

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
APPEAL (L) NO.77 OF 2017
WITH
NOTICE OF MOTION (L) NO.2043 OF 2017
IN
COMM. ARBITRATION PETITION NO.128 OF 2017

Mohammed Ali M. Sali, Sole proprietor of
M/s. Myco Construction Co. ... Appellant
Vs.
Rajaram Chavan Real Estate Private Limited ... Respondent

Mr. E. A. Sasi for Appellant.
Mr. Rishi Soni i/b. Ashok Purohit & Co. for Respondent.

**CORAM : NARESH H. PATIL &
R. G. KETKAR, JJ.**

Reserved on : OCTOBER 10, 2017

Pronounced on: OCTOBER 13, 2017

ORDER: (PER R. G. KETKAR, J.)

Heard Mr. Sasi, learned Counsel for the appellant and Mr. Soni, learned Counsel for the respondent at length.

2. By this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), appellant, hereinafter referred to as 'petitioner', has challenged the orders dated - (i) 05.04.2017, (ii) 17.04.2017, (iii) 26.05.2017, (iv) 21.06.2017, (v) 03.07.2017, (vi) 12.07.2017 and (vii) 19.07.2017 passed by the learned Single Judge (Coram: G. S. Patel, J.) in Commercial Arbitration Petition No.128 of 2017 with Chamber Summons (L) No.66 of 2017.

3. In the order dated 05.04.2017, the learned Single Judge, after noting presence of the petitioner in the Court, recorded his statement that he is willing to secure the amount claimed by the respondent, which is Rs.1.75 crores. That amount will cover the period till September

2016 for costs already incurred. The learned Single Judge expected the petitioner to furnish sufficient security of that amount by 17.04.2017. It was further recorded that the security must be such as can be immediately realised. The learned Single Judge also expected the petitioner to make a complete disclosure with names of all the tenants, corresponding unit numbers in the redeveloped buildings and the precise status of each of those units; and, specifically, whether the petitioner has created any third party rights in respect of the premises meant for allotment to tenants. If the petitioner has unauthorizedly disposed of or created any third party rights in respect of the premises that are to be allotted to a tenant, that tenant will be accommodated in the premises that will be drawn from the petitioner's share of the free sale component. This direction was issued as the tenants took out Chamber Summons (L) No.66 of 2017 raising grievance that the premises that were to be allotted to them have been sold by the petitioners to the third party purchasers. On behalf of the respondent, it was made clear that 20 tenants' new premises for allotment are in a separate wing numbered as 'D' Wing. The premises in respect of two other tenants were required to be allotted out of the petitioner's free sale quota and this aspect was to be decided on the next date. The contention raised on behalf of the tenants that there are arrears of transit rent in the amount of Rs.65,00,000/- was noted. Whether this is due from the petitioner or the respondent was also to be decided on the next date. The matter was adjourned to 17.04.2017.

4. In the order dated 17.04.2017, the learned Single Judge noted that the petitioner did not bring a single rupee despite his statement made to the Court on 05.04.2017. He, however, changed his Advocate. It was tried to be contended that petitioner did not in fact make that statement. The learned Single Judge did not accept the said contention after recording that petitioner was present in the Court on the last occasion

and he did very much make that statement. It was made clear that till the petitioner abides by his statement to the Court, he would not be heard. The learned Single Judge expected petitioner to abide by his commitment to the Court and that he would be required to secure the claim of the tenants for unpaid transit rent over and above the amount (Rs.1.75 crores). On 26.05.2017, by consent of the parties, the learned Single Judge disposed of Arbitration Petition filed under Section 9 of the Act. Paragraph 9 of that order is to the following effect:

“9. It is however agreed that this order will not operate as a restraint or bar on the Respondent from selling the TDR arising from the garden plot or from surrendering the plot to the MCGM. It will be open to the petitioner to move the Arbitral Tribunal for an appropriate interim relief under Section 17 of the Arbitration Act in regard to this plot and all issues arising from it. Any transactions that the Respondent undertakes in respect of the garden plot whether by sale of TDR or surrender to the MCGM will necessarily be subject to the further orders in arbitration.”

5. The dispute between the petitioner and the respondent regarding monetary claims once against another was also referred to the arbitrator. The parties were directed to enquire about availability of Mr. Shailesh Shah, Senior Advocate and obtain his statement of disclosure. The matter was ordered to be listed for final order in regard to the appointment of Mr. Shah on 06.06.2017.

6. The matter was thereafter heard on 21.06.2017. The learned Single Judge recorded that Mr. Sasi appearing for the petitioner was unable to control the petitioner, who kept on interrupting the matter. That was second or third time, petitioner was doing that. The learned Single Judge, therefore, passed order “Not to be treated as part-heard. Removed from board.”.

