

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY*****ORDINARY ORIGINAL CIVIL JURISDICTION*****COMM.ARBITRATION PETITION (L) NO. 452 OF 2017****M/s.Srushti Raj Enterprise (India) Ltd.****..... Petitioner****VERSUS****Tilak Safalya Co-operative Housing  
Societies Ltd.****..... Respondent**

Mr.Harinder Toor, a/w. Ms.Yasmeen M.Sabir, Mr.Ravi Kotian for the  
Petitioner.

Mr.Niranjan Jagtap, i/b. Mr.Niranjan Jagtap & Co. for the Respondent.

**CORAM : R.D. DHANUKA, J.****DATE : 2<sup>nd</sup> FEBRUARY, 2018****P.C.**

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 the petitioner has impugned the arbitral award dated 7<sup>th</sup> October,2017 thereby rejecting the claims made by the petitioner and allowing part of the counter claims by the respondent society.

2. The parties have entered into a Development Agreement on 9<sup>th</sup> May, 2007 by which the petitioner had agreed to construct a building for the members of the respondent society on the terms and conditions set out in the said agreement. On 1<sup>st</sup> June, 2007, 23 out of 24 members of the society vacated their respective flats in the building no.93. The building was demolished by the petitioner in the year 2010. The members of the flat had however vacated the flats in the year 2007 itself.

3. It is the case of the respondent that the petitioner has not paid the rent and compensation under the said agreement to the members of the society. According to the petitioner, the FSI which was agreed by and between the parties was 2.4 whereas the same was found less. The petitioner thus could not commenced the construction on the plot in question for the members of the respondent society.

4. On 12<sup>th</sup> January,2014, the respondent through its advocate terminated the said development agreement. The petitioner therefore filed a claim for specific performance before the learned arbitrator. The society filed written statement and counter claim for claiming damages as well as for payment of rent and compensation etc. The learned arbitrator rendered an award dismissing the claim for specific performance and allowed the part of the counter claim made by the society.

5. Mr.Toor, learned counsel for the petitioner submits that the FSI which was agreed by and between the parties was 2.4 whereas it was found at 2.14 which caused delay in commencement of the development agreement. He submits that the learned arbitrator could not have thus held the termination notice valid and ought to have granted specific performance of the development agreement between the parties. In support of this submission, he invited my attention to some of the findings rendered by the learned arbitrator.

6. It is submitted by the learned counsel that there was no provision for termination of the contract in the development agreement and thus

the society could not have terminated the development agreement.

7. It is submitted by the learned counsel that even today, the petitioner is ready and willing to carry out the development under the development agreement dated 9<sup>th</sup> May, 2007. He submits that the findings rendered by the learned arbitrator are perverse and this court thus can exercise power under section 34 of the Act and shall set aside the award.

8. Mr.Jagtap, learned counsel for the respondent society on the other hand submits that the FSI at 2.4 was available. He submits that the petitioner has admitted in the statement of claim that FSI was at 2.4 sanctioned whereas the claim of the petitioner was at the rate of 2.5. He also invited my attention to the calculation of FSI at page 633 of the compilation in support of his submission that the total built up area computed was as per 2.4 FSI, however the petitioner had submitted the calculation at the rate of 2.14. He invited my attention to various findings rendered by the learned arbitrator and more particularly on this issue of FSI whether was sanctioned to 2.4 or at 2.14.

9. With the assistance of the learned counsel for the parties, I have perused the impugned award and the part of the record produced for perusal of this court by the parties.

10. Insofar as issue as to whether FSI was 2.4 or not, perusal of the statement clearly indicates that it is admitted position that the FSI sanctioned was at 2.4 whereas the claim of the petitioner in the

statement of claim was 2.5. The calculation brought on record clearly indicates that sanctioned FSI was 2.4 and not 2.14. The learned arbitrator has considered this issue at great length in the impugned award and has rendered a finding of fact based on the documents produced by both parties.

11. Insofar as submission of the learned counsel for the petitioner that there was no provision for the termination of the development agreement is concerned, this court has already taken a view in case of ***Chaurangi Builders and Developers Pvt. Ltd. vs. Maharashtra Airport Authority Company Ltd.*** in Arbitration Petition (L) No.1999 of 2013 dated 29<sup>th</sup> November, 2013 that even if there is no provision of termination in the contract, if the breaches are committed, contract can still be terminated. The learned arbitrator has rightly followed the said judgment of this court.

12. The learned arbitrator has rightly rendered a finding that the members of the respondent society had vacated the premises in the month of June 2007 and till 2014 when development agreement was terminated, the petitioner had not even commenced the construction of the flats for the members of the respondent society. Various findings of fact rendered by the learned arbitrator that the termination of the development agreement was proper and no case for specific performance was made out by the petitioner are based on the documents and evidence led by the parties. The findings rendered by the learned arbitrator being not perverse and thus cannot be interfered with by this court under section 34 of the Arbitration and Conciliation

Act, 1966. In my view the petition is totally devoid of merits and is accordingly dismissed.

13. Mr.Toor, learned counsel for the petitioner seeks continuation of the ad-interim order passed by this court. The application for continuation of the order is opposed by Mr.Jagtap, learned counsel for the respondent society.

14. Division Bench of this court in case of ***Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited in Appeal No.114 of 2013*** has held that if the claim is rejected by the learned arbitrator, no interim relief can be granted by the court in the petition impugning such award. Application for continuation of the ad-interim relief is accordingly rejected.

**[R.D. DHANUKA, J.]**