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

ARBITRATION PETITION NO.1084 OF 2016
ALONG WITH
NOTICE OF MOTION NO.61 OF 2017

Saranga Estate Pvt. Ltd.	…	Petitioner/Applicant
Versus		
Paragaon Co-operative Housing Society Ltd.	…	Respondent No.1
Mr. Amarjit Singh Gupta	…	Respondent No.2

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Mr. Ashish Kamat a/w Mr. Kunal Mehta, Ms. Sudeshna Guha and Mr. Pritvish Shetty I/b Vidhii Partners for the Petitioner.
Mr. Kishor M. Jawle for the Respondent.
Mr. Amarjit Singh Gupta, Respondent No.2-Intervenor present in-person.

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CORAM : S.C.GUPTE, J.

DATE : 9 JANUARY 2019

P. C. :

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a Sole Arbitrator in an arbitration reference arising out of a development agreement. The facts of the case may be briefly stated as follows :-

3 By a development agreement dated 16 April 2002, entered into between the Petitioner and Respondent No.1-society, the Petitioner was allowed to construct additional floors on the building of the society by erecting columns around the building, and create third party rights therein. The consideration payable by the Petitioner to Respondent No.1-society

was Rs.200/- per sq.ft. for the right to load and use TDR FSI of about 15480 sq.ft. The consideration was to be paid in the manner stated in clauses (a) to (i) of the development agreement. It is not in dispute that out of these installments, only the first two installments, that is to say, the amount of Rs.1 lac payable on or before the execution of the development agreement and Rs.5 lacs within two months of such execution, were paid. None of the balance installments has been paid by the Petitioner to Respondent No.1. In pursuance of the development agreement, the Petitioner executed individual compensation agreements with nineteen consenting members from out of twenty four existing members of Respondent No.1. Sometime in June-July 2003, the Municipal Corporation of Greater Mumbai ('MCGM') approved the plans for construction of additional floors followed by a commencement certificate ('CC') upto plinth level. Soon thereafter, i.e. on 24 July 2003, at the instance of some of the dissenting members, MCGM issued a stop work notice to the Petitioner. This stop work notice was withdrawn on 17 January 2014. Sometime thereafter, that is, on or about 4 February 2004, the Petitioner and the consenting members of Respondent No.1 entered into a supplemental agreement modifying *inter alia* some of the terms of the original development agreement. Within a few months of this agreement, that is, on or about 6 May 2004, a second stop work notice was issued by MCGM on account of a complaint of dissenting members. Subsequent to this stop work notice, there were negotiations between the parties for an outright purchase of the society's building by the Petitioner. Admittedly, nothing came of these negotiations. On or about 6 October 2015, Respondent No.1, in the premises, terminated the development agreement. It was *inter alia* contended by Respondent No.1 in its termination notice that the

Petitioner had failed to complete the work within twenty four months from the date of the development agreement; that in fact, no work had been carried out by the Petitioner until then and the building was in the same shape and condition as it was at the time of the agreement. It appears that on the same date, i.e. on 6 October 2005, MCGM withdrew its second stop work notice. Further communications ensued between the parties sometime in November and December 2005. Nothing appears to have happened thereafter for a long time till the Petitioner issued its notice invoking arbitration. That was on 31 July 2008. This notice was followed by an application under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") to this court. At the hearing of the application, the parties were referred to arbitration by consent. That is how the sole arbitrator entered upon the reference and adjudicated the disputes between the parties.

4 In his impugned award dated 4 July 2005, the learned arbitrator rejected the Petitioner's claim for specific performance and instead directed Respondent No.1-society to refund the sum of Rs.6 lacs paid by the Petitioner to it. For arriving at this operative award, the learned arbitrator, firstly, held that the Petitioner had failed to prove its readiness and willingness to perform the terms and conditions of the development agreement. The learned arbitrator, secondly, held that the development agreement, by reason of change of law and other circumstances mentioned in the award, had become incapable of performance as of the date of the award and thus, the Petitioner was not entitled, in any event, to specific performance. The learned arbitrator *inter alia* observed that in view of his finding on this particular issue, all other issues had really become academic

and would not have any bearing on the relief claimed by the Petitioner. The learned arbitrator nevertheless proceeded to consider the other issues such as creation of interest, if any, in favour of the Petitioner under the development agreement and justification of Respondent No.1-society in repudiating the development agreement. On both issues, the learned arbitrator held against the Petitioner.

5 Mr. Kamat, learned Counsel for the Petitioner, submits that the conclusions of the arbitrator, both on readiness and willingness of the Petitioner and on justification of Respondent No.1-society in repudiating or terminating the agreement, suffer from breach of public policy. Learned Counsel submits that the conclusions drawn by the arbitrator are not possible conclusions. Learned Counsel submits that the arbitrator had completely disregarded vital pieces of evidence bearing on these two issues. Even on the issue of interest created by the development agreement in favour of the Petitioner, learned Counsel submits that the conclusion was against binding judgments of our court. Learned Counsel draws my attention to the relevant clauses of the development agreement to show that the agreement not only was for a valuable consideration, but even permitted the Petitioner-developer to dispose of FSI allowed to be exploited by it by Respondent No.1. Learned Counsel, in the premises, submits that the development agreement being coupled with interest to be created in immovable property, was indeed capable of specific performance as an agreement for sale of immovable property.

6 Whatever may be his conclusions on the other issues, the learned arbitrator's conclusion that the development agreement had become

incapable of being performed as of the date of the award by reason of change of law and other circumstances mentioned in the award, which clearly goes to the root of the matter and bears crucially on the permissible relief, is beyond reproach under the parameters of Section 34 of the Act.

7 Originally, under the Development Control Regulation ("DCR") for the City of Mumbai, a vertical expansion of an existing building by erection of columns around it was permissible. By an order of the State Government under Section 154 of Maharashtra Regional Town Planning Act, 1966, issued on 21 August 2004, a material change was introduced in the Regulation. It was provided that no vertical expansion of existing buildings by loading TDR or by utilization of balance FSI should be permitted with erection of columns in available marginal open spaces of existing buildings. This order was clarified by a further oder issued by the State Government on 3 November 2004. The clarification provided that where building proposals were received before receipt of directives and processed further for sanction of concessions, which were obtained prior to the date of directives, but no IOD was issued, the directives would not apply to such proposals, if the commissioner had already approved such concessions. Though the concessions were made in the present case before issuance of the aforesaid directives, it is an admitted position that the original IOD and CC issued in the matter had expired on 13 July 2004. The learned arbitrator held that the building proposal, which had admittedly stood expired on 13 July 2004, had not been renewed till date for carrying out any development on the suit property, and therefore, a fresh proposal would have to be submitted as per the provisions of Regulation 5, sub-regulation (6) of DCR. The learned arbitrator took note

of the fact that under the terms of CC, there could be no extension beyond three years and that since the building proposal would now have to be treated as a fresh proposal, liable to be governed under the order of 21 August 2004 of the Government of Maharashtra, no development was permissible in accordance with the terms of the development agreement, that is to say, by constructing additional floors on the existing building by erecting columns in the available open spaces of the subject property. The learned arbitrator construed in this behalf Clause (6) of Regulation 5 of DCR, read with the order dated 21 August 2004 and clarification of 3 November 2004. Clause (6) requires that the CC would remain valid for four years in the aggregate, but would have to be renewed before the expiry of one year from the date of its issue. The arbitrator noted that even if application for renewal were to be made before expiry of one year, such renewal could only be done for three consecutive terms of one year each, after which the proposal would have to be submitted afresh for obtaining development permission. In the circumstances, the learned arbitrator held that the development agreement, by reason of subsequent developments referred to above, had become incapable of performance as on the date of the award and in the premises, all other issues had really become academic and any decision thereon would not have bearing on the relief claimed by the Petitioner.

8 This conclusion of the learned arbitrator clearly takes a pre-eminently possible view of the law as it stood at the relevant time. A commencement certificate issued as far back as in July 2003 could never have been renewed beyond four years in the aggregate, that is to say, after July 2007. After July 2007, the proposal would have to be resubmitted for

obtaining development permission afresh. Nothing is pointed out by learned Counsel for the Petitioner to show how the commencement certificate issued in July 2003 could have been renewed after July 2007. Learned Counsel relies on an alleged revalidation issued by MCGM on 21 March 2009. In the first pace, this letter does not amount to renewal of commencement certificate in itself. What it peculiarly says is that "*plinth CC for the building under reference which expired on 13 June 2004 has been revalidated upto 5 March 2010*", whatever this expression means. It is difficult to fathom its meaning, but it surely does not indicate that the letter itself is revalidation of the commencement certificate, which had expired on 13 June 2004. Besides, the letter is said to have been issued in response to the Petitioner's own letter dated 19 March 2009 (which was after invocation of the arbitration agreement) and "*with a view to certify for any relevant court of law*". The Petitioner's own letter dated 19 March 2009 was not produced before the learned arbitrator. At the earlier hearing of this arbitration petition, my learned predecessor, who heard a companion notice of motion, called for it. Since the letter has now been produced in pursuance of those directions and is relevant, it bears a mention. The letter, in the first place, is not an application for revalidation. (The application is supposed to be by a letter dated 5 March 2009 which forms part of the record of the proceedings before the learned arbitrator.) The letter refers to expiry of plinth CC on 13 June 2004, payment of fees for revalidation of CC on 19 March 2009 (*sic* 5 March 2009), the proceedings filed before this court (purportedly, Section 9 petition by the Petitioner as indicated above) and the date assigned for the hearing of the proceedings, i.e. 23 March 2009. It then refers to purported directions of the court "to produce official intimation that the CC has been revalidated" and the request for issuing "*a letter certifying the revalidation of the plinth CC upto 5 March 2010 as mentioned in the revalidation form attached herewith*". It is obvious, in the premises, that a purported certificate *inter alia* claiming that the plinth CC had been revalidated, is no renewal or revalidation in itself. The learned arbitrator in his impugned award has clearly held that though the Petitioner claimed to have made an application for renewal/revalidation on 5 March 2009, no such renewal/revalidation was placed on record before the arbitral tribunal. Secondly, though the letter of 21 March 2009 was produced along with the affidavit of evidence of the Petitioner, there is nothing to suggest that the letter is a genuine document ensuing from MCGM. What was annexed to the affidavit of Kartik Bhatt, the sole witness of the Petitioner, was a copy of this letter purportedly signed by the Assistant Engineer, Building Proposals. It is common knowledge that no decision on revalidation/renewal of a commencement certificate is taken by MCGM by issuing a one line letter such as this. For revalidation/renewal of commencement certificate, the endorsements need to be made on the development plans. In the premises, it is apparent that there was no proven case of renewal/revalidation of CC before the arbitrator; the regulations, i.e. DCR, made it clear that no CC could be renewed beyond the period of four years from the date of its issue and thus, any proposal forming part of such originally issued CC would be treated as a fresh proposal for obtaining development permission after four years. As noted above, and it is not in dispute, that after 21 August 2004 DCR does not permit construction of additional floors on an exiting building by raising of columns in available marginal open spaces. That effectively concludes the controversy between the parties. The arbitrator's conclusion that the original development agreement has been rendered incapable of performance as of the date of the award is, thus, beyond reproach; it is not amenable to any challenge within the permissible grounds of objection under Section 34 of the Act.

9 Even on the question of readiness and willingness of the Petitioner to perform its part of the development agreement, the arbitrator has reached a conclusion, which can be termed as a pre-eminently possible view. Learned Counsel for the Petitioner, in his challenge to this part of the award, relies heavily on the supplemental agreement entered into between the Petitioner and consenting members of Respondent No.1 on 4 February 2004. Learned Counsel submits that this agreement has a crucial bearing on the performance required by the Petitioner, and the arbitrator, having completely disregarded this agreement, can be said to have arrived at a perverse conclusion. The learned arbitrator has not disregarded the agreement of 4 February 2004, but appears to have treated this agreement as a mere modification of the schedule of payment so as to provide additional time to the Petitioner for making payment of balance installments. The commitment of the Petitioner to complete the additional construction and its disentitlement to rely on any obstruction caused by dissenting members for avoiding such commitment, were left intact by this agreement, though the timeline for such construction was made effective from 1 February 2004 instead of the date of approval of column position. There is no case that the Petitioner carried on any construction, much less completed it, even with reference to this altered date of 1 February 2004. Learned Counsel for the Petitioner submits that the Petitioner had in fact carried out some construction after spending over a crore of rupees for the same. The learned arbitrator has applied his mind even to this aspect of the

matter. In paragraphs 25-26 of the impugned award, the learned arbitrator has held that it was clear from the documentary and oral evidence produced by the claimant itself that no construction/development work had taken place in accordance with the terms of the development agreement till the date of its termination. The learned arbitrator's conclusion in this behalf is also a possible conclusion. Afterall, almost immediately after, that is, within a few days of, issue of plinth CC, MCGM had issued a stop work notice. This stop work notice, issued on 24 July 2003, admittedly subsisted upto 17 January 2004. Thereafter the parties are claimed to have entered into the supplemental agreement of 4 February 2004 and within about three months of this agreement, another stop work notice was issued by MCGM (stop work notice of 6 May 2004). It is not in dispute that this stop work notice subsisted right upto the date of termination of the development agreement. In other words, save and except the period of ten days immediately following issuance of the plinth CC and the intervening period between 17 January 2004 and 6 May 2004, there was a complete embargo on the construction throughout. If that is so, then, in the light of fact that no oral or documentary evidence was in fact tendered before the learned arbitrator of actual construction carried out by the Petitioner, the arbitrator's conclusion that there was in fact no construction carried out could very well be seen as a possible conclusion. No vital or important piece of evidence, germane to the controversy, appears to have been disregarded by the learned arbitrator and no irrelevant or non-germane material appears to have been considered by him to arrive at his conclusion. In other words, within the parameters of Section 34 of the Act no fault can be found with such conclusion.

10 It is not necessary, in the light of the foregoing discussion, to consider the other issues decided by the learned arbitrator. The learned arbitrator himself was of the view that these issues were really academic and any decision on them would have no bearing on the relief claimed by the Petitioner. That is quite correct. The issue of impossibility of performance goes to the root of the matter and really clinches the controversy.

11 In the premises, there is no merit in the arbitration petition. The petition is dismissed. There shall, however, be no order as to costs.

12 In view of dismissal of the petition, the Notice of Motion does not survive and the same is also disposed of.

(S.C. GUPTE, J.)