

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.117 OF 2018
in
ARBITRATION PETITION NO.1260 OF 2016
with
NOTICE OF MOTION NO.271 OF 2018

M/s Midas Constructions ... Appellant
vs
Navghar Road Co-operative Housing Society Limited ...Respondent

Mr.C.G.Gavnekar a/w Mr.A.C.Gavanekar I/b
Mr.G.S.Hiranandani for Appellants
Mr.Shailesh Shah a/w Mr.K.S.Ghadge
I.b.Mr.A.S.Desai for Respondent

**CORAM : NARESH H.PATIL &
G.S.KULKARNI, JJ
DATED : 30TH JULY, 2018**

P.C. :

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") challenges an order dated 12th January 2018 passed by the learned single Judge whereby the petition filed by the appellant under section 34 of the Act, challenging an Award of the learned sole Arbitrator dated 21st July 2016 stands rejected.

2. The dispute between the parties had arisen under a development agreement dated 21st July 2006 which was registered on 24th July 2006. The respondent is a co-operative housing society of building no.13 which was constructed on land belonging to MHADA. It has 32 members. By virtue of development agreement, the appellant had

undertaken to demolish the said building and construct a new building and hand over possession of the premises to all the members within 24 months from obtaining the commencement certificate. In the agreement, the parties had referred to the plot area of 936.19 sq.meters. Subsequent to the entering of the development agreement, the respondent had also issued a power of attorney to enable the appellant to do all necessary acts for the purpose of obtaining the premises and undertaking constructions which included, to approach MHADA and other statutory authorities.

3. It is not in dispute that though the development agreement dated 21st July 2006 referred to the plot area as 936.19 sq.meters, however, the actual measurement the plot area was revealed to be less and to be an area of 663.37 sq.meters. The appellant appears to have thought it to be economically unviable to undertake this development and appears to have approached MHADA as also had made a demand for FSI of 2.5 which was not granted.

4. On 10th December 2008 MHADA had granted NOC to the appellant to demolish the old building while not granting FSI of 2.5. The appellant initially had taken a position with the respondent that though it had agreed to construct flats admeasuring 300 sq.ft for the members, however, as the plot area was less, the appellant would provide a lesser area per tenement, namely provide an area of 250 sq.ft. However, this position was reconciled and the appellant confirmed to give same area of 300 sq.ft as agreed in the development agreement dated 21st July 2006. In

pursuance thereto, a supplemental agreement dated 15th May,2009 was entered into between the parties confirming that flats which would be constructed for members of the respondent-society would be of the same dimension as agreed in the principal agreement.

5. Thereafter, an IOD (Intimation of Disapproval) was obtained by the appellant on 14th October 2010. However, commencement certificate was not obtained. In December, 2010 the building was also demolished and members of the society were shifted to the transit accommodation as per terms and conditions in the development agreement. It appears that in the intervening period, some members of the respondent society being aggrieved by the inaction of the appellant for not commencing construction of the building/the flats for about four years had approached the City Civil Court, Mumbai by filing suit no.1291 of 2009 which ultimately was compromised by the parties on 8th November 2010. However, despite the supplemental agreement, as no progress was made in regard to the construction, the respondent by its notice dated 20th December 2013 terminated the development agreement as also the supplemental agreement dated 15th May,2013.

6. The appellant being aggrieved by the termination of the development agreement dated 21st July 2006 and the supplemental agreement dated 15th May 2009 invoked the arbitration clause as contained in the agreement and the learned sole Arbitrator was appointed to arbitrate the dispute. The appellant *inter-alia* prayed for specific performance of the

said agreements. The learned Arbitrator after granting full opportunity to the parties to lead evidence and examining the evidence on record rejected the claims as made by the appellants for specific performance of the said agreements as also rejected the claim for damages.

7. The appellant being aggrieved by the award passed by the learned Arbitrator, filed a petition under section 34 of the Arbitration Act which is dismissed by the impugned order.

8. In assailing the impugned order, grievance of the appellant is two-fold: Firstly, it is contended that the appellant was entitled to a specific performance of the agreement. This for the reason that the appellant was always ready and willing to perform their part of the obligations and in fact had agreed by making payment of the agreed rent to the members. It is submitted that commencement of the construction could not be undertaken due to lesser area being made available than what was agreed in the development agreement. The second contention is that termination of the agreement by the respondent was bad and illegal, as there was no clause in the development agreement or in the supplemental agreement providing for termination of the agreement and thus, the award was required to be set aside by the learned single Judge. These issues are not appreciated by the learned Arbitrator and the learned single Judge and thus ought to have set aside the same.

9. On the other hand, learned senior counsel for the respondent has supported the award and the impugned order. It is submitted that this

is a gross case where members of the society are deprived of roof over their head for almost 12 years. It is submitted that for no justifiable reason, the appellant refrained from undertaking and completing the construction. It is submitted that the plot area was less was no reason not to undertake construction, inasmuch as the appellant was completely aware of the factual position and nonetheless entered into the development agreement dated 21st July 2006 agreeing to construct tenements of the same area as agreed in the principal agreement. It is submitted that as regards the contention that there is no termination clause, the same is untenable in law.

10. We have heard learned counsel for the parties. We have also perused the impugned order, the award and documents as placed on record.

11. It is clear that the appellant after entering into the development agreement at all material times, was aware of the plot area to be lessor and had accordingly taken up the issue with MHADA as the appellant was granted power of attorney to undertake whatever necessary steps with the MHADA and other authorities. Surely, when a commercial decision was taken by the appellant to enter into a development agreement dated 21st July 2006 with the respondent, it was expected with all care and caution, construction would be undertaken on all counts. It also appears to be quite clear from the record that the issue of plot area was very much taken up by the appellant with the MHADA, and being well aware that

construction potential was only with regard to 663.37 sq.meters, the appellant entered into a supplemental agreement dated 15th May, 2009 and undertake construction and provide tenements to the members of the respondent of the same area as agreed in the development agreement. The respondents had also not created any hurdles and/or prevented the appellant from taking up the issue with the MHADA authorities in construction of the building and undertake redevelopment. It appears that on economic considerations the appellant did not undertake construction well in time as the project appeared to the appellant had become economically unviable. Despite this position, the appellant had undertaken demolition of the building and made the members of the respondent roofless. The members of the respondent could not have waited endlessly to have provided alternate premises in the redeveloped premises. In the circumstances, the argument as urged on behalf of the appellant that the plot area was less and therefore, the construction could not be undertaken, is totally without any basis. It has also no basis on evidence. The findings of the learned Arbitrator in this regard, therefore, cannot be faulted.

12. As regards the contention that there was no termination clause in the agreement, and thus the respondent had no authority to terminate the agreement cannot be accepted. Law in that regard is well-settled. In a recent judgment in the case of **M/s Srushti Raj Enterprise (India)Ltd vs Tilak Safalya Co-operative Housing Societies Ltd decided on 10th July 2018 in Commercial Appeal (L) No.67 of 2018**, a similar

issue was raised and came to be rejected by this Bench. The Court made the following observations :

“12. As regards the second contention that the development agreement made no provision for termination of development agreement and therefore, the termination of the agreement by the respondent was illegal, also cannot be accepted. Law in that regard is well settled. Even if there is no provision in the agreement for termination of the agreement, nonetheless under law if there is breach of the terms and conditions of the contract, the parties are entitled to terminate the contract. The learned arbitrator has clearly recorded a finding based on evidence that the termination of the development agreement was proper and further that there was no ground made out for granting specific performance as sought by the appellant. The learned single Judge has rightly adverted to the decision in case of **Chaurangi Builders and Developers Pvt.Ltd** (supra) in rejecting the said contention of the appellant.”

13. The learned single Judge by a well-reasoned order, has rightly rejected the section 34 petition filed by the appellant. Appeal lacks merit. It is accordingly, rejected.

(G.S.KULKARNI, J)

{NARESH H. PATIL, J}