

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.1248 OF 2018

Shraddha Shelters Pvt.Ltd.

... Petitioner

Vs.

1.Pandharinath S.Prabhu

2. Purshottam Nagar "A" Co-operative Hsg.Scty Ltd.

3.Bharati Ram Aglave

4. Ram Aglave

... Respondents

Dr.Birendra Saraf and Mr.Mayur Khandeparkar, Ranjeev C., Anubhut Gandhi I/b. Yogesh M.Adhia, for the Petitioner.

Mr.Surya Das with R.R.Sharma, for Respondent No.1.

Mr.Aditya Chitale with Avinash Belge I/b. NMSQ Legal, for Respondent No.2.

CORAM : G.S.KULKARNI, J.

DATED: 5 December 2018

P.C.:-

1. This is a petition under Section 9 of the Arbitration and Conciliation Act,1996 (for short 'the Act'). The petitioner is the owner of the plot of land bearing CTS No.F/1133 to F/1136 admeasuring 4445 square meters situated at Jarimari Mandir Road, Bandra (West), Mumbai. Respondent no.1 is a member of respondent no.2-Society and was occupying the residential premises being Flat No.2B admeasuring 191 sq.ft. (carpet area) on the ground floor of the building known as Purshottam Nagar "A".

2. On 22 April 2013 an agreement was entered between the petitioner and respondent no.1 titled as "Agreement of Permanent

Alternate Accommodation” whereby the petitioner agreed to provide/allot to respondent no.1 Flat No.504 on the 5th floor admeasuring 239 sq.ft. (carpet area) in the new multi storied building constructed on the said property. Thereafter on 1 August 2015, a supplementary agreement for temporary /transit accommodation was entered between the parties wherein the petitioner had agreed that respondent no.1 would be shifted to temporary/transit/alternate accommodation in flat bearing No.203 on the 2nd floor on the site itself.

3. The case of the petitioner is that substantial construction of the building is completed and the petitioner has obtained part occupation certificate in the new multi-storied building on 8 March 2018. Consequent thereto, the petitioner by its letter dated 12 March 2018 informed respondent no.1 of the receipt of the part occupation certificate. Respondent no.1 however through Advocate's letter dated 2 April 2018 addressed to the petitioner alleged defects in the construction of the new premises. According to the petitioner on false and untenable grounds the respondent refused to occupy the permanent alternate premises. The petitioner contends that refusal of the petitioner now to occupy the permanent alternate premises namely flat no.504 is causing serious prejudice to the petitioner inasmuch further work of completion of podium work etc. has been held up. The petitioner says that the petitioner held several meetings with respondent no.1 to convince him that all the other

existing members have moved to their permanent alternate premises and respondent no.1 cannot take a stand that he would not occupy the premises and that too on the grounds which were not correct. The petitioner by its advocate's letter dated 21 August 2018 pointed out that the grievance of respondent no.1 in regard to height is not correct. It was recorded that the height within the flat is as per the Agreement of Permanent Alternate Accommodation dated 22 April 2013 and has floor to floor height at 2.90 meters and in accordance with the sanctioned plan.

4. The case of the petitioner is that respondent no.1 has committed breach of the Permanent Alternate Accommodation Agreement dated 22 April 2013 and the supplementary agreement and is causing hardship and inconvenience to the petitioner and other members of the society by not vacating the temporary accommodation. On the above conspectus, the petitioner has approached this Court by the present petition seeking the following reliefs pending arbitration proceedings:-

“(a) Pending the hearing and final disposal of the present petition, the commencement of and pending the arbitral proceedings and the declaration and execution of the Award that may be passed by the Arbitrators:-

(i) Respondent No.1 and all other persons claiming through him, be by a mandatory order of injunction, ordered and directed to remove himself and all such other persons claiming through him from the temporary alternate accommodation, being Flat No.203 on the second floor in the building known as Tirumala Residences situated at Jari Mari Mandir Marg, Bandra (West), Mumbai 400050, and hand over possession thereof to the Petitioner, within such time as this Hon'ble

Court may deem fit and appropriate; and

(ii) This Hon'ble Court be pleased to also order that in the event of Respondent No.1 failing to hand over possession of the temporary alternate accommodation to the Petitioner within the time this Hon'ble Court may fix, the Court Receiver, High Court, Bombay or any other fit person to stand appointed as the Receiver of the temporary alternate accommodation, with all the powers under order 40 Rule 1 of the Code of Civil Procedure, 1908, including the power to physically remove the Respondent No.1 or all the persons claiming through him from the temporary alternate accommodation and hand over possession thereof to the Petitioner.

(b) Ad-interim reliefs in terms of prayers "A" be granted to the Petitioner;"

5. A reply affidavit has been filed on behalf of respondent no.1.

As can be seen from the reply affidavit, the primary grievance of respondent no.1 is that the petitioners have not complied with the consent terms entered between the parties in S.C.Suit No.3046 of 2003 inasmuch as in paragraph 36 of the consent terms it was agreed between the parties that the petitioner shall construct new building as per the rules and regulations of the municipal corporation and the Development Control Regulations,1991 and shall maintain the floor wise height of 9.6 feet in the proposed new building. It is submitted that the height of the premises being provided by the petitioner to respondent no.1 is not as per the said clause as contained in the consent terms and therefore, the petitioner itself is in breach of the consent terms. There is thus no obligation on respondent no.1 to shift from the temporary premises to permanent alternate accommodation.

6. It needs to be noted that during the course of argument the only contention as urged on behalf of the learned Counsel for respondent no.1 is in regard to the height of flat no.504. There is no dispute on the area of the flat. The learned Counsel for the respondent no.1 has also made a statement that his client is agreeable and willing to walk out of the project if he is monetarily compensated. However, the rate at which the respondent no.1 demanded the compensation, was not agreeable to the petitioner.

7. This petition was heard by this Court earlier on 23 October 2018 when this Court (S.J.Kathawalla, J.) has passed the following order:-

“1. The grievance of the Petitioner in the above Suit is that though the Permanent Alternate Accommodation which is to be provided to Respondent No.1, is ready along with part OC, he has not given up the Temporary Alternate Accommodation and has refused to shift to the Permanent Alternate Accommodation allotted to him. The Temporary Alternate Accommodation, which is occupied by Respondent No.1 forms part of the podium to be constructed for Phase-2. The podium cannot be constructed until the said Temporary Alternate Accommodation is vacated by Respondent no.1.

2. The learned Advocate appearing for Respondent No.1 seeks time upto 25th October,2018 to file the Affidavit in Reply to the above Petition. In view thereof, stand over to 25th October,2018. However, the parties are put to notice that the Court may on the adjourned date proceed to hear the above Petition finally at the ad-interim stage.”

8. Thereafter considering the grievance of respondent no.1 in respect of the height of the said tenement, this Court (S.J.Kathawalla, J.) passed a further order on 25 October 2018 which reads thus:-

“1. Mr.Mayank Rawal, Associate, is appointed as Commissioner to visit the Suit Flat on 27th October,2018 and after measuring the height from flooring to ceiling and flooring upto the main beam, submit his report to

this Court on 30th October,2018.

2. The Petitioner to file its response to the Affidavit in Reply filed by the Respondents on or before 29th October,2018.

3. The parties are put to notice that on the adjourned date, the Court may proceed to hear the petition finally. Stand over to 30th October,2018.”

9. On the above conspectus, I have heard the learned Counsel for the parties, I have perused the record. At the outset it needs to be noted that the area of dispute between the parties is quite narrow. The grievance of respondent no.1 for not vacating the temporary premises and shifting to the permanent alternate accommodation as available, is primarily in regard to the height of the flat. According to respondent no.1 the height of the flat is not as what was agreed between the parties as also it is in breach of the consent terms and not according to the Development Control Regulations. The second grievance is that the petitioners have not provided for Italian marble flooring as agreed between the parties in the agreement.

10. In regard to the second grievance about Italian marble flooring, Dr.Saraf, learned Counsel for the petitioner on instruction of his client makes a statement that the same would be immediately provided. Thus, there cannot be any dispute on this count.

11. As regards the height of the premises, the contention as urged on behalf of the petitioner, that the height is not as per the approved building plan, the applicants contend that the height is in accordance with

the Development Control Regulations. It is stated that the contention of Respondent no.1 that the height is not 8.9 ft., is also now proved to be incorrect in view of the Commissioner's report as placed on record. The learned Counsel for the petitioner would submit that there cannot be any challenge to the approved building plans and the approved height of the flats between the floor to floor, which is completely in consonance with the permissible parameters of the Development Control Regulations. Learned counsel for the applicant submits that if the height was not maintained, the occupation certificate itself would not have been granted. Learned counsel for the applicant has also submitted that all the amenities including installation of an air conditioners, fans etc. would be provided by the petitioner in respect of the said flat being allotted to respondent no.1, and thus respondent no.1 cannot have any grievance in not occupying the permanent alternate premises. The applicants have stated that all the other members have shifted to the respective tenements and that respondent no.1 cannot hold up further development, to be undertaken having financial repercussions by delaying the development.

12. I find much substance in the contention as urged on behalf of the petitioner. Prima facie I do not find that there is bonafide grievance of respondent no.1 in not vacating the premises. A suggestion was also made to the learned Counsel for Respondent no.1 that respondent no.1 can occupy the premises without prejudice to his rights and contentions which

can be adjudicated in the arbitration proceedings. However, the learned Counsel for respondent no.1 on instructions outrightly rejected the said suggestion. In fact, it was quite strange and peculiar to consider the submission as made by the learned counsel for the respondents that respondent no.1 is ready to walk out of the project and surrender his rights to claim Flat no.504 if he is compensated monetarily.

13. In the above circumstances, I am of the clear opinion that the balance of convenience is in favour of the petitioner. At all material point of time, respondent no.1 was aware of the plans as also in regard to the height of the premises when the construction of the building was being undertaken. The grievance is made only after the tenement is fully ready to be occupied and only when the respondent was called upon to occupy the premises by the petitioners. Further, if at all the grievance is genuine, all these issues can surely be resolved in the arbitration proceedings. There is no legitimate justification for respondent no.1 not to vacate the temporary premises and shift to a permanent alternate accommodation and stall the podium and further development work. In the above circumstances interest of justice requires that the following order is passed :

ORDER

(I) Respondent no.1 and all the persons claiming through him are directed to remove themselves from the temporary alternate accommodation being Flat no.203, 2nd Floor, Tirumala Residency,

S.V.Road, Bandra (W), Mumbai-400050, and hand over the possession thereof to the petitioner within a period of ten days from today.

(II) In the event the respondent no.1 fails to vacate and hand over the premises to the petitioner as directed in Clause (I) above, then the Court Receiver, High Court, Bombay shall stand appointed as a receiver of the said temporary alternate accommodation in occupation of the respondent, with all powers under Order 40 Rule 1 of the Code of Civil Procedure including power to physically remove respondent no.1 or any person claiming through him and to take possession of the said temporary premises and hand over the said premises to the petitioner.

(III) In either of the situation at Clause (I) and (II) above, the respondent no.1 shall be permitted to occupy Flat no.504 on the 5th floor of the said building without prejudice to his rights and contentions in any arbitration which respondent no.1 may invoke for adjudication of the dispute between the parties under the agreement in question.

(IV) Needless to observe that in the event if there is any reference of the disputes to be adjudicated by the arbitral tribunal, all rights and contentions of the parties on merits of the matter are expressly kept open.

14. The petition is accordingly disposed of in the above terms. No order as to costs.

(G.S.KULKARNI, J.)