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

ARBITRATION PETITION NO.1266 OF 2016

M/s. Hitech Hafizi Town (A) Developers ....Petitioner
Vs.
Om Shree Gokul Co-operative Housing Society Ltd. ....Respondent

Mr. Deepak Chitnis i/by M/s.Deepak Chitnis–Chiparikar and Co. for Petitioner.

Mr. Ankit Lohia a/w Mr. S.S. Amir i/by Nilam S. Pawar for Respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 27th SEPTEMBER, 2017

P.C.:

1. This Petition is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (the Act), impugning an order passed by the Sole Arbitrator on 31.08.2016, rejecting the prayer of Petitioner for interim relief. Petitioner is Claimant in the arbitration proceedings. Petitioner had approached this Court under Section 9 of the Act and this Court by an order dated 22.07.2016, with consent of the parties, appointed Shri. Cyrus Ardeshir, Advocate as Arbitrator and directed the Arbitrator to treat the said petition as a petition under Section 17 of the Act.

2. Mr. Deepak Chitnis, counsel appearing on behalf of Petitioner, states that application under Section 9 (converted into an application under Section 17) of the Act, was to restrain Respondent, who terminated the Development Agreement, from appointing another Developer.

3. This matter is one of the plethora of matters pending in this Court,

where one side is members of residential cooperative society and the other side is a developer, having entered into a Development/Re-Development Agreement. Petitioner is a registered Partnership firm carrying on the business of developers and Respondent is a Co-operative Society consisting of 63 members, who were living in two buildings consisting of four wings, viz.A, B, C and D. As the buildings were old and in a dilapidated condition, Respondent decided to appoint a Developer for redevelopment of the two buildings.

4. A Letter of Intent dated 22.07.2010 was issued by Respondent Society to Petitioner and the General Body of the members accepted the offer of Petitioner. Petitioner made a revised offer and thereafter on 18.08.2010 a Development Agreement was executed between Respondent and Petitioner. Respondent also issued an irrevocable Power of Attorney in favour of Petitioner. As per the Development Agreement, Petitioner was to demolish the existing building and construct a new building by utilizing permissible FSI and TDR on the terms and conditions more particularly set out therein.

5. Thereafter, 62 out of 63 members also executed the permanent alternate accommodation agreements with Petitioner and over a period of time members vacated their premises. 13 out of 63 members, however, refused to vacate their respective premises. On 27.11.2012 an IOD was issued in the name of Petitioner. On 27.02.2013 Petitioner issued a cheque of Rs.3,00,00,000/- to Respondent in lieu of the Performance Bank Guarantee, which Respondent was to receive from Petitioner under the Development Agreement. A Deed of Rectification was executed on 16.04.2013 between the parties. There are some controversies between the parties regarding execution of this Deed of Rectification.

6. Before Arbitrator, submissions of Respondent were that even if the arbitrator was to consider the Deed of Rectification as valid, still Petitioner was in breach of the Development Agreement read with Deed of Rectification.

7. Respondent by a letter dated 13.11.2014 terminated the Agreement for Development dated 18.08.2010 for reasons mentioned therein. On 16.12.2014 Advocates for Petitioner replied to the Termination Notice. This was followed by letter dated 18.11.2014 from Petitioner forwarding 47 cheques towards corpus fund.

8. The three primary breaches by Petitioner, as reason for termination alleged by Respondent were (A) Petitioner was to give a Bank Guarantee of Rs.3,00,00,000/-, which was later changed to a cheque of Rs.3,00,00,000/- (Respondent does not admit that the Rectification Deed was valid) and the cheque was to be substituted with fresh cheque before the end of three months, which is the validity period of every cheque and after August 2013 Petitioner did not send a fresh cheque for Rs.3,00,00,000/-; (B) Petitioner was to pay corpus fund to all the members upon all the members vacating the building some time in May 2014 and corpus fund was paid only to 16 members out of 63 and that also before it became payable, i.e., before vacating the building and thereafter none of the members were given the corpus fund until after termination with a letter dated 18.12.2014; and (C)Rent for alternate accommodation, which was to be paid until the members of the society were put in possession of their respective flats in the building to be constructed were abruptly stopped in February 2014. Therefore, these breaches were fundamental leading to Development Agreement being terminated.

9. It was the case of Petitioner before Arbitrator that so far as point (A) above is concerned, if Petitioner did not substitute the cheque of Rs.3,00,00,000/- with a fresh cheque, Respondent should have encashed the cheque. So far as point (B) above is concerned, it was submitted that Petitioner had forwarded the cheques for corpus fund on 18.12.2014, but those cheques were returned by the society. So far as point (C) above is concerned, Petitioner's obligation ceased in February 2014 because as per the Development Agreement, the building was to be completed within 30 months and therefore, nothing was payable. Learned Arbitrator has considered each of the submissions made by Petitioner and Respondent and has analyzed each of the point and given his order, that is impugned in this petition.

10. So far as point (A), viz., non-replacement of three crores cheque is concerned, learned Arbitrator has concluded that under the Deed of Rectification, there was an obligation cast on Petitioner to issue a cheque. Just because the validity period of the earlier cheque came to an end and Respondent did not encash the cheque during its validity period, does not in any manner, absolve Petitioner from complying with its obligation by replacing the cheque with another valid cheque. Arbitrator has concluded this is the obligation cast on Petitioner under the Development Agreement read with the Deed of Rectification.

11. So far as point (B) and (C) are concerned, viz., payment of corpus fund, learned Arbitrator has observed that when Petitioner did not pay the corpus fund and stopped paying the alternate accommodation rent, Respondent by their letter dated 07.07.2014 called upon Petitioner to rectify their breaches and also gave a last chance to Petitioner to comply with all the terms and conditions of the Development Agreement, which would include

payment of corpus fund and rent amount. It is also noted that Respondent admitted that only 16 members were paid the corpus fund, which would mean the remaining 47 have not been paid. It is also observed that somewhere in or around 25.05.2014 all the members had vacated their respective flats, whereas till the date of the order (impugned) 47 members have not been paid corpus fund. Learned Arbitrator has observed that he could understand the situation where, soon after 25.05.2014, which is the date whereafter all the flats were vacated, learned Arbitrator had tendered 47 cheques towards corpus fund and Respondent refused the same, but there is no explanation as to why the corpus fund amount was not paid or atleast offered to the remaining 47 members after 25.05.2014. Learned Arbitrator has come to a *prima facie* opinion that Claimant has not paid the entire corpus fund amount to Respondent.

12. So far as payment of rent for alternate accommodation, Petitioners submitted that they were not required to make any payment after February 2014 was concerned. Learned Arbitrator has considered a letter dated 21.11.2014 from Petitioner having apologized for the delay in payment of rent and further enclosing cheques for 11 months together with one month brokerage as per the list of members. Learned Arbitrator has concluded that if Petitioner's submission was to be accepted that no rent was payable from February 2014, there were no need to write letter dated 21.11.2014 apologizing for the delay and forwarding cheques for rent for the period of 11 months.

13. In [1]***M/s. Meera Housing Private Limited V/s. M/s. Khatau Makanji and Co. Pvt. Ltd. & Ors.***, a Division Bench of this Court in, para no.3, relied

1 ***2016 SCC Bom.12710***

upon a judgment of the Apex Court in the case of [2]***Wander Ltd. V/s. Antox India Pvt. Ltd.*** and observed the circumstances under which the Appellate Court can intervene with the order of the lower Court. In my view, the same principles will have to be kept in mind while considering an order passed under Section 17 of the Act by the Learned Arbitrator. This petition under Section 37 is against the exercise of discretion by the Learned Arbitrator. In such petitions, which are in effect appeals from the order passed under Section 17, the appellate Court will not interfere with the exercise of discretion by learned Arbitrator and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where learned Arbitrator had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. The appellate Court cannot reassess the material and seek to reach a conclusion different from one reached by the Learned Arbitrator, if the one reached by Arbitrator is reasonably possible on the material. The appellate Court should not interfere with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Learned Arbitrator, reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the arbitrator's exercise of discretion.

14. Para no.3 of ***M/s. Meera Housing Private Limited (supra)*** reads as under:-

"It will be pertinent to mention that the Apex Court in the case of Wander Ltd. V/s. Antox India P.Ltd., 1990 Supp SCC 727 has made it clear under what circumstances the appellate Court can intervene with the order of the lower Court or the learned single Judge refusing to grant injunction, in other words, will not interfere with the refusal of exercise of discretion of the Court. Paragraph-14 of the said judgment reads as under:

2 ***1990 Supp SCC 727***

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate Court will not interfere with the exercise of discretion of the court of first instance and substituted its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721)

"These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton, 1942 AC 130...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in any individual case".

The appellate judgment does not seem to defer to this principle."

15. In my view, learned Arbitrator has analyzed each of the submissions made by the parties on the material before him and has reasonably come to a conclusion that the reliefs prayed under Section 17 should not be granted. I cannot find anything arbitrary or perverse in the order passed by the Learned Arbitrator. In the circumstances, Petition stands dismissed with costs fixed at Rs.50,000/- payable within 4 weeks by Petitioner by way of cheque drawn in favour of Advocate on record for respondent.

16. I am informed by Mr. Deepak Chitnis and Mr. Ankit Lohia that learned Arbitrator has withdrawn from the arbitrary proceedings for the reasons mentioned in the Minutes of Meeting held on 21.04.2017. Mr.

Chitnis states that Petitioner's application under Section 15 of the Act is ready and will be filed in a week. Mr. Lohia states that Respondent has consented to appoint another Arbitrator and therefore, Petitioner need not file a petition under Section 15 of the Act.

17. Shri. Gautam Mehta, an Advocate practicing in this Court, by consent of parties through counsel, is appointed as Arbitrator in place of Shri. Cyrus Ardeshir. The fees and administrative expenses of learned Arbitrator, venue charges and typing charges shall be shared equally by Petitioner and Respondent and same will be costs in the Arbitration Proceedings. Learned Arbitrator will continue the arbitration proceedings from where the arbitration proceedings were left by the earlier Arbitrator.

18. Mr. Chitnis's statement that Petitioner will share all the earlier Arbitrator's fees and expenses, which has been paid by Respondent to learned Arbitrator and it will be paid within two weeks from today, is also accepted.

19. Mr. Chitnis states that Petitioner had initially filed an appeal against the same impugned order being Appeal (L) No.12 of 2016 and the matter was transferred to be heard by a Single Judge and that is the current arbitration proceeding.

20. Registry to note that Appeal (L) No.12 of 2016 has already been disposed.

(K.R. SHRIRAM, J.)