

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION (L) NO.386 OF 2019**

Maitri Vijay Co-operative Housing Society Ltd. ... Petitioner
versus
Mishal Constructions Pvt. Ltd. ... Respondent

**WITH
CONTEMPT PETITION (L) NO.8 OF 2019
IN
COMM. ARBITRATION PETITION NO.161 OF 2016**

Mr. Zubin Behramkamdin with Mr. Pramod Bhosale I/by Mr. Sharad Bhosale, for Petitioner.
Mr. Arif Bookwala, Senior Advocate with Mr. Piyush Raheja, Mr. Krishna Borkute, Mr. Ginni Ahuja I/by Markand Gandhi and Co., for Respondent.
Mr. R.Y.Sirsikar, for MCGM.
Mr. Patil, EEBP, present.

CORAM: S.J. KATHAWALLA, J.

DATE: 16th APRIL, 2019

P.C.:

1. Being aggrieved by the Order dated 27th July, 2018 passed by the learned Arbitrator in the Application filed by the Petitioner - Maitri Vijay Co-operative Housing Society Ltd. under Section 17 of the Arbitration and Conciliation Act, 1996, seeking ad-interim/interim reliefs, the Petitioner Society has filed the above Arbitration Petition (L) No.386 of 2019 seeking reliefs as prayed therein.
2. The facts in brief as narrated by the Petitioner Society are as follows :
 - (i) In 2008, the Petitioner Society comprising of 39 members decided to go into

redevelopment of its property bearing Survey No.5 Hissa No.2(part), 3 (part), 4 (part) CTS No.109, 109/1 to 120 and in all admeasuring about 3044 sq. yards equivalent to 2545.179 sq. mtrs., situated at Wadavli Village, Dr. Choitram Gidwani Road, Chembur (the Suit Property).

(ii) Accordingly on 17th January, 2009, a Development Agreement was executed between the Petitioner Society and the Respondent on the terms and conditions set out therein.

(iii) An intimation of Disapproval (IOD) was granted to the Respondent on 4th May, 2009. The commencement certificate was granted on 6th October, 2010.

(iv) The plans put up for sanction were according to the Society, not in consonance with the area promised to the respective members of the Society.

(v) Though the developer had promised to handover the newly constructed flats of larger areas to the members of the society within a period of 25 months from 17th January, 2007 (which included the grace period), the developer has even after a decade i.e. even after 10 years, failed to provide a roof over the heads of the 39 members of the society and their family members, as promised.

(vi) The Society filed Commercial Arbitration Petition No.161 of 2016 seeking various ad-interim/interim reliefs. On 27th October, 2016 an ad-interim order was passed by which Mr.Amol Shetgiri, Architect was appointed to forthwith verify the actual situation at the suit site and to submit his report to this Court.

(vii) On 25th November, 2016 this Court directed the Executive Engineer of the Municipal Corporation to visit the premises of the Society and to remain present in Court on 29th November, 2016.

(viii) On 29th November, 2016, Architect Mr. Shetgiri made a statement before the Court that the construction was not in accordance with the plans. The Executive Engineer also filed an Affidavit setting out how the provisions of law were violated.

(ix) The Corporation thereafter, issued a stop work notice dated 8th December, 2016.

(x) Since thereafter at the ad-interim stage, the Advocate appearing for the Respondent stated that in view of the stop work notice, no work will be carried out at the Suit site, and status quo will be maintained in respect of the suit premises agreed to be sold to the flat purchasers, as well as premises to be allotted to the original members of the Society, no further ad-interim order was passed and the Arbitration Petition was directed to be placed for final hearing.

(xi) On 5th April, 2017, the Advocate for the developer reiterated the statement made before this Court at the ad-interim stage. In view thereof, the Arbitration Petition was disposed of by an order dated 5th April, 2017.

(xii) Sometime in June, 2017, the Society became aware of an Agreement dated 7th April, 2017 registered under Serial No.KRL-1/3227 of 2017 wherein the Respondent No.1 developer had sold the premises in the suit site to one Mrs. Asha

Siddharth Donde for consideration of Rs.1,30,00,000/-. According to the Petitioner, under this agreement, the Director of the Respondent sold portion of the suit premises to be allotted to the members of the Society in breach of the statement recorded in the orders dated 21st December, 2016 and 5th April, 2017.

(xiii) The Society also became aware of another Agreement dated 18th April, 2017 registered under Serial No.KRL-3/2993 of 2017 wherein the Director of the Respondent Developer sold one of the premises to another director of the Company in his individual capacity.

(xiv) The Petitioner Society held a Special General Body Meeting on 18th May, 2017 and terminated the agreements as well as appointment of the Respondent No.1 Developer.

(xv) Since the Society thereafter also learnt that the Directors of the Respondent No.1 developer had given possession of certain premises in the suit property, despite construction not being completed and have also entered into various agreements in breach of the orders dated 21st December, 2016 and 5th April, 2017, the Society issued a legal notice dated 9th December, 2017 to the Directors of the Respondent No.1 interalia pointing out the breaches.

(xvi) The Directors of the Respondent failed to reply to the said notice, but instead addressed a letter dated 12th December, 2017 to the members of the Petitioner Society and forwarded draft Consent Minutes.

(xvii) On 20th December, 2017 this Court issued a Show Cause Notice to Respondent Nos.2 and 3 as to why contempt proceedings should not be initiated against them. On 21st January, 2018 certain corrections were carried out by the Court.

(xviii) Since the learned Arbitrator recused himself, the Petitioner filed Arbitration Petition (L) No.722 of 2018 and this Court by an order dated 4th July, 2018 appointed another Arbitrator. The learned Arbitrator passed an order dated 27th July, 2018, the operative portion of which is reproduced hereunder :

“a) Pending the final disposal of the present proceedings, the Respondent developer, its servants, agents and assigns are restrained by a temporary injunction from in any manner proceeding further in accordance with the Development Agreement dated 17th January, 2009 and any power of attorneys and are further restrained from creating any further third party rights of any nature whatsoever in respect of new building that is sought to be constructed on the subject property.

b) Pending the final disposal of the present proceedings, the Claimant society is restrained from entering into/executing and registering a new Development Agreement with any new Developer. However, this does not preclude the Claimant Society in taking such steps and assisting the new Developer in making appropriate plans/drawings and holding further discussions/negotiations.

c) A copy of this order shall be placed by the Claimant Society before the new Developer if it so chooses to engage with one.

d) The physical status quo on the subject property shall not be altered by any party.

e) The Respondent developer shall offer subsequent rents/compensation in lieu of alternate accommodation to the claimant Society at the agreed rate in the same manner that it has been so offered and accepted till March, 2018. The Claimant Society shall be at liberty to accept the same from the Respondent Developer without prejudice to its rights and contentions which are hereby expressly kept open. It is made clear that acceptance of the rent by the members of the Claimant Society shall not be construed as a waiver of any of its rights and contentions.

f) Having regard to the present circumstances, the costs towards this Application shall be the costs in the cause.”

(xix) The Respondent developer has admittedly failed to comply with the directions of the learned Arbitrator by not paying compensation to the Petitioner since March, 2018. The learned Arbitrator by his emails dated 24th and 26th September, 2018 directed the Respondent to comply with the directions contained in his order dated 27th July, 2018. However, the Respondent failed to to comply with the same.

(xx) Since the Respondent failed to comply with the order dated 27th July, 2018, the Petitioner filed Arbitration Application No.9 of 2018 dated 3rd September, 2018 before the learned Arbitrator seeking modification of the Order and to permit the Society to appoint a new Developer. Since the learned Arbitrator was of the opinion that he does not have the power to modify its own order, the Petitioner Society

withdrew an Application filed before the learned Arbitrator and filed a Contempt Petition (L) No.8 of 2019 before this Court and has now filed an Appeal impugning the order passed by the learned Arbitrator dated 27th July, 2018.

3. It is submitted on behalf of the Petitioner that despite several breaches committed by the Respondent Developer – Mishal Constructions Pvt. Ltd. and despite the members of the Petitioner Society being deprived of their roof since the last ten years, which compelled the Petitioner Society to terminate the Development Agreement on 4th May, 2019, the learned Arbitrator has not permitted the Society to appoint a new developer and to proceed with the development work, but has instead directed the developer to continue making payment of the monthly compensation in lieu of alternate temporary accommodation to the society/members at the agreed rate that was offered and accepted till March, 2018, which too the Developer has failed to pay.

4. It is further submitted on behalf of the Petitioner that since the Developer has carried out construction in violation of the provisions of law and deprived them of the roof over their heads since a decade, they have completely lost trust and faith in the Developer and the learned Arbitrator ought to have allowed the Petitioner Society to complete the development work through a new Developer whom they can trust and obtain possession of their flats.

5. It is also submitted on behalf of the Petitioner Society that the Society

comprising of 39 members and their families are not allowed to appoint a new developer and to get the work completed, only because the Developer has filed a Counter Claim seeking specific performance of the agreement, which the Society has already terminated. It is submitted that the developer who has promised to pay compensation in lieu of temporary alternate accommodation under the development agreement to the Society / its members and has admittedly failed to make payments even after the learned Arbitrator directed them to do so, can certainly not claim specific performance of the Development Agreement.

6. It is therefore submitted on behalf of the Petitioner Society that they be permitted to complete the development work through a new developer and obtain possession of their flats.

7. The learned Senior Advocate appearing for the Developer has admitted that the Developer has not made payments towards compensation to the Petitioner Society / its members since last several months despite specific directions given by the Arbitrator in this regard. Even at this point of time, the developer is not in a position to forthwith pay the entire arrears of compensation aggregating to approximately Rupees two crores to the members of the Petitioner Society. Instead, the learned Senior Advocate for the developer has on instructions made some without prejudice offer to the Society to make payments in installments, which the Society has not accepted on the ground that they have completely lost trust and faith in the

Respondent Developer. According to the members of the Petitioner Society, they have waited for 10 years to get the roof over their heads, but are now unable to wait any further. They have also submitted that in view of the defaults committed by the developer in complying with the direction of the Arbitrator to pay to them the monthly compensation towards alternate temporary accommodation, they do not have the necessary funds to pay towards monthly compensation required to be paid by them to the licensors/landlords in whose premises they are currently residing and they are likely to even loose the temporary / alternate roof over their heads.

8. I have considered the submissions advanced on behalf of the Petitioner as well as Respondent. Admittedly, the Respondent developer had promised to handover the new flats of larger areas to the members of the Petitioner Society within a period of 25 months (including the grace period) from the date of the Development Agreement dated 17th January, 2009. However, the Respondent has failed to do so even after ten years. Instead as confirmed by the Corporation, the developer has carried out construction in violation of the sanctioned plans. Since the developer has also filed Counter Claim seeking specific performance of the Development Agreement, which is admittedly terminated by the Petitioner on 4th May, 2017, the learned Arbitrator has not allowed the members of the Society to appoint a new developer and complete the development work, but has directed the developer to continue paying the monthly compensation to the 39 members of the Petitioner Society from March, 2018. The

developer has admittedly breached the order of the learned Arbitrator by not paying the monthly compensation since the last several months (aggregating to approximately Rupees two crores) towards temporary alternate accommodation because of which the members and their families are put to risk of even losing the temporary roofs over their heads. The developer is even today not in a position to comply with the direction / order of the learned Arbitrator in its entirety. Instead, only because of the members have moved this Court, the developer has now made some without prejudice offer i.e. to make part payments, which the members of the Society who have completely lost trust and faith in the developer have rejected. Under such circumstances, the members certainly have a right to move the learned Arbitrator seeking appropriate ad-interim/interim reliefs against the developer under changed circumstances. The learned Arbitrator would certainly have a right to hear such Application and pass ad-interim/interim orders including orders which were earlier not granted/passed in favour of the members of the Society. Mr. Bookwala, Senior Advocate, appearing for the developer states that if such an Application is made, the Respondent shall not oppose the same on the ground that such an Application is not maintainable before the learned Arbitrator. In the circumstances, the following order is passed :

- (i) The Petitioner Society is granted liberty to apply to the Arbitrator seeking ad-interim/interim reliefs under changed circumstances i.e. breach on the part of the developer to pay monthly compensation in lieu of temporary alternate accommodation

to the members of the Society despite the directions of the Arbitrator contained in his order dated 27th July, 2018.

- (ii) All contentions of the parties are kept open.
- (iii) The learned Arbitrator shall if necessary hear the Application on day to day basis and pass his orders on or before 9th May, 2019.
- (iv) The above Commercial Arbitration Petition (L) No. 386 of 2019 is accordingly disposed of. The above Contempt Petition (L) No. 8 of 2019 is also disposed off.

Liberty to apply.

(S.J.KATHAWALLA, J.)