

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER (STAMP) NO.5568 OF 2018

Milan Ramniklal Kamdar & Ors. ...Appellants
Versus
Star Shine Land Developers Private
Limited ...Respondents

...

Mr. Mandar Soman for the Appellants.
Mr. Krishna K. Holambe Patil for the Respondent No.1.

**CORAM: SMT. ANUJA PRABHUDESSAI, J.
DATED: 22nd MARCH, 2018.**

JUDGMENT:

Heard. With consent matter is heard finally at the stage of admission.

2. The Appellants herein, who are the original Defendants(hereinafter referred to as 'Defendants') have challenged the impugned order dated 19th January, 2018 whereby the learned Judge, City Civil Court at Borivali Division, Dindoshi, Goregaon, Mumbai has granted prayer clause (b) of the Notice of Motion No.3823 of 2016 filed by the Respondent-original Plaintiff (hereinafter referred to as 'Plaintiff') in S.C. Suit No.3332 of 2016 and thereby appointed a court receiver in respect of the suit premises viz. two stack car parking spaces bearing Nos.80, 81, 82 and 83 in basement 2 level of the building Aura

Biplex situated at village-Magathane, Taluka: South Selsette, within then District Thane, now Taluka-Borivali District-Mumbai suburban.

3. Mr. Mandar Soman, the learned counsel for the Defendants contends that in the reply filed to the notice of motion the Defendants had specifically stated that the agreement for sale dated 25.3.2014 contains arbitration clause. The learned counsel for the Defendants submits that in view of the said arbitration clause, it was obligatory for the Trial Court to refer the parties for arbitration. Relying upon the decision of the Delhi High Court in *Parasramka Holdings Pvt. Ltd. Vs. Ambience Pvt. Ltd. and Anr. dated 15th January, 2018 in CS(OS) 125/2017* he submits that party invoking the arbitration clause does not have to file a formal application seeking a specific prayer for referring the dispute to arbitration as long as an objection is raised in the written statement that the suit is not maintainable in view of arbitration clause in the agreement. He has further submitted that there was no prima facie material to show that the Appellants had surrendered possession in respect of the suit premises and hence no case was made out for the appointment of court receiver.

4. Per contra, Mr Krishna K. Holambe Patil for the Plaintiff has submitted that the relief sought in the suit is in respect of two stack car

parking spaces bearing Nos.80, 81, 82 and 83 whereas the three parking spaces allotted to the Defendants as per the deed of Rectification are bearing Nos.194, 195 and 196. He has submitted that there is no dispute in respect of the said three car parking spaces and hence there was no question of invoking the arbitration clause and referring dispute to arbitration.

5. It is to be noted that Section 8(1) of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), which deals with power to refer the parties to arbitration, reads thus :-

“8.Power to refer parties to arbitration where there is an arbitration agreement.-

“(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.”

6. A plain reading of this provision would indicate that powers under Section 8(1) of the Act can be invoked only when the dispute raised before the judicial authority is the subject matter of an arbitration agreement. It would be therefore necessary to make a brief

reference to the plaint to understand the nature of the dispute between the parties.

7. The Plaintiff, who is a Developer has constructed a building known as Aura Biplex comprising of two wings situated at Village-Magathane, Taluka: South Selsette, within then District-Thane, now Taluka-Borivali District-Mumbai suburban. The Defendants had entered into an agreement dated 24th March, 2014 and purchased flat Nos.1801/02 in Building-Habitat of Aura Biplex alongwith use of two stack car parking spaces. The Plaintiff had claimed that pursuant to the said agreement they had handed over to the Defendants two stack car parking spaces bearing Nos.80, 81, 82 and 83 in the basement two level of the building-Habitat. The dispute in the suit is in respect of these two stack car parking spaces bearing Nos.80, 81, 82 and 83, which are referred as suit premises.

8. The Plaintiff claimed that sometime in the month of September, 2015 the defendants had informed them that suit premises were inconvenient and had requested to allot three car parking spaces at lower ground level. Accordingly, the Plaintiff and the Defendants had entered into a deed of rectification dated 24th September, 2015, wherein they agreed to allot three car parking spaces instead of the suit

premises, which were already allotted to the Defendants. The Plaintiff claims that the Defendants had surrendered the suit premises and that in terms of deed of rectification the Defendants were allotted three parking spaces bearing Nos.194, 195 and 196.

9. The Plaintiff claims that on 21.12.2015 the Defendants entered into the suit premises and displayed a board stating that the suit premises are belonged to them and the trespassers would be prosecuted. Despite the request, the Defendants refused to vacate the suit premises. The Plaintiff made a police complaint, however, no action was taken. The Plaintiff therefore filed a suit under Section 6 of the Specific Relief Act.

