

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

CHAMBER SUMMONS NO.130 OF 2019

IN

ARBITRATION PETITION NO.555 OF 2018

The Niwara Cooperative Housing Society Ltd.)....Applicant/Petitioner
V/s.

Vastukala Developers & Anr.)....Respondent

Mr.Shailendra Singh for applicant/petitioner.

Ms.B.T.Mardhekar I/by Vikas K.Mahangare for respondent no.1.

Ms.Dhruti M.Kapadia a/w Mr.Dadasaheb Shingade for respondent no.2 (MCGM).

[Mr.Mahendra Mhatre-proprietor of respondent no.1 present in Court].

CORAM : K.R.SHRIRAM,J

DATE : 5.7.2019

P.C.:-

1. This Chamber summons has been taken out for various reliefs but considering the reliefs sought it is basically to modify the order dated 20.8.2018 whereby the Court was pleased to form a committee headed by the Court Receiver of this Court for completing the project so that the project is completed under Court's supervision. The committee comprised of 4 members of petitioner-society, Amol Shetgiri, an independent Architect and one Mr.Mahendra Mhatre-developer-sole proprietor of respondent no.1.

2. Mr.Singh for applicant/petitioner stated that the Court Receiver be removed and the project be handed over to petitioner to complete as they deem fit. In any event, the presence of Mr.Mahendra Mhatre is something that has to be avoided because of his conduct.

3. No affidavit-in-reply has been filed by respondent no.1. Respondent no.2 is not really concerned with the Chamber summons. Counsel for respondent no.1 also did not make any submissions and when counsel was asked to make submissions, she simply stood quiet except saying that the matter be kept back.

4. It will be useful to reproduce the order dated 20.8.2018 passed by this Court which would reflect the despicable and dishonest conduct of Mr.Mhatre-the developer. The order dated 20.8.2018 reads as under :-

“1. On 16th June, 2018 this Court passed the following order :

1. The above Petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 by the Petitioner society seeking protective reliefs against the Respondent Builder. The development agreement dated 11-04-2013 was executed by and between the Petitioner Society and the Respondent No.1 developer, wherein the developer agreed to redevelop the property and to give flats of

larger areas to the 18 members of the society. In 2014, the developer took possession of the original tenements/flats of the members and demolished the same. Till date, he has obtained the commencement certificate only upto 3rd floor and has not carried out any further construction. Since November 2016, he has also stopped paying compensation in lieu of temporary alternate accommodation to the 18 members, of the Petitioner Society. Therefore, the amount payable to the members from November 2016 upto May 2019 aggregating to Rs.1,63,10,497/-. The Developer has also not paid property taxes aggregating to Rs.20,95,563/-, because of which the property of the society is sealed by Respondent No.2 Corporation. Out of 14 free sale flats, the Developer has already sold one flat and has collected Rs.88 Lakhs from one Mr. Pawar. The members of the society are therefore, left completely helpless and in the lurch by Respondent No.1 developer.

2. On 15th June, 2018 the matter was called out in the morning session for ad-interim reliefs. However, the Respondent No.1 was not present on the ground that he was in a meeting with his bankers. He was therefore, directed to remain present at 3.00 p.m. In the afternoon session, the Court was informed that his meeting is still not over and he shall appear before me in Chamber, today at 11.00 a.m. Accordingly, today the Developer is present in my Chamber. He states that within a period of 15 days from today he shall pay Rs.1,63,10,497/- to the members towards compensation in lieu of temporary alternate accommodation for the period November 2016 to May 2019. He states that within a period of four days from today, he shall pay an amount of Rs.20,95,563/- to the Corporation being arrears of property tax. However, he states that in default of such payment, the society shall be at liberty to terminate the Development Agreement dated 11th April, 2013. He states that some of the unsold flats in his other project are mortgaged to Kotak Mahindra Bank against a loan of Rs.6 crores. He undertakes that the entire amount will be used by him towards the suit project. In view thereof, the following order is passed :

(i) The undertakings of the developer to pay Rs.1,63,10,497 to the members of the society towards the arrears of temporary alternate accommodation within a period of 15 days from today and Rs.20,95,563/- to the Corporation towards the property tax within four days from today, are accepted.

(ii) The developer undertakes to forthwith file within a period of one week from today his Affidavit disclosing all his encumbered as well as unencumbered assets, particulars of all other projects, his bank accounts and the balance lying therein, his income tax returns from 2015. The undertaking is accepted.

(iii) He further undertakes that he has not created any encumbrances qua the suit property. The undertaking is accepted.

(iv) Stand over to 21st June, 2018 when the Advocate for the developer shall produce a Challan confirming the payment of the property tax to the Corporation.”

2. The undertaking to pay Rs.1,63,10,497/- to the members of the Society towards the arrears of temporary alternate accommodation within a period of 15 days and Rs..20,95,563/- to the Corporation towards property tax within four days from 16th June, 2018 is breached by the developer and no amount whatsoever as undertaken or otherwise is paid. On 25th June, 2018, the Court was informed that the developer is taking a loan from Kotak Mahindra Bank and in lieu thereof, he shall mortgage certain flats in Udyam Kung Co-op. Hsg. Soc. Ltd. On 27th June, 2018, the Branch Manager of the Kotak Mahindra Bank Ltd., Worli Branch appeared and informed the Court that no application for loan is made by the developer, who is a proprietor of Respondent No.1 to the Kotak Bank. Since the developer had made a statement which was incorrect to his knowledge, the Court issued a Show Cause Notice to him and also directed him to file his Affidavit setting out the particulars set out in the order dated 27th June, 2018.

The said order was also violated and the particulars are provided today i.e. after almost two months.

3. On 3rd July, 2018 the Court was informed by the developer that two flats admeasuring 645 sq.ft. (carpet area) and 985 sq.ft (carpet area) in Udyam Kunj Co-op. Hsg. Soc. Ltd., belong to him and the same can be sold under Court supervision by public auction. In view thereof, the Commissioner for Taking Accounts was appointed as an Officer to conduct the sale of the said two flats.

4. On 19th July, 2018 the Court officer informed the Court that the developer has now informed him that he has sold one of the two flats and has collected Rs.35 Lakhs from the purchaser, however, he is unable to deposit the said amount with the Court officer. When this Court inquired as to why this fact was not disclosed to this court when the order dated 3rd July, 2018 was passed, he had no answer. The Court therefore, recorded in paragraph 2 of its order dated 19th July, 2018 as follows :

“2. Respondent No.1 has now informed the Court Officer that he has sold one of the two flats and has collected Rs.35 Lakhs from the purchaser, however, he is unable to deposit the said amount with the Officer appointed to conduct the sale of the two flats. When this Court inquired as to why this fact was not disclosed to this Court when the order dated 3rd July, 2018 was passed, he has no answer. This is again a pointer to the fact that he is not only cheating the flat purchasers, but is also dishonest with the Court. Before taking any action against the proprietor of Defendant No.1 qua his conduct, Mr. Trivedi shall visit the project at Malad on 22nd July, 2018 at 10.00 a.m., and ascertain the correct status qua the flats which the Respondent No.1 claims to be unsold and are of his ownership. Mr. Trivedi shall also meet the office bearers of the society and ascertain the claims made by the Respondent No.1 before this Court qua the unsold flats and as to whether the Society has any claims against him. The parties

and/or their Advocates shall be at liberty to remain present during Mr. Trivedi's visit. Mr. Trivedi shall submit his report to this Court on 23rd July, 2018 at 11.00 a.m. Stand over to 23rd July, 2018.”

4. Thereafter, on 23rd July, 2018 this Court passed the following order :

“1. Perused the report dated 23-07-2018 submitted by Mr. Trivedi. By consent, Mr. Trivedi shall now arrange to sell Flat Nos.401, 801, 703 and 803 in Udyam Kunj Co-op. Hsg. Soc. Ltd., Opp. Navjivan High School, Off Rani Sati Road, Malad (E), Mumbai – 400 097. The Developer undertakes to deposit Rs.60 Lakhs with Mr. Trivedi as and when he receives the same in his account maintained with Bank of Baroda being Account No.17580200001291, being the balance consideration for Flat No.804. He undertakes to handover the same to the Commissioner. The Commissioner shall attempt to finalize the deal within two weeks from today. He shall meet the parties today at 5.00 p.m., to workout the modalities. Stand over to 6th August, 2018.”

5. The members of Udyam Kung Co-op. Hsg. Soc. Ltd., have now filed a Suit stating that the developer should not be allowed to sell free sale unsold flats in their redeveloped project, since the developer has till date not only not fulfilled the promises made by him to the Petitioner Society (The Niwara Co-op. Hsg. Soc. Ltd.) under their Development Agreement, but has also breached the promises made by him to their Society (Udyam Kunj Co-op. Hsg. Soc. Ltd.) under the Development Agreement executed with them. The unsold flats in their project will be required by them to sell the same and complete their own project. In view thereof, it is clear that as stated earlier the developer has not only cheated the original tenants and flat purchasers of the Petitioner Niwara Co-op. Hsg. Soc. Project, but has also repeatedly made statements/given undertakings before this Court which are false and incorrect to his knowledge. He has also breached the promises made qua his other projects. He has not paid compensation to them

as agreed under the development agreement since the year 2015 and is wanting to mortgage the unsold flats in their project and pay the amount as undertaken by him before this Court, because of which the members of the Udyam Kunj Co-op. Hsg. Soc., will have nothing to look upto if he fails to comply with their project. In view thereof, the following order is passed :

(i) The Court Receiver, High Court, Bombay is appointed as Receiver in respect of the present project i.e. the project of the Niwara Co-op. Hsg. Soc. Ltd.

(ii) A Committee of the following individuals is constituted to complete the project under the supervision of the Court :

(a) The Court Receiver, High Court, Bombay;

(b) Four members of the Society : - Mr. Sachin Kulkarni, Ms. Pratiksha Thakur, Mr. Ajit Nagarkar, Mr. Rakesh Moghe;

(c) Mr. Mahendra Mhatre - Developer

(d) Mr. Amol Shetgiri, independent architect.

(iii) The Committee shall complete the project.

(iv) To work out the modalities, the Committee shall have its first meeting on 3rd September, 2018 at 5.00 p.m.

(v) The Developer shall file his Affidavit in respect of the Udyam Kung Co-op. Hsg. Soc. Ltd., within a period of one week from today.

(v) In the meantime, he shall not sell, alienate, encumber, part with possession and/or create third party rights in respect of the unsold flats in Udyam Kunj Co-op. Hsg. Soc. Ltd. The developer shall not accept any amounts due and payable by the flat purchasers under the said project.

(vi) The Inspection report dated 16th August, 2018 filed by the Corporation is taken on record.

(vii) Mr. Ketan Trivedi, Addl. Prothonotary and Senior Master and Commissioner appointed by this Court stands discharged.

(vii) Stand over to 5th September, 2018.”

(emphasis supplied)

5. On 15.6.2018 Mr.Mhatre had informed the Court that within 15 days from that day, he shall pay Rs.1,63,10,497/- to the members of the society towards compensation in lieu of temporary alternate accommodation for the period November-2016 to May-2019. He also informed the Court that within four days from 15.6.2018 he shall pay amount of Rs.20,95,563/- to respondent no.2-Corporation being arrears of property tax. He also informed the Court that in default of such payments, the society shall be at liberty to terminate the development agreement dated 11.4.2013.

6. Admittedly, not a penny has been paid towards the unpaid rent. Ms.Mardhekar for respondent no.1 states that sum of Rs.10,00,000/- has been paid towards municipal Corporation taxes but it is not clear for what period. Ms.Kapadia for respondent no.2-MCGM states that as on date a further amount of Rs.19,00,000/- (approximately) is still outstanding from the developer.

7. In view of this, petitioner-society has terminated the agreement with respondent no.1.

8. Mr.Mhatre had also informed the Court that some of the unsold flats are mortgaged to Kotak Mahindra Bank against loan of Rs.6 crores and he gave undertaking that entire amount can be used towards the suit project. He was also directed to forthwith file within a period of one week from 16.6.2018 an affidavit disclosing all his encumbered as well as unencumbered assets, particulars of all other projects, his bank accounts with balance lying thereof, his income-tax returns from 2015 etc.

9. It was recorded in the order of 20.8.2018 that the undertaking to pay Rs.1,63,10,497/- to the members of the society towards arrears of temporary alternate accommodation within a period of 15 days and Rs.20,95,563/- to the Corporation towards property tax within four days from 16.6.2018 was breached by Mr.Mhatre. On 25.6.2018 the Court was informed that the developer-Mr.Mhatre was taking a loan from Kotak Mahindra Bank and in view thereof mortgaged some flats from Udayam Kunj Co-op.Hsg.Soc. Ltd. On 27.6.2018, the Branch Manager of Kotak Mahindra Bank Ltd., Worli Branch, appeared and

informed the Court that no application for loan is made by developer to Kotak Mahindra Bank. The Court therefore, issued a Show Cause Notice to him since Mr.Mhatre had made a statement which was incorrect to his knowledge.

10. On 3.7.2018 Court was informed by Mr.Mhatre that two flats admeasuring 645 sq. ft carpet area and 985 sq. ft. carpet are in Udayam Kunj Co-op.Hsg.Soc.Ltd., belong to him and the same can be sold under Court supervision by public auction. The Court Commissioner for taking accounts was appointed to conduct the sale of the two flats. On 19.7.2018 Court officer informed the Court that developer has now informed him that he has sold one of the two flats and collected Rs.35,00,000/- from the purchaser, however, he was unable to deposit the said amount with the Court Receiver. When the Court inquired as to why this fact has not disclosed to the Court, Mr.Mhatre had no answer. Therefore, Court recorded in paragraph-2 of the order dated 19.7.2018 that Mr.Mhatre was not only cheating the flat purchasers but was also dishonest with the Court.

This Court can go on and on like listing out various dishonest acts of Mr.Mhatre.

On earlier occasions, Mr.Mhatre's conduct was very belligerent and aggressive. He was repeatedly requested to behave properly.

In fact, Police constables were made to stand next to Mr.Mhatre to control his belligerence. This is the background of Mr.Mhatre.

I have to also note that members of Udayam Kunj Co-operative Housing Society Ltd., have also filed suit against Mr.Mhatre because he has breached promises made by him to the society under their Development Agreement.

11. In these circumstances, a person like Mr.Mhatre if he remains in the committee, it will only keep hindering the progress or completion of Project which he had undertaken way back by a Development Agreement dated 11.4.2013. The project was to be completed within 21 months.

12. At the same time, in view of the dispute involved in this matter, it would be necessary to retain the Court Receiver and not to discharge the Court Receiver but ends of justice will be met if Mr.Mhatre will be removed from the committee. In any case his agreement with Mhatre has been terminated. He had also informed the Court that the agreement be terminated if he committed default of his undertaking to the Court. Therefore, the committee that was constituted pursuant to the order dated 20.8.2018 shall continue with the exception of Mr.Mhatre who shall not form part of the committee. Mr.Mhatre is

also directed not to go anywhere near the suit project or enter the site without leave of this Court.

13. Mr.Singh states that whatever property taxes are there to be paid to the municipal corporation which were Mhatre's liability to pay, the members of petitioner-society shall pay by contributing for the same. Mr.Singh states that this was the liability of respondent no.1 and petitioner may take such proceedings to recover this amount from respondent no.1.

Chamber summons accordingly stands disposed. Liberty to apply.

ARBITRATION PETITION NO.555 OF 2015

14. Prayer clauses-(a) and (b) read as under :-

“(a) Pending the hearing and final disposal of the present Petition and arbitral proceedings this Hