

Sharayu.

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

APPEAL (L) NO. 332 OF 2017

IN

NOTICE OF MOTION NO. 1133 OF 2017

IN

ARBITRATION PETITION NO. 199 OF 2013

WITH

NOTICE OF MOTION (ST.) NO. 1692 OF 2017

IN

APPEAL (L) NO. 332 OF 2017

**Bharat Infrastructure & Engineering
Pvt.Ltd.**

...Appellant

Versus

Padma Vishnu Khandelwal & Ors.

...Respondents

ALONG WITH

APPEAL (L) NO. 353 OF 2017

IN

NOTICE OF MOTION NO. 1133 OF 2017

IN

ARBITRATION PETITION NO. 199 OF 2013

Park Darshan CHS Ltd.

...Appellant

Versus

Padma Vishnu Khandelwal & Ors.

...Respondents

Mr. M.M. Vashi, Senior Counsel, a/w Ms. Prachi Khandagale, i/b M/s. M.P. Vashi & Associates, for the Appellant in APPL/332/17.

Mr. Uday S. Samudrala, a/w Ms. Dhanashree Teblhure, for the Appellant in APPL/353/17 and for the Respondent No. 4 in APPL/332/17.

Mr. Vineet Naik, Senior Counsel, a/w Mr. Zal Andhyarujina, Ms. Ankita Singhania, Mr. Punit Damodar, Ms. Nikita Vardhan, i/b Kanga & Co., for the Respondents No. 1 to 3 in both the Appeals and for Applicant in NMAST/1692/17.

**CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.**

DATE : 13 September 2017

ORDER :

1. As the regular Bench presided over by the Hon'ble Shri. Justice S.C. Dharmadhikari could not take up these Appeals, as per the general standing order issued by the Hon'ble the Chief Justice, the Appeals will have to be heard by this Bench.

2. As the controversy involved in these Appeals is very narrow and as these Appeals arise out of the order made under Section 9 of the Arbitration and Conciliation Act, 1996, we have forthwith taken up these Appeals for final hearing by putting the parties to the notice to that effect.

3. For the sake of convenience, we are referring to the parties with reference to their status in the Petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "*the said Act*"). The Appellant in Appeal (L) No. 332 of 2017 was the Petitioner in the Petition under Section 9 of the said Act. The Appellant in Appeal (L) No. 353 of 2017, which is the Society registered under the Co-operative Societies Act, 1960 was the 1st Respondent in the Arbitration Petition. The 1st to 3rd Respondents in Appeal (L) No. 332 of 2017 are legal representative of 6th Respondent in the Arbitration Petition. The 6th Respondent was occupying a flat in the building in question. Even the 2nd to 5th Respondents in the Arbitration Petition were also holding flats in the building of the 1st Respondent

Society.

4. It appears that the 1st Respondent Society appointed the Petitioner as a developer and a Development Agreement was executed on 8 April 2011. According to the case of the Petitioner, I.O.D. and development permission was granted on 5 January 2012. It appears that there were 41 members of the 1st Respondent. On the date of filing the Petition under Section 9 of the said Act, 37 out of 41 members had executed a Tripartite Agreement with the Petitioner and the 1st Respondent providing for vacating the flats in the old building and for payment of rent/compensation for obtaining alternate accommodation and for allotment of permanent accommodation in the redeveloped property. It appears that the 2nd to 6th Respondents filed a dispute before the Co-operative Court and applied for interim relief before the Co-operative Court. The Application for interim relief was rejected. An Appeal was preferred against the said order before the Maharashtra State Co-operative Appellate Court.

5. It appears that there is an arbitration clause in the Development Agreement. In the Petition filed under Section 9 of the said Act by the Petitioner, a prayer was for seeking appointment of the Court Receiver in respect of the flats occupied by 2nd to 6th Respondents with a further direction to take physical possession of the said flats. There are further directions sought against the Receiver to handover the possession of the said flats to the Petitioner for facilitating the demolition of the old building for the purpose of reconstruction. Injunction was also prayed for.

6. By the judgment and order dated 18 March 2013, the said Petition under Section 9 of the said Act was disposed of by the learned Single Judge. The Operative part of the said order reads thus:-

“(i) Petition is made absolute in terms of prayer clause (a).

(ii) Till the Court Receiver takes physical possession of the flats from respondent Nos.2, 2(a), 2(b), 5, 6(a) to 6(c) there shall be interim injunction in terms of prayer clause (b).

(iii) Petition is disposed of in aforesaid terms. No order as to costs.”

7. Thus, the learned Single Judge directed the appointment of the Court Receiver. The Court Receiver was directed to take physical possession of the flats occupied by the 2nd to 6th Respondents and handover the possession thereof to the Petitioner.

8. Chamber Summons No. 225 of 2017 was taken out by the Petitioner in the disposed of Petition under Section 9 of the said Act seeking discharge of the Court Receiver. The said Chamber Summons was disposed of by an order dated 18 April 2017 passed by the learned Single Judge. The learned Single

Judge has noted therein that the old building has been demolished and a new building has been put up. The learned Single Judge has recorded in paragraph 3 of the said order that though flats have been allotted to the Respondents No. 2(a) to 2(d), 5 and the Respondents No. 6(a) to 6(c) in the newly constructed building, a Tripartite Agreement has not been executed. Considering the fact that in the order dated 18 March 2013, there is no direction issued to the Court Receiver in respect of the flats in the newly constructed building, the learned Single Judge proceeded to discharge the Court Receiver. The learned Single Judge noted that the Respondent Nos. 2(a) to 2(d) have already filed a Notice of Motion seeking a direction regarding the execution of Tripartite Agreement and delivery of possession of the flat in the newly constructed building.

9. Respondents No. 6(a) to 6(c) took out Notice of Motion No. 1133 of 2017 in disposed of Arbitration Petition seeking three substantive reliefs which read thus:-

“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 in 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 Respondent 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 what 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."*

10. By the impugned order, the learned Single Judge allowed the Notice of Motion. The Notice of Motion was made absolute in terms of prayers (a) and (b). In paragraph 13, the learned Single Judge has dealt with the prayer clause (c) and has issued further directions. Paragraph 13 of the impugned order reads thus:-

"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.1society, 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.”

11. It is this order dated 7 August 2017 which is subjected to a challenge by the Petitioner and the 1st Respondent in these Appeals.

12. The learned Senior Counsel appearing for the

Petitioner in Appeal (L) No. 332 of 2017 firstly submitted that the Notice of Motion taken out by the Respondents No. 6(a) to 6(c) in a disposed of Petition under Section 9 of the said Act was not maintainable. He submitted that firstly, the said Respondents are not the parties to the arbitral proceedings, though repeatedly the Petitioner had called upon the said Respondents to join the arbitral proceedings. He submitted that in the disposed of Petition, by entertaining the Notice of Motion, substantive reliefs have been granted to Respondents No. 6(a) to 6(c), which is impermissible in law especially when the Notice of Motion was not maintainable and admittedly, the Respondents No. 6(a) to 6(c) are not the parties to the arbitral proceedings. He submitted that as the said Respondents are not the parties to the said proceedings, no relief under Section 9 of the said Act could have been granted in their favour. He invited our attention to the judgment and order of the learned Single Judge dated 18 March 2013. Inviting our attention to paragraph 32 of the said judgment and order, he submitted that the Petitioner has stated before learned Single Judge that it had no

objection, if the Respondents in the Petition appeared before the Arbitrator after withdrawing the dispute filed before the Co-operative Court. He submitted that subject to said Respondents agreeing to appear before the Arbitrator after withdrawal of the proceedings before the Co-operative Court, the Petitioner had shown readiness and willingness to execute Tripartite Agreement with the said Respondents on the terms already agreed upon between the Petitioner and the 1st Respondent Society.

