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

ARBITRATION PETITION NO.1260 OF 2016

WITH
NOTICE OF MOTION NO.2941 OF 2016
IN
ARBITRATION PETITION NO.1260 OF 2016

M/s.Midas Constructions, A Partnership Firm	...Petitioner
V/s.	
Navghar Road Harikripa CHSL	...Respondent

Mr.C.G. Gavnekar i/b Mr.G.S. Hiranandani for the Petitioner.

Mr.Shailesh Shah, Senior Counsel i/b Mr.A.S. Desai for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 12TH JANUARY, 2018.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 21st July, 2016 passed by the learned arbitrator, dismissing the claims made by the petitioner. The petitioner was the claimant before the learned arbitrator, whereas the respondent herein was the original respondent. Some of the relevant facts for the purpose of deciding this writ petition are as under :

2. The petitioner is engaged in the business of real estate

development and also in the business of redevelopment of the old and dilapidated buildings. The Maharashtra Housing and Area Development Authority (MHADA) developed the housing colony at Navghar Road, Mulund (East), Mumbai – 400 081 for the lower income group comprising of 55 buildings. The respondent society was formed by the allottees of building no.13. The petitioner vide offer letter dated 18th January, 2006 offered to redevelop the said building, which was in dilapidated condition. On 23rd May, 2006, the respondent appointed the petitioner to redevelop its building and passed an unanimous resolution thereby accepting the offer of the petitioner. The petitioner and the respondent accordingly entered into a Development Agreement on 21st July, 2006 which was registered on 24th July, 2006.

3. It is the case of the petitioner that under the said agreement, till November, 2013, the petitioner had paid the sum of Rs.1,55,00,000/- to the respondent society which was accepted by its members. It was the case of the petitioner that the area of the plot in question shown in the Lease Deed and the Sale Deed entered into between the respondent and MHADA was shown as 936.19 sq. mtrs. and on this area, redevelopment was to take place. However, on taking actual measurement of the plot, it was found that the area of the plot was 663.37 sq. mtrs. instead of 936.19 sq. mtrs. as

mentioned in those documents. According to the petitioner, this shortfall in the plot area made the development work economically unviable till the said shortfall was made good. The parties entered into a Supplementary Agreement dated 15th May, 2009, wherein the area to be developed was mentioned as 936.19 sq. mtrs. The petitioner thereafter entered into the individual consent / declaration with the members of the respondent society confirming the Development Agreement entered into with the society. About 13 members of the respondent filed a suit bearing No.1291 of 2009 in the City Civil Court at Bombay regarding redevelopment work against the petitioner. On 6th May, 2010 and 8th November, 2010 the said suit was settled by filing the consent terms.

4. It is the case of the petitioner that on 15th October, 2008, the respondent applied to MHADA for Floor Space Index (FSI) of 2.5. On 10th December, 2008, MHADA gave its no objection to demolish the said existing building but could not grant FSI of 2.5 due to insufficient plot area. On 14th October, 2010, the Intimation Of Disapproval (IOD) was issued by Municipal Corporation to the petitioner on the basis of the actual area of plot admeasuring 663.37 sq. mtrs.

5. It is the case of the petitioner that the petitioner thereafter made various correspondence with MHADA for rectification of the

area with the knowledge and consent of the respondent. It is the case of the petitioner that MHADA thereafter passed a resolution dated 16th October, 2010 and intimated about such resolution to the Municipal Authorities vide a letter dated 23rd August, 2010. The petitioner made an application to MHADA on 6th September, 2012 seeking information about the rectification of the said area of the said plot. MHADA had taken a decision to hand over an area of 272.82 sq. mtrs. from the adjoining plot of building no.13 of the respondent.

6. The respondent society however, vide a notice dated 20th December, 2013 sought to terminate the said Development Agreement entered into between the parties. The petitioner vide its letter dated 14th January, 2014, denied the allegations made by the respondent in the notice dated 20th December, 2013. The respondent thereafter issued a public notice in the two newspapers informing about the termination of the agreement entered into between the parties. The petitioner therefore, filed an Arbitration Petition (301 of 2014) against the respondent in this Court. On 5th March, 2014, this Court granted an *ad-interim* order, restraining the respondent from entering into any fresh Development Agreement with any developer for redevelopment of the said building. On 15th December, 2014, the arbitration petition filed by the petitioner came to be disposed of. This Court appointed a counsel of this Court as the sole arbitrator.

7. The petitioner filed a claim before the learned arbitrator against the respondent *inter-alia* praying for quashing and setting aside the termination notice dated 20th December, 2013, for specific performance of the Development Agreement dated 21st July, 2006 and Supplemental Agreement dated 15th May, 2009 and in the alternate for damages in the sum of Rs.10,00,00,000/- arising out of the termination of the Development Agreement by the respondent. The respondent resisted the said claim by filing the written statement. Learned arbitrator made an award on 21st July, 2006, dismissing the claim filed by the petitioner.

8. Mr.Gavnekar, learned counsel appearing for the petitioner invited my attention to some of the documents annexed to the arbitration petition, a copy of the Development Agreement and the Supplemental Agreement, some of the findings recorded by the learned arbitrator and would submit that the actual area mentioned in the Development Agreement entered into between the parties was 936.19 sq. mtrs. for the purpose of development, whereas upon demolition of the building, it was found that the actual area available for the development to the petitioner was only 663.37 sq. mtrs. and not 936.19 sq. mtrs. He submits that due to several attempts of the petitioner made with MHADA, the MHADA had agreed to hand over the balance area to the petitioner from the adjoining plot and thus the

redevelopment of the property was possible based on the subsequent developments. He submits that the Municipal Corporation of the Greater Bombay had also issued an IOD in favour of the petitioner. The petitioner had also paid the rent to the members of the respondent society till November, 2013.

9. It is submitted that the learned arbitrator has though rendered a finding that during the period between 2006 and 2010, the construction could not be started because of the shortfall in the area and that after 2010, the parties had approached jointly to MHADA for possession of additional area, the learned arbitrator illegally upheld the termination of the agreements. The petitioner was not at all at fault for not starting the process of redevelopment in these circumstances. He submits that the petitioner and the respondent have admittedly entered into the Supplemental Agreement.

10. It is submitted that there was no provision for the termination of the Development Agreement or the Supplemental Agreement in those two documents entered into between the parties and thus on this ground also, the respondent could not have terminated those agreements. He placed reliance on clauses 25 and 42 of the Development Agreement and would submit that under those two provisions, the only remedy, in the event of the petitioner not commencing the redevelopment and not handing over possession of

the flats to the members of the society, was to refer the dispute to arbitration and not by terminating the Development Agreement .

11. It is submitted by the learned counsel for the petitioner that the petitioner could not commence the redevelopment on the plot in question due to various reasons provided in clause 22 of the Development Agreement which were unforeseen circumstances and other genuine reasons such as a rectification in the area to be developed which caused delay in construction of the building by the petitioner which was beyond the control of the petitioner. The petitioner had no knowledge of such shortfall in the area till demolition of the building in question. He submits that the learned arbitrator thus ought to have granted reliefs in favour of the petitioner and against the respondent. He submits that the impugned award thus deserves to be set aside.

12. Mr.Shah, learned senior counsel for the respondent, on the other hand, invited my attention to various correspondence annexed to the arbitration petition, affidavit in reply filed by the respondent before the learned arbitrator, various provisions of the agreements entered into between the parties and also the findings rendered by the learned arbitrator in the impugned award dismissing the claims made by the petitioner.

13. It is submitted by the learned counsel that there are 40

members of the respondent society. The building of the respondent society was in dilapidated condition and thus the petitioner was appointed as a developer for redevelopment of the said building on 21st July, 2006. The said building was demolished some time in the month of September, 2009. Since the date of the demolition of the said building, the members of the respondent have been staying in transit accommodation. It is submitted that in addition to the said agreement for redevelopment dated 21st July, 2006, the respondent had also executed a power of attorney in favour of the petitioner on 21st July, 2006 thereby empowering the petitioner with various powers relating to redevelopment of the plot in question.

14. It is submitted that the MHADA had granted the said plot on lease. Parties had specifically agreed about the area to be provided to the members of the respondent society i.e. of the residence of 32 flats and 8 non-residential premises. The construction of the proposed building was to be completed within 24 calendar months from the date of obtaining commencement certificate from the MCGM. It was the responsibility of the petitioner to obtain requisite permission from MHADA, MCGM and other authorities as constituted power of attorney of the respondent. The petitioner however did not take any steps including obtaining NOC from MHADA for reconstruction of the building till 2009.

15. It is submitted that the petitioner had obtained IOD from Municipal Corporation only on 14th October, 2010. The petitioner was directed to remove various objections to obtain commencement certificate. It is submitted that since the petitioner did not take any steps under the development agreement as well as supplementary agreement, the respondent society vide their letter dated 20th December, 2013 terminated the said agreement. It is submitted that as per guidelines laid down under the Government Resolution dated 3rd September, 2009 after terminating the development agreement which was entered into between the petitioner and the respondent, the respondent society was entitled to appoint new developer.

16. It is submitted that on 7th September, 2006, MHADA had addressed a letter to the petitioner Architect informing about the area of plot as 663.37 sq. mtrs. On 18th October, 2006, the respondent addressed a letter to MHADA pointing out difference in area. He invited my attention to the letter dated 10th March 2007 addressed by the respondent thereby refusing to reduce the flat area from 300 sq. ft. to 250 sq. ft. owing to reduction of land from 936.19 sq. mtrs. to 663.37 sq. mtrs. The petitioner vide letter dated 16th March, 2007 in response to the letter dated 10th March, 2007 informed the respondent that the petitioner could give an area admeasuring 250 sq. ft. only to the members of the respondent for

development of the agreement.

17. The petitioner however entered into individual agreement with the members of the respondent on 15th May, 2009 for area admeasuring 300 sq. ft. with 32 existing members who are confirming parties to the development agreements, flats with wall to wall carpet area of 27.87 sq. mtrs. equivalent to 300 sq. ft. plus additional 4.65 sq. mtrs. (50.00 sq. ft.) which includes niche, flower bed etc. as permitted by the Municipal Corporation and also agreed to provide 6 existing shops admeasuring about 190.00 sq. ft. and 2 existing shops of admeasuring about 182.00 sq. ft. carpet area. On 22nd June, 2009, the MHADA gave NOC for redevelopment for 663.37 sq. mtrs.

18. It is submitted that on 18th May, 2009, in the supplementary agreement executed between the parties, the petitioner had agreed to provide an area of 300 sq. ft. to each of the members of the respondent society. It is submitted that whether the actual area was 663.37 sq. mtrs. or 936.19 sq. mtrs., the petitioner had agreed to provide an area of 300 sq. ft to each of the members of the respondent society. The petitioner was to make an arrangement for additional FSI. The petitioner only knew about area available for redevelopment as 663.37 sq. mtrs.

19. Learned senior counsel invited my attention to various

findings of facts rendered by the learned arbitrator in the impugned award rejecting the claims made by the petitioner. He submits that the findings of facts rendered by the learned arbitrator are rendered after considering the evidence led by both the parties and after interpreting the terms and conditions of the two agreements entered into between the parties. He submits that the petitioner itself had made an averment in the pleadings filed before the learned arbitrator and even in this proceeding that it was unviable for the petitioner to go ahead with the project in view of reduced area of 663.17 sq. mtrs. He submits that this Court cannot interfere with the findings of facts rendered by the learned arbitrator and cannot re-appreciate the evidence in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996. He submits that interpretation of various provisions of these two agreements entered into between the parties by the learned arbitrator is a possible interpretation and the same cannot be substituted by another interpretation by this Court.

20. Mr.Gavnekar, learned counsel for the petitioner in rejoinder submits that the petitioner is even today ready and willing to provide tenements of the same area which was agreed to be provided by the petitioner to the members of the respondent and thus this Court shall interfere with the impugned award rendered by the learned arbitrator.

21. Mr. Shah, learned senior counsel for the respondent, on instructions, states that his client has no faith in the petitioner developer and because of gross breaches and delay, members of the respondent society have been suffering a lot. Since 2009, the members of the respondent society are in transit camp.

REASONS AND CONCLUSIONS :-

22. A perusal of the development agreement dated 21st July, 2006 entered into between the parties indicates that in the recital of the said agreement, it was clearly provided that the respondent was sufficiently entitled to a plot of land admeasuring 936.19 sq. mtrs. or thereabouts, as allotted by the MHADA. Under the said development agreement, the respondent had permitted the petitioner to apply and obtain for FSI/TDR upto 2.0 as maximum approvable built-up area for construction of the new building. The petitioner was under an obligation to obtain all necessary permission, NOC and to get FSI/TDR at its own cost. The petitioner had agreed to provide 32 existing members who were confirming parties to the development agreements, flats with wall to wall carpet area of 27.87 sq. mtrs. equivalent to 300 sq. ft. plus additional 4.65 sq. mtrs. (50.00 sq. ft.) which includes niche, flower bed etc. as permitted by the Municipal Corporation and also agreed to provide 6 existing shops admeasuring about 190.00 sq. ft. and 2 existing shops of

admeasuring about 182.00 sq. ft. carpet area.

23. The petitioner had agreed to provide rent with certain amount to deposit in lieu of temporary transit accommodation. The petitioner was required to complete the entire construction within 24 calender months from the date of obtaining commencement certificate from the Municipal Corporation. The petitioner was granted selling rights of the shops / commercial premises / flats / 50% stilt parking and 50% open parking constructed in the remaining area of the building by utilizing additional FSI / TDR purchased by the petitioner at their own cost and construction carried out in accordance with the plan approved by the Municipal Corporation of Greater Mumbai. The MHADA had granted NOC for demolishing the said building No. 3 on 21st September, 2006. It was noticed by the MHADA in the said letter that upon inspection by the concerned Deputy Engineer, it was found that the said building was in dilapidated condition.

24. A perusal of the provisions of the supplementary agreement dated 15th May, 2009 executed by and between the parties clearly indicates that even in the said agreement which was executed by and between the parties, much after the date of knowledge of the petitioner about reduction of area from 936.19 sq. mtrs. to 663.37 sq. mtrs., the petitioner still continued to agree to

provide flats admeasuring 300 sq. ft. plus permissible elevation area and also 8 shops with wall to wall carpet area of 200 sq. ft. self-contained as required and permitted by MCGM.

25. Insofar as the submission of the learned senior counsel for the petitioner that there was no provision for termination of the agreement and thus the agreement could not have been terminated by the respondent is concerned, in my view, the learned senior counsel for the society is right in his contention that under the Government Resolution referred to aforesaid, the respondent was permitted to appoint another developer after termination of the development agreement. Even if there is no specific provision in the agreement for termination, none of the party is prohibited from terminating the agreement in the event of other party having committed breaches of their obligations under the said agreement.

26. It is not in dispute that by a letter dated 7th September, 2006, MHADA had informed the area of plot as 663.37 sq. mtrs. to the petitioner Architect. The respondent had addressed a letter to the MHADA regarding difference in area as far back as on 18th October, 2006. Correspondence exchanged between the parties clearly indicates that the petitioner had proposed to reduce the area of flat from 300 sq. ft. to 250 sq. ft. owing to reduction of area from 936.19 sq. mtrs. to 663.37 sq. mtrs. The respondent had specifically refused

to accept the lessor area from the petitioner. After entering into such correspondence, admittedly the petitioner had entered into individual agreement with the members of the respondent society and once again agreed to provide flat admeasuring 300 sq. ft. area. Admittedly MHADA had given NOC on 22nd June, 2009 for redevelopment for 663.37 sq. mtr. The petitioner offered the same area of 300 sq. ft. comprising of flats to 32 members of the respondent and the same area in respect of shops that was offered under the development agreement.

27. Though the petitioner had obtained IOD for the rehab building as far back as on 14th October, 2010, the petitioner did not obtain commencement certificate and did not commence redevelopment of the said plot till the date of termination. The petitioner also did not pay any rent to the members of the respondent society since November 2013. In my view, even if there was no provision for termination of agreement either party could still terminate, such agreement in the event of either party committing breach thereof and in accordance with the provisions of law. Admittedly there was no prohibition under the agreement from terminating the development agreement or supplementary agreement.

28. Learned counsel for the petitioner could not dispute that

since the date of demolition of the building which was occupied by the members of the respondent society, the members of the society have been staying in transit camp. Both the parties had approached the MHADA for allotment of additional area. Be that as it may, the provision of the agreement entered into between the parties clearly indicates that though there was reduction in area, the petitioner had still agreed to provide the same area of flat and shop what was agreed by and between the parties in the development agreement by entering into the supplementary agreement.

29. In these circumstances, in my view, the learned arbitrator was right in holding that termination of the agreement by the respondent was valid by rendering various findings of facts. It is held by the learned arbitrator that the petitioner had failed to prove that the development agreement and supplementary agreement were valid and binding. The petitioner also failed to prove that the termination letter dated 20th December, 2013 is not valid and binding on the petitioner. The petitioner had failed to prove that the petitioner was entitled to specific performance of the said development agreement as well as the supplementary agreement. The learned arbitrator held that the petitioner had failed to prove that the delay in executing the agreement was due to circumstances beyond its control. Learned arbitrator rendered a finding that time was an

essence of the agreement. Learned arbitrator accordingly rejected the claims made by the petitioner.

30. A perusal of the award indicates that the learned arbitrator has also rendered a finding that even according to the petitioner, the project was not viable. In paragraphs 8 and 11 of the arbitration petition, it is averred by the petitioner itself that the building of the respondent was in a very dilapidated condition and was not in a condition to repair. Notices were issued by the Municipal Corporation through Fire Brigade to demolish the building. In paragraph 13 of the petition, it is averred by the petitioner that shortfall in plot area made the redevelopment work economically unviable till the said shortfall was made good. It is also admitted by the petitioner that in the supplementary agreement dated 15th May, 2009 entered into between the parties, it was clearly stated that area to be developed was 936.10 sq. mtrs.

31. A perusal of the award indicates that there was no conflict between two agreements. The supplementary agreement proceeds on the basis of entitlement of the parties while individual agreement proceeds on the basis of actual area available. From a joint reading of the two agreements, it appears that the parties had arrived at an understanding that the petitioner would take risk of the shortfall not being allotted and therefore regardless of the said allotment, each

member would get a flat of 300 sq. ft. in the redeveloped building despite the fact that there was a shortfall in the original plot area of 936.19 sq. mtrs. The petitioner, on the other hand, got benefit of additional FSI of 0.5 taking his FSI to 2.5 on the total area. Under the development agreement, the petitioner was only entitled to utilise an FSI upto 2.

32. It is held by the learned arbitrator that the petitioner had received an IOD after duly applying for the same for an area of 663.17 sq. mtrs. and since the petitioner had failed to construct the building as well as allowed the expiry of the IOD, it constitute a terminable breach. Learned arbitrator also referred to the oral evidence of the witnesses examined by the parties. The petitioner had obtained IOD after the disputes between the parties have been sorted out. Under the terms of the agreement, the petitioner remained bound to continue with the redevelopment even if the total area was 663.17 sq. mtrs.

33. In so far as the claim for damages is concerned, it is held by the learned arbitrator that since there was a valid termination of the agreement by the respondent, no damages could be granted to the petitioner. The petitioner did not choose to terminate the agreement or claim damages for shortfall in the area on knowledge of reduction in area but arrived at supplementary and individual

agreements with the members of the society again agreeing to the same area.

34. A perusal of the award clearly indicates that the learned arbitrator had rendered various findings of facts after considering the oral and documentary evidence and has rightly come to the conclusion that the termination of the agreement by the respondent was valid and lawful. The learned arbitrator has also interpreted the provisions of both the agreements in the impugned award which interpretation, in my view, is a possible interpretation and cannot be substituted by another interpretation. The findings of facts being not perverse cannot be interfered with by this Court under section 34 of the Arbitration and Conciliation Act, 1996. In my view, the petition is thus devoid of merit.

35. I therefore pass the following order :-

- i). The arbitration petition is dismissed.
- ii). In view of dismissal of the petition, notice of motion does not survive and is accordingly disposed of.
- iii). *Ad-interim* order passed by this Court, if any, stands vacated.

(R.D. DHANUKA, J.)