart from this motion it calls for a independent action against the petitioner and the society cannot be a mute spectator and instrumental in defeating the orders passed by this

Court. There is much substance in this submission of Mr. Andhyarujina.

11. A perusal of the orders as noted above would indicate that, it was an obligation on the part of the petitioner as also respondent no.1 society to execute the Tripartite Agreement and also hand over the premises to the applicants. Infact, it was unwarranted for these applicants to be dragged to initiate the present proceedings and more so in the light of the adjudication of the above petition by an order dated 18/03/2013 passed by this Court. The applicants in pursuance of the assurances of the petitioner have handed over the premises to the respondent no.1-society. Further without any objection, in regard to any of the issues as decided by the said order, the petitioner has undertaken development of the said building. On the face of the order dated 18/03/2013 passed by this Court it would not lie in the mouth of either the petitioner or respondent no.1 to resist and oppose the reliefs which are being prayed by the applicants in this motion.

12. In view of the above deliberation the interest of justice would certainly require that the present notice of motion is allowed. It is accordingly allowed in terms of prayer clause (a) and (b).

13. As regards, prayer clause (c), the same pertains to the amount of compensation which was required to be paid by the petitioner during the period of development in question and till the premises were handed over to the respondent no.1-society on 03/09/2016. The portion of amount as directed by this Court which was initially deposited with the society for the period upto October 2014, in pursuance of the order dated 30/10/2014 has now been deposited with the Prothonotary and Senior Master. The applicants would be at liberty to withdraw the said amount along with the accrued interest if any. Learned counsel for the petitioner fairly states that, the liability of the petitioner would be to pay the amount upto August 2016, that is just before the premises were handed over to the society on 03/09/2016. She submits that, the petitioner shall make payment of the said amount for the period 01/11/2014 till August 2016 within a period of one month from today. If the said amount is already paid by the petitioner to the respondent no.1-society, the same in turn shall be paid to the applicants by respondent no.1-society within a period of one month from today. The Tripartite Agreement as directed to be executed between the petitioner, the respondent no.1-society and the applicants be executed within a period of one month from today. As regards handing over of the possession of the permanent

alternate premises to the applicants, the same shall be handed over within a period of two weeks from today.

14. The notice of motion is accordingly allowed in the above terms.

15. At this stage learned counsel for the petitioner seeks stay of this order for a period of six weeks. Considering the facts and circumstances of the case, the request is rejected.

(G.S. Kulkarni, J.)