13. The learned Senior Counsel appearing for the Petitioner assailed the directions issued in paragraph 13 of the impugned order by contending that the learned Single Judge could not have modified the order dated 30 October 2014 and could not have directed the 1st Respondent-Society to pay the amount paid by the Petitioner as the payment of the said amount was subject to pending arbitral proceedings.

14. The learned Counsel appearing for the 1st

Respondent in support of the Appeal (L) No. 353 of 2017 submitted that if the Petitioner is ready and willing to execute Tripartite Agreement as directed under the impugned order, the said Respondent has no objection for handing over the possession of the flat in the newly constructed building to the Respondents No. 6(a) to 6(c).

15. The learned Senior Counsel appearing for the Respondents No. 6(a) to 6(c) submitted that by the impugned order, a direction has been issued by the learned Single Judge for implementation of the solemn statement made by the Petitioner which is recorded in paragraph 32 of the judgment and order dated 18 March 2013. He would, therefore, submit that there is no reason to interfere with the impugned order passed by the learned Single Judge.

16. We have given careful consideration to the submissions. We have already quoted the operative part of the order dated 18 March 2013 by which the Court Receiver, High

Court, Mumbai was appointed as the Court Receiver in respect of the flat held by the Respondents No. 6(a) to 6(c) in the old building of the 1st Respondent and by which the possession of the said flat was ordered to be handed over to the Petitioner. The said order has admittedly been acted upon. After the Court Receiver handed over possession to the Petitioner, the old building was demolished and a new building has been constructed. It is not in dispute between the parties that the flat which was earmarked for the Respondents No. 6(a) to 6(c) is now in the possession of the 1st Respondent-Society.

17. At this stage, we may make a reference to paragraph 32 of the judgment and order dated 18 March 2013, which reads thus:-

“32. Perusal of record indicates that resolutions have been passed by the society by overwhelming majority of members of the society and 38 members out of 41 have already handed over

possession of their respective flats to the society and society in turn, has handed over possession of the same to the petitioner. The petitioner has to commence redevelopment on the plots of the society after demolition of the building and to hand over possession of the respective flats to the members of the society under tripartite agreements. The said respondents cannot be permitted to obstruct the redevelopment of the buildings under development agreement. In my view, if the said members have any claim for larger area from the petitioner developer or have any monetary claim, the same is already a subject matter of proceedings pending in Cooperative Court. This court has already appointed an arbitrator as per the arbitration clause recorded in development agreement. Mr. Vashi, the learned counsel appearing for the petitioner has no objection if the said respondents appear before the

learned arbitrator appointed by this Court on the said respondents withdrawing their proceedings filed in Cooperative Court. 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.”

(Underline supplied.)

18. Perusal of the said paragraph shows that according to the case of the Petitioner, some of the Respondents in the Petition under Section 9 of the said Act were refusing to vacate the flats/premises in the old building in their respective possession. In paragraph 32, the learned Single Judge has recorded a finding that the Petitioner is required to handover the possession of the respective flats of the members of the

Society in the new building, as per the Tripartite Agreements and therefore, the concerned Respondents cannot be permitted to obstruct the redevelopment work by holding on to the premises in the old building. In the further part of paragraph 32, the learned Single Judge has recorded a statement made by the learned Senior Counsel appearing for the Petitioner that the Petitioner has no objection, if the Respondents appear before the learned Arbitrator. Further statement of the learned Senior Counsel appearing for the Petitioner is that all such benefits which have been extended such as payment of compensation would be extended to the contesting Respondents. There is a clear statement made by the Petitioner that it is ready and willing to execute Tripartite Agreements with the contesting Respondents on the terms already agreed upon between the Petitioner and the 1st Respondent Society. The last two statements recorded in paragraph 32 are not at all subject to the condition of the concerned Respondents appearing before the learned Arbitrator and subjecting themselves to the jurisdiction of the learned Arbitrator. These statements are independent

statements which are recorded by the learned Single Judge. It is by the reason of the said statements that the learned Single Judge proceeded to pass a drastic order for the appointment of the Court Receiver and directed dispossession of the contesting Respondents in the said Arbitration Petition only for the purpose of the facilitating the work of re-development. As of today, the judgment and order dated 18 March 2013 has become final and in fact, acting upon the said judgment, the Petitioner has taken the benefit of the said judgment and order.

19. We have already noted the subsequent order passed by the learned Single Judge by which the Court Receiver was discharged. Notice of Motion in which the impugned order is passed, has been taken out essentially for enforcing the aforesaid statements made by the Petitioner which are recorded in paragraph 32 of the main judgment and order dated 18 March 2013. By grant of prayer clause (a) of the Notice of Motion, all that the learned Single Judge has done is to ensure that the Petitioner abides by its solemn statements which are

recorded in the paragraph 32 of the main judgment and order. In fact, the said solemn statements were specifically accepted as noted in paragraph 32 and therefore, the said statements become undertakings of the Petitioner. All that the learned Single Judge has done by the impugned order is that he has ensured that the Petitioner complies with its solemn statements recorded in the main judgment and order, instead of initiating any coercive action against the Petitioner for non-compliance with the said statements.

20. The jurisdiction of the learned Single Judge under Section 9 of the said Act is discretionary. The effect of the impugned order is that the learned Single Judge has ensured that the Petitioner abides by its solemn statements recorded in the judgment and order which has become final. In our view, for doing complete justice to the parties, the learned Single Judge certainly had jurisdiction to issue a direction to the Petitioner to execute the Tripartite Agreement. The 1st Respondent-Society has never declined or refused to execute the Tripartite

Agreement. Therefore, in our view, no fault can be found in the direction issued in terms of prayer clause (a) of the Notice of Motion as the said direction ensures that the Petitioner abides by its solemn statement recorded in the judgment and order which was acted upon by the Petitioner.

21. Today, admittedly, the 1st Respondent is in possession of the flat earmarked for allotment to the Respondents Nos. 6(a) to 6(c). The 1st Respondent-Society, as it is clear from the submission of the learned Counsel appearing for the Society recorded above, has no objection for executing the Tripartite Agreement. The 1st Respondent-Society has no objection for handing over the possession of the flat to Respondents No. 6(a) to 6(c) after execution of the Tripartite Agreement. The Petitioner has not challenged the order of the learned Single Judge by which the Court Receiver was discharged. In fact, admittedly, the Petitioner has handed over the possession of the three flats to the 1st Respondent-Society. Therefore, the Petitioner cannot have any objection, if the 1st

Respondent-Society puts the Respondents No. 6(a) to 6(c) in possession of the flat earmarked for allotment.

22. Now we turn to the direction issued in paragraph 13 of the impugned order. The learned Arbitrator issued an interim direction on 10 June 2013 against the Petitioner. The said direction was to deposit with the 1st Respondent-Society diverse amounts payable to the contesting Respondents in the Petition under Section 9 of the said Act including the Respondents No. 6(a) to 6(c), such as corpus fund, shifting charges, brokerage and rent for accommodation. The learned Arbitrator directed that the deposit of the amount will be subject to result of the pending arbitral proceedings. There was a specific direction issued restraining the 1st Respondent from utilising the said amount for any purpose whatsoever. Some of the contesting Respondents (except Respondents No. 6(a) to 6(c)) challenged the said interim direction by preferring Arbitration Petition No. 1009 of 2014. The learned Single Judge on 30 October 2014 modified the interim directions issued by