7. On 03.07.2017, on the request made by the learned Counsel for the petitioner, the learned Single Judge took up the matter. The

petitioner was present in the Court. He tendered an unconditional apology, which was accepted and the order dated 21.06.2017 was recalled. In paragraph 2 of that order, the learned Single Judge recorded that Mr. Purekar, appearing on behalf of the tenants, tendered a revised list of arrears of transit rent payable. That was taken on record and marked 'P1' for identification. Mr. Sasi clarified that the amount of Rs.75,000/- each for 22 tenants (plus two others) has been duly adjusted. The total adjusted amount towards conversion charges was Rs.18 lakhs. The learned Single Judge noted that according to Mr. Purekar, the statement shows the amount due after adjusting Rs.28 lakhs that has been paid by the petitioner under the previous order. On the request made by the petitioner, on the latest revised figures, matter was adjourned to 05.07.2017.

8. The matter was thereafter heard on 12.07.2017 and the dispute was raised in regard to paragraph 9 of the order dated 26.05.2017. In paragraph 3, it was noted that petitioner had no difficulty with second and third portion of paragraph 9 but he did not agree to the first sentence “that the order would not operate as a bar on the respondent from selling the TDR or from surrendering the plot to the MCGM”. In paragraph 4, the learned Single Judge observed that the petitioner is no way prejudiced by the first sentence and clarified that it is equally open to the petitioner if he is able to surrender the garden plot to the MCGM. In paragraph 5, it is observed that this order does not explicitly direct the respondent to surrender the plot to the MCGM. It does not explicitly direct the respondent to sell the TDR on that plot. But at the same time, it does not bar the respondent from doing either of these things and the order dated 27.05.2017 is not to be construed as containing any such prohibition. It was also observed that it will be open for Mr. Sasi and petitioner to move the Arbitral Tribunal if he is aggrieved. Thus, what was abundantly clear on 27.05.2017 was even made clearer in the order

dated 12.07.2017. The learned Single Judge further recorded that it was explained to Mr. Sasi in Court three times. He had read it another three times. Mr. Sasi confirmed that he understood and agreed that that was a sufficient clarification.

9. In paragraph 6, the learned Single Judge noted that there are no proceedings between the petitioner and the tenants. There is no arbitration agreement between them. The tenants are vitally affected and feel the impact of the dispute in real and monetary terms. On behalf of the tenants, it was contended that amount of Rs.40,25,000/- was payable. This was disputed by Mr. Sasi who submitted that there is excess claim of Rs.38,34,3330/ and an amount lesser than Rs.2,00,000/- is payable to the tenants. The learned Single Judge, therefore, adjourned the matter on 19.07.2017 to consider a proposal for nominating the Commissioner for Taking Accounts as an Arbitrator with a view to saving costs of arbitration.

10. By order dated 19.07.2017, after referring to all the orders, that were passed from time to time, the learned Single Judge directed the petitioner to deposit amount of Rs.40,25,000/- with the Commissioner for Taking Accounts, who was to invest the entire amount in a fixed deposit with any nationalised bank. The Commissioner for Taking Accounts was not to permit withdrawal of this amount by either the tenants or the petitioner. In the event of not depositing the amount, liberty was reserved to the parties to apply. Against these orders, petitioner has instituted the above Appeal.

11. In support of this Appeal, Mr. Sasi strenuously contended that the learned Single Judge has not properly considered the points raised by the petitioner vide speaking to minutes of the order dated 05.06.2017.

The learned Single Judge did not properly consider various provisions of the Development Agreement dated 20.08.2009. The learned Single Judge passed the orders without applying mind to the terms and conditions contained therein. He submitted that the learned Single Judge passed various orders without hearing the petitioner solely on the ground that the petitioner failed to deposit / pay a sum of Rs.1.75 crores to the respondent as per order dated 05.04.2017. The learned Single Judge failed to consider various claims of the petitioner and the fact that the keys of 16 flats, out of 21 flats coming to the share of the petitioner as the owner are lying with the respondent. He submitted that the learned Single Judge failed to appreciate that there was neither any order nor any statement or undertaking made by the petitioner to deposit the sum of Rs.1.75 crores. The learned Single Judge committed serious error in insisting upon depositing Rs.1.75 crores as also Rs.40,25,000/-. He submitted that the learned Single Judge failed to appreciate that the Chamber Summons taken out by the tenants, itself, was not maintainable in a Petition instituted under Section 9 of the Act. He has taken us through the grounds raised in the Memorandum of Appeal and submitted that impugned orders deserve to be set aside thereby allowing the Petition instituted by the petitioner under Section 9 of the Act.

12. On the other hand, Mr. Soni supported the impugned orders. He submitted that the order dated 05.04.2017 recorded the statement in the presence of the petitioner in the Court. He submitted that the contention of the petitioner that petitioner never agreed to deposit Rs.1.75 crores and only agreed to secure the amount of Rs.1.75 crores without prejudice to the rights and contentions is wholly misconceived. He submitted that the learned Single Judge expected petitioner to furnish sufficient security of that amount, which can be immediately realized. Instead of furnishing security or depositing the amount of Rs.1.75

crores, petitioner changed his Advocate and disputed making of such statement on 05.04.2017. Mr. Soni, therefore, submitted that petitioner cannot be allowed to challenge order dated 05.04.2017. As far as challenge to the order dated 17.04.2017 is concerned, he submitted that the same is misconceived as no rights of the petitioner were adversely decided and the said order was passed in continuation of the order dated 05.04.2017. By order dated 26.05.2017, by consent of the parties, Arbitration Petition under Section 9 was disposed of. He submitted that the petitioner cannot challenge order, which was passed by consent of the parties. Challenge to the order dated 21.06.2017 is equally misconceived as by that order, the learned Single Judge directed matter not to be treated as part heard and removed from the board.

13. Mr. Soni submitted that at the request of Mr. Sasi, on 03.07.2017, matter was taken up by the learned Single Judge and the order dated 21.06.2017 was recalled. In view thereof, challenge to the orders dated 21.06.2017 and 03.07.2017 is misconceived. By order dated 12.07.2017, the order dated 26.05.2017 was clarified. He, therefore, submitted that the challenge raised to that order is misconceived. By order dated 19.07.2017, after considering the series of orders, the learned Single Judge directed the petitioner to deposit Rs.40,25,000/- with the Commissioner for Taking Accounts, with further direction to invest that amount in a fixed deposit with any nationalised bank. He, therefore, submitted that no case is made out to interfere with the impugned orders.

14. Mr. Purekar, representing the tenants, submitted that though the Chamber Summons was taken out by the tenants, they are not impleaded in the present Appeal. Mr. Purekar further submitted that in pursuance of the order dated 19.07.2017, he has returned amount of Rs.1,16,682/-

to Mr. Sasi. In other words, petitioner is selectively challenging order which is not favourable to him and is accepting the benefit flowing from order dated 19.07.2017. He, therefore, submitted that no case is made out for interfering with the impugned orders.

15. We have considered the rival submissions advanced by the learned Counsel appearing for the parties. We have also perused the the material on record. A perusal of order dated 05.04.2017 clearly shows that petitioner was present in the Court on that date. He stated that he is willing to secure the amount of Rs.1.75 crores claimed by the respondent. The said amount will cover amount till September 2016 for costs already incurred. The learned Single Judge expected the petitioner to furnish sufficient security of that amount, which can be immediately realized. Mr. Sasi did not point out that petitioner either deposited Rs.1.75 crores in this Court or has furnished sufficient security of that amount. The learned Single Judge, therefore, rightly observed that petitioner did not deposit single rupee despite his statement. The petitioner simply changed his Advocate and contended that in fact he did not make the statement as recorded in the order dated 05.04.2017. The learned Single Judge observed that instructions given to Mr. Sasi were incorrect. The learned Single Judge also noted that the petitioner has not paid transit rent of Rs.65,00,000/-, which was payable till December 2016. By order dated 26.05.2017, by consent of the parties, Petition under Section 9 was disposed of. We fail to appreciate how petitioner can challenge the order, which was passed by the consent of the parties. The petitioner should have moved the learned Single Judge on the ground that he had never consented for disposing of the Arbitration Petition. The order dated 21.06.2017 merely says, "Not to be treated as part heard.". By order dated 03.07.2017, order dated 21.06.2017 was recalled. We, therefore, fail to appreciate challenge to orders dated

21.06.2017 and 03.07.2017. By order dated 12.07.2017, order dated 26.05.2017 was clarified. The challenge to this order is, therefore, totally unwarranted. Finally, by order dated 19.07.2017, the learned Single Judge, after referring to series of orders and also considering the fact that arbitration will be expensive which tenants cannot afford as also filing of the civil Suits either by the petitioner or by the tenants, which is a cumbrous process and will take far too long to yield any meaningful result, thought it fit to appoint Commissioner for Taking Accounts for resolving the controversy between the petitioner on one hand and tenant on the other. It is in this context, the learned Single Judge directed the petitioner to deposit Rs.40,25,000/-. We do not find that the learned Single Judge has committed any error in passing the impugned order. In fact, though by consent of the parties, Petition was disposed of on 26.05.2017, without filing review petition and moving the praecipe for speaking to the minutes of the order, the learned Single Judge showed indulgence to the petitioner by passing orders on 03.07.2017, 12.07.2017 and 19.07.2017. The conduct of the petitioner deserves to be deprecated strongly and accordingly we do. We are clearly of the opinion that appeal is wholly misconceived and devoid of any merit. Hence, Appeal fails and the same is dismissed.

16. In view of the dismissal of the Appeal, nothing survives in Notice of Motion (L) No.2043 of 2017 and the same is disposed of accordingly.

(R. G. KETKAR, J.)

(NARESH H. PATIL, J.)