10. A plain reading of the averments made in the plaint clearly indicate that subject matter of the suit are the two stack car parking spaces bearing Nos.80, 81, 82 and 83 in the basement level of the building-Habitat of the Aura Biplex project. The next question which would therefore arise is whether these two stack car parking i.e. suit premises are the subject matter of the arbitration agreement. Agreement dated 25th March, 2014 clearly indicates that the Defendants had agreed to purchase flat Nos.1801/02 in the building-habitat of Aura Biplex alongwith exclusive right to use two stack car

parking spaces. Clause 56 of the said agreement reads thus:

“Any dispute of differences that may arise at any time hereafter between the parties hereto or their successors in title touching or concerning this agreement or its constructions or effect or as to the rights, duties, obligations and liabilities of the parties hereto or either of them under it by virtue of this Agreement or otherwise or as to any other matter in any way connected with or arising out of in relation to the subject matter of this Agreement shall be referred to the sole arbitrator and such arbitration shall be governed in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification thereof for the time being in force. Such arbitration proceedings shall be in English and shall be held in Mumbai. Courts in Mumbai alone shall have jurisdiction.”

11. Pursuant to the said agreement Plaintiff vide letter dated 21st October, 2014 had allotted to the Defendants two stack car parking spaces bearing Nos.80, 81, 82 and 83 in the basement level of the building-habitat of the Aura Biplax. Perusal of the said allotment letter clearly indicates that the Defendants had confirmed the allotment of the suit premises. The records reveal that subsequently the Plaintiff and the Defendants had entered into a deed of rectification dated 24th September, 2015. Clauses (ii) and (iii) of the said deed of rectification agreement read as under :-

“(ii) At the treaty of sale of the said Premises it was also agreed that the Purchaser shall also be entitled to exclusive use of Three car parking space without any additional consideration. However in the said

Agreement it is mentioned as two stack car parking space instead of three car parking space which remains to be included in the said agreement for Sale dated 25th March, 2014.

(iii) The Purchaser has now requested the vendors to execute this Deed of Rectification to confirm that along with the sale of the said Premises, the Purchaser is also entitled to exclusive use of three car parking space instead of two stack car parking space, exact location of such car parking space to be duly intimated or before handing over possession of the said premises.”

The relevant covenants of the said deed of rectification reads thus :-

“2. The Vendors agree that at the time of sale of the said Premises No.1801/02 on the 18th level (i.e. 16th floor above the top of the podium) of the building/wing known as “Habitat” of “Aura Biplex” and the said property is more particularly described in the Schedule hereunder written, the Vendors has agreed to grant to the Purchaser exclusive right to use three car parking space, exact location of such car parking space shall be intimated on or before handing over possession of the said premises without any additional consideration.

3. The Vendors hereby further confirm that the said Agreement dated 25th March, 2014 should be read with this Deed of Rectification and accordingly the Purchasers shall be entitled to the exclusive right to use three car parking spaces instead of two stack car parking space.”

12. The deed of rectification therefore, clearly indicates that the Defendants were entitled for three parking spaces instead of two stack car parking spaces as stated in earlier agreement dated 25th March,

2014. Hence, they had entered into a deed of rectification, pursuant to which the Plaintiff had handed over to the Defendants three car parking spaces bearing Nos.194, 195 and 196 in the lower ground level of the building-habitat of the project-Aura Biplex. The Defendants had signed the said allotment letter and had thus, confirmed the said allotment. It is thus, evident that by executing the deed of rectification, the Defendants had accepted three car parking spaces Nos.194, 195 and 196 instead of two stack car parking spaces being Nos.80, 81, 82 and 83, which were the subject matter of the earlier agreement dated 25th March, 2014.

13. The subject matter of the agreement is the three car spaces bearing Nos.194, 195 and 196 whereas the dispute in the suit is in respect of two stack car parking spaces bearing Nos.80,81,82 and 83. Since the dispute is not in respect of or connected with or arising out of car parking premises Nos.194,195 and 196, which is the subject matter of the agreement, the same is not covered by the clause 56. of the agreement dated 25.3.2014.

14. As stated earlier, the averments in paragraphs 9,10 and 12 of the plaint indicate that the Defendants had surrendered/handed over peaceful possession of the two stack car parking spaces i.e. 80, 81,

82 and 83, which were allotted by letter dated 21st October, 2014 and pursuant to the deed of rectification they had received possession of car parking premises Nos.194, 195 and 196 allotted by letter dated 25th September, 2015. The Plaintiff had further averred that on 21st December, 2105 the Defendants had trespassed in the said two stack car parking spaces and parked two cars and put a board stating that the said car parking spaces are belonged to them and trespassers would be prosecuted. A perusal of the reply to the notice of motion prima facie indicates that the Defendants had not specifically denied the fact that they had handed over the possession of the two stack car parking spaces Nos.80, 81, 82 and 83 to Plaintiff. The material on record thus, prima facie indicates that the Defendants had taken forcible possession of the said two stack car parking spaces. Under the circumstances, the learned Judge was perfectly justified in appointing the receiver. The order is neither arbitrary nor perverse and does not want any interference. Hence, the appeal is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)