the learned Arbitrator and directed the 1st Respondent to encash the fixed deposits made by it of the amounts paid by the Petitioner and directed the 1st Respondent to deposit the said amount in this Court. The Prothonotary & Senior Master was directed to invest the said amount in fixed deposit initially for a period of three years and for such further period as may be directed by the Court. Thus, the effect of the order dated 30 October 2014 is that the amount payable to the Respondents No. 6(a) to 6(c) by the Petitioner and which was paid to the 1st Respondent would remain invested. In fact, the learned Single Judge has not disturbed the directions issued by the learned Arbitrator which prevent the 1st Respondent-Society from utilising the amount for any purpose whatsoever. Admittedly, the Respondents No. 6(a) to 6(c) have not challenged the interim direction given under the order dated 10 June 2013 by the learned Arbitrator and the judgment and order dated 30 October 2014.

23. The direction issued by the learned Single

Judge in paragraph 13 permitting the Respondents No. 6(a) to 6(c) to withdraw the amount invested by the Prothonotary and Senior Master in terms of directions given in the order dated 30 October 2014 amounts to the modification of the order dated 30 October 2014, which in our view, the learned Single Judge could not have done while disposing of the Notice of Motion in a disposed of Petition filed under Section 9 of the said Act. The statement of the Petitioner recorded by the learned Single Judge in paragraph 13 was to pay the amount payable to the Respondents No. 6(a) to 6(c) till August 2016, to the 1st Respondent-Society. The learned Single Judge could not have directed the 1st Respondent to pay the said amounts to the Respondents No. 6(a) to 6(c), as the said amounts paid to the Society will be subject to the result of pending arbitral proceedings. Therefore, while we are confirming the direction issued in terms of prayer clauses (a) and (b) of the Notice of Motion, the direction issued regarding payment in paragraph 13 will have to be set aside with liberty to the Respondents No. 6(a) to 6(c) to adopt appropriate proceedings in accordance

with law.

24. The learned Senior Counsel appearing for the Respondents No. 6(a) to 6(c) on instructions stated that the said Respondents are not willing to submit to the jurisdiction of the learned Arbitrator. The learned Senior Counsel appearing for the Petitioner states that the statement made by him that the Petitioner has no objection, if the said Respondents join the arbitral proceedings, will continue to operate.

25. Accordingly, we dispose of these Appeals by passing the following order:-

(i) The impugned order to the extent to which the Notice of Motion No. 1133 of 2017 is made absolute in terms of prayer clauses (a) and (b) is hereby confirmed;

(ii) The direction issued by the learned Single Judge in paragraph 13 of the impugned order

permitting the Respondents No. 6(a) to 6(c) to withdraw the amount deposited in this Court on the basis of the order dated 30 October 2014 is hereby set aside;

(iii) We also set aside the direction issued by the learned Single Judge to the 1st Respondent to pay the amount paid by the Petitioner;

(iv) We make it clear that it will be open for the Respondents No. 6(a) to 6(c) to adopt appropriate remedy as regards the direction to invest the amount;

(v) All contention of the Petitioner and the 1st Respondent in said proceedings, if filed, will remain open;

(vi) The Appeals are partly allowed on the above terms, with no order as to costs;

(vii) Pending Notice of Motion do not survive.

26. The learned Senior Counsel appearing for the Appellant in Appeal (L) No. 332 of 2017 seeks continuation of ad-interim relief.

27. We grant time to the original Petitioner (Appellant in Appeal (L) No. 332 of 2017) to comply with the direction issued in terms of prayer clause (a). Compliance shall be made by the Petitioner within a period of six weeks from the date on which this judgment and order is uploaded.

28. We clarify that the compliance with the direction issued in terms of prayer clause (b) shall be made only after Tripartite Agreement is executed.

29. We direct 1st Respondent-Society to place the Respondents No. 6(a) to 6(c) in possession of the concerned flat

within a period of two weeks from the date on which the Tripartite Agreement is executed in terms of the directions issued in prayer clause (a).

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]