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

COMMERCIAL ARBITRATION PETITION NO.643 OF 2018

M/s Chetna Enterprises ... Petitioner.

V/s.

RBI Employees Bhagvati
Co-operative Housing Society
Ltd and ors

... Respondents

- Mr. Piyush M.Shah a/w Mr. Dishang shah, Ms. Meetal savla, Mr.Amir Attari, Mr. Deep M. for the Petitioner.
- Mr. A. M. Khandekar, for respondent No.1.
- Ms. Shweta Singh, for respondent Nos. 2 to 6.

CORAM : G. S. KULKARNI, J.

DATE : 6th MARCH, 2019.

P.C. :

1] Heard Mr. Piyush Shah, learned counsel for the petitioner, Mr. Khandekar, learned counsel for respondent No.1 society and Ms. Shweta Singh, learned counsel for respondent Nos. 2 and 6. Respondent Nos. 3, 4, 5 and 7 though duly served are not appearing and have chosen not to contest this petition.

2] This petition is filed under Section 9 of the Arbitration and Conciliation Act 1996 (for short “ACA”), whereby the petitioners pray for interim reliefs pending the arbitral proceedings. The interim reliefs

so prayed are as follows :-

“a. This Hon'ble Court be pleased to appoint the receiver High Court Bombay or any other just and proper person be appointed receiver with respect to flats occupied by the respondent nos. 2 to 7 as mentioned in the cause title with further directions.

b. To take vacant and peaceful possession of the said flats from respondent Nos. 2 to 7 herein.

c. In case of obstruction by the respondent Ns. 2 to 7, with police assistance.

d. Hand over possession of the said six flats to the petitioner to enable the petitioner to demolish the same and proceed with the redevelopment work.”

3] The case of the petitioner is that respondent No.1 society after following appropriate procedure and taking consent of its members has entered into a development agreement dated 9th November, 2010 with the petitioner. Thereafter a supplementary agreement dated 03.09.2017 came to be entered with petitioner, under which the petitioner was required to undertake redevelopment work of the three wings of the building. The case of the petitioner is that there are 45 members. Out of which 39 members have already entered into an agreement for permanent alternate accommodation and these agreements are registered. It is the case of the petitioner that 28 members have already vacated, however, respondent Nos. 2 to 7

are not ready to vacate. Learned counsel for the petitioner has drawn my attention to the declaration-cum-undertaking (Exhibit “C” 118 colly” page No.118 of the paper book), as executed by respondent Nos. 2 and 6 whereby they have unconditionally agreed for appointment of the petitioner as the developer. The case of the petitioner is that respondent Nos. 2 to 7 are not vacating the premises and are not coming forward to enter into an agreement for permanent alternate accommodation. Learned counsel for petitioners also contends that respondent Nos. 2 and 6 in fact approached the City Civil Court, Mumbai by filing Civil suit No.2349 of 2017, seeking a relief of an injunction against the respondent No.1 society as also the petitioner, to restrain them from taking an eviction action and dispossession of these respondents. However, no interim relief could be obtained by respondent Nos.2 and 6 in the said proceeding. It is stated that the said suit is still pending. The case of the petitioner is that the respondent Nos. 2 to 7 are creating hurdles and obstacles in the redevelopment of the premises of respondent No.1.

4] Respondent No.1 has appeared and has filed a reply affidavit. Learned counsel for the respondent society would support the contentions as urged on behalf of the petitioner. It is submitted

that the building is in a dangerous condition and the respondent No.1 society having entered into development agreement with the petitioner, there is necessity of urgent redevelopment of the said premises and more particularly in view of the fact that about 28 members have already vacated and 39 members have already entered into agreement of permanent alternate accommodation being a tripartite agreement between the members, the petitioner and respondent No.1 society. It is submitted that respondent Nos. 2 and 6 cannot contend that they are opposing redevelopment inasmuch these respondents have given an irrevocable consent for appointment of the petitioner as developer. It is submitted that, in any case, respondent Nos 2 and 6 cannot take a decision which is against the majority decision taken by the members of the society. It is submitted that the reliefs which are sought by the petitioner in fact ought to be granted which would be also in the interest of the majority members of the respondent No.1 society.

5] Learned counsel for respondent Nos. 2 and 6 has opposed this petition. The first contention as urged on behalf of respondent Nos. 2 and 6 is that the development agreement as entered by the society with the petitioner itself is illegal. The second contention is that

even assuming the development agreement was rightly entered as per mandate of the majority of the members, however, the petitioner developer is in breach of clause No.12 of the development agreement dated 9.11.2010 under which the petitioner had agreed for obtaining commencement certificate within six months from the execution of the Development Agreement and the General Power of attorney although it was subject to fulfillment of the compliances and requirements, that may be required by the Municipal Corporation of Greater Mumbai as per its D.C. Regulations, and the society and the said existing members extending co-operation and assistance for the same from time to time. Learned counsel for respondent Nos. 2 and 6 has also drawn my attention, to the letters dated 25.11.2011 and 9.3.2012 (page Nos. 272 and 270 of the paper book); whereby the Municipal corporation recorded that there are certain compliances which are informed to the Architect Shri. Mukesh Shah. The contention is that this shows that there was breach on the part of the petitioner in complying with the terms and conditions of the development agreement. It is submitted that, therefore, the project was delayed and the petitioner is not entitled to undertake the redevelopment. Learned counsel for respondent Nos. 2 and 6 has also pointed out that her clients have also approached to the Co-operative court, by filing a suit against society

seeking declaration that the resolution of the society as passed in 2008 to appoint the petitioner as developer, itself is bad in law and illegal. It is next contended that the present petition filed under section 9 of ACA is not maintainable against respondent Nos. 2 and 6 inasmuch as respondent Nos. 2 and 6 are not party to the agreement as entered into between the petitioner and the respondent No.1 society. It is next contended that there is new structural report (though not produced on record), stating that the building is in a repairable condition and hence, redevelopment is not required.

6] Having heard learned counsel for the parties and on perusal of the relevant documents placed on record, at the outset it needs to be observed that there is no dispute on the issue that the building of the respondent No.1 society has become old and thus, the society had taken a conscious and consensual decision way back in the year 2008, to undertake redevelopment of building by appointing developer. It is also not in dispute that the resolution was passed by majority of the members to appoint the petitioner as developer. In fact respondent Nos.2 and 6, who are now opposing the redevelopment accepted and agreed for appointing the petitioner as developer. The fact that the building is in dilapidated condition was also noticed by

this Court (S. J. Kathawala, J.), as observed in the order dated 12th April, 2018; in which the report of Mr. R. C. Tipnis, Chartered Engineer was referred and reproduced. The order dated 12th April, 2018 as passed by this Court reads thus :-

"The Society building has three wings i.e. A, B and C, which were constructed in the year 1984 (the suit building). A development agreement was executed on 09-11-2010 between the Society and the Petitioner developer. Mr. R.C. Tipnis, Chartered Engineer has inspected the suit building and has submitted a report qua the condition of the same, which is reproduced hereunder:-

"The Building consists of three wings namely A, B and C. Wing a and B are having ground and four upper floors and Wing C is having ground and three upper floors. The building was constructed somewhere in 984-85. I have inspected entire building to study present condition of RCC members and over all condition of the building. Concrete of most of the columns has deteriorated, concrete has cracked and reinforcement is exposed and corroded. Especially concrete of peripheral columns is in bad condition, columns have developed extensive cracks. Concrete of beams has deteriorated, cracks have developed. Concrete of slab Chajjas have deflected, concrete has cracked and reinforcement is corroded. Heavy monsoon leakage are noticed through roof slab, resulting in further damage to concrete and reinforcement.

External plaster has developed cracks, leading to monsoon leakages. In my opinion, structural members especially columns, are not in good condition. I strongly recommend reconstruction of building".

2. The Corporation has on 18-01-2018 written a letter to the Architect stating that though the Corporation has approved the amended plan on 03-06-2017, the developer has not obtained CC for the same, as the building is in very dilapidated condition, the developer is called upon to obtain CC. The Corporation has also recorded that if any mishap takes place,

the Corporation will not be held responsible for the same.

3. The Society has 45 members. The entire development process is stalled only because six members of the society re not co-operating with the majority members. Inview thereof, six non co-operating members i.e. respondent Nos. 2 to 7.

4. The non cooperative members are until further orders directed to maintain status quo as of today in respect of their respective tenements/flats. They are alo directed to file their affidavits on or before 16th April 2018.

4. Place the above petition for hearing and final disposal on 19th April 2018, when all the six non co-operating members i.e. Respondent Nos. 2 to 7 are directed to remain present before this Court. Office shall forthwith serve a copy of this order on Respondent Nos. 3 to 7 and inform them that if they fail to appear before this Court by themselves and/or through an Advocate on 19th April, 2018, the Court shall proceed to hear the above Petition and proceed to pass necessary orders.

5. In the proceedings, the name of Respondent No.6 be read as Mr. S. B. Huli instead of Mr. H. B. Huli. Necessary amendments shall be forthwith carried out by the advocate for the petitioner".

7] As can be clearly seen from the record and the arguments as made on behalf of respondent No.1 society, all the members of the society had agreed for redevelopment of the buildings and a resolution to that effect was passed by the society and by its majority members in the year 2008. Thereafter an agreement dated 9.11.2010 was entered between petitioner and respondent society for redevelopment of the society's building. Further in view of change in the circumstances, a

supplementary agreement dated 3.9.2017 was entered into between the petitioner and the society, which was acted upon. In pursuance thereof, the petitioner had taken further steps and on 28th October, 2016, an I.O.D. was also granted in favour of the petitioner to undertake redevelopment work. The Court also cannot be oblivious of the fact that out of 45 members, 39 members which itself constitute majority members of the respondent No.1 society, have entered into agreement for permanent alternate accommodation and further in pursuance thereto, 28 members have already vacated the premises. It is only respondent Nos. 2 to 7 who are not vacating and creating obstacles in the further development of the building causing prejudice to the majority members. This petition was filed on 4.4.2018 and pending since then, the work of redevelopment is already delayed on account of the adamant approach as adopted by respondent Nos. 2 and 6 and other respondents who are members of the society.

8] It is also a fact that respondent Nos. 2 and 6 had also approached the City Civil Court by filing suit against respondent No.1 society and the petitioner, seeking an injunction that their possession should not be disturbed by the petitioner or by respondent No.1 society. However, respondent Nos. 2 & 6, could not succeed in getting

any relief of a temporary injunction. This being the position, respondent Nos. 2 and 6 have now approached the Co-operative Court for declaration that the resolution passed by respondent No.1 society in the year 2008 is illegal and those proceedings are stated to be pending. There are no interim orders obtained by respondent Nos. 2 & 6 in the said proceedings.

9] As regards to contention as urged on behalf of respondent Nos. 2 and 6, that there is no arbitration agreement, between respondent Nos. 2 and 6 with the petitioner and therefore, this petition is not maintainable. This submission cannot be accepted.

10] This Court (R.D. Dhanuka, J.) in case of **Calvin Properties and Housing -vs- Green Fields Co-operative Housing and ors¹** in paragraph Nos.26, 27 and 28 has observed that :-

"26. The next objection raised by the respondents is that respondent Nos. 2 to 6C are not party to the development agreement which contains arbitration clause and thus no reliefs under Section 9 which is in aid of final relief can be granted against those respondents. In support of this submission, the respondents have placed reliance on the Judgment of Supreme Court in case of Indowind Energy Vs. Wescare (I) Ltd. (2010) 5 SCC 306. Supreme Court has held that an arbitration agreement can come into existence only in the manner contemplated under Section 7. It is not in dispute that individual

1 2004 (2) Bom C.R. 398

members of the society have not signed the said development agreement. Question however that arises for consideration of this Court is whether any interim measure can be granted by this Court against respondent Nos. 2 to 6C though they were not the signatories to the development agreement between petitioner and respondent No. 1 society.

27. Division Bench of this Court in case of Girish Mulchand Mehta (supra) has considered this issue in detail. Division Bench has held that Section 9 can be invoked even against a third party who is not a party to arbitration agreement or arbitration proceedings, if he was to be a person claiming under a party to the agreement and accordingly to be affected by interim measure. Such party who is likely to be affected by interim measure will have to substantiate that he was claiming independent right in respect of any portion of the subject matter of the arbitration agreement on his own and not claiming under a party to the arbitration agreement. This Court has held that in absence of such situation, Court has jurisdiction to pass appropriate order by way of interim measure even against such party irrespective of the fact that they are not party to arbitration agreement or the arbitration proceedings. This Court has also considered Rule 803E of the Bombay High Court (Original Side) Rules, which provides that notice of filing application has to be issued to all persons likely to be affected. Paragraphs 12 to 14 and 16 of the Judgment of division bench on this issue would be relevant which read thus:

12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under Section 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

13. The Appellants, however, place reliance on the decision of the Kerala High Court in the case of Shoney Sanil v. Coastal Foundations (P) Ltd. and Ors. reported in AIR 2006 Ker. (206). In that case the question considered was whether the writ-petitioner, admittedly, a third party to an alleged Arbitral Agreement between the

Respondents inter se, and who had in his favour a confirmed Court sale and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, enjoined or subjected to other Court proceedings under Section 9 of the Act? The Kerala High Court held that orders under Section 9(ii) (c) can be passed only in relation to subject matter of dispute in arbitration which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third party rights. It concluded that on a plain reading of Section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party holding possession on the basis of Court sale could be interfered with, enjoined or subjected to proceedings under Section 9 of the Act. Instead, it held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject matter of the Arbitration Agreement, Section 9 cannot be invoked to affect his rights. At the same time, the Kerala High Court has plainly opined that it is possible to pass orders under Section 9 against a third party if such person is claiming under the party to the Arbitration Agreement. Thus understood, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The Appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 Society who is party to the Arbitration Agreement. In absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the Appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings.

27. On perusal of the prayers in the arbitration petition, it is clear that petitioner seeks appointment of Court Receiver and mandatory injunction against respondent Nos. 2 to 6C in respect of the premises in their occupation. It is thus clear beyond reasonable doubt that any order if passed in this petition as prayed, respondent Nos. 2 to 6C would be affected. Such parties are thus rightly impleaded as parties to the present petition and are given an opportunity of being heard and to oppose this petition. Without going into the larger issue whether respondent Nos. 2 to 6C are party to the arbitration agreement or not, not being signatories to the development

agreement, in view of the fact that each of these respondents are claiming through respondent No. 1 society in respect of the properties of the society in which these members have subservient rights and in view of the fact that any orders that would be passed in these proceedings would seriously affect the rights of the respondent Nos. 2 to 6C, such interim measure can be granted by this Court under Section 9 of Arbitration Act against such parties even if they are not parties to the arbitration agreement. In my view there is no merit in the submission made by the learned counsel appearing for respondent Nos. 2 to 5 and reliance placed by the learned counsel appearing for the respondents on the Judgment of Supreme Court in case of Indowind Energy (supra) would be thus of no assistance to the respondents".
(emphasis supplied)

11] Having considered the above clear factual and legal position, I am of the opinion the petitioner has become entitled to interim reliefs pending arbitral proceedings. Respondent Nos. 2 to 7 are required to be restrained from obstructing the redevelopment work and directed to vacate their respective premises and hand over the same to the petitioner for the purpose of redevelopment. The balance of convenience is in favour of petitioner as also in the interest of society and its members. Accordingly the following order :-

Order

- i) Respondent Nos. 2 to 7 are directed to hand over the possession of their respective premises to the petitioner within a period of four weeks from today.
- ii) On failure of respondent Nos. 2 to 7 to hand over the possession of their respective premises as directed in (i) above, the Court Receiver, High Court, Bombay is

appointed as Receiver with all powers under Order XL Rule (1) of the Code of Civil Procedure, to take physical possession of the tenements/premises from respondent Nos. 2 to 7 and hand over the same to the petitioner. If necessary the Court Receiver is permitted to take help of police from the local police station.

iii) It would open to respondent Nos. 2 to 7 to enter into agreements for permanent alternate accommodation as per their respective entitlement under the provisions as made in the declaration-cum undertaking as given by them dated 20.02.2010.

iv) The petitioner is directed to deposit, in this Court the appropriate amounts as are required to be disbursed to respondent Nos 2 to 7 as on the development agreement as being given to the other members, within four weeks. Respondent Nos. 2 to 7 are permitted to withdraw these amounts.

v) On completion of the redevelopment, in case the possession of the pre-redevelopment flats/tenements, were handed over to the petitioner by respondent Nos. 2 to 7, in that event the petitioner shall hand over the same to respondent Nos. 2 to 7. If the possession of the said flat/tenements, was handed over to the petitioner by the Court Receiver, in that event petitioner shall hand over the possession of newly constructed/redeveloped

premises as per entitlement of respondent Nos. 2 to 7 to the Court Receiver. The Court Receiver would be at liberty to offer the possession of post-redevelopment premises (permanent alternate accommodation) to respondent Nos. 2 to 7 and if respondent Nos. 2 to 7 do not come forward to take possession, the Court Receiver shall be at liberty to move necessary Report to this Court, in which this Court shall consider passing appropriate orders.

vi) The petition is disposed of in the above terms. No costs.

12] Learned counsel for the respondent Nos. 2 and 6 seeks stay to this order, for a period of four weeks. In the facts and circumstances of the case, the request is rejected.

13] The parties to act on the authenticated copy of this order.

[G. S. KULKARNI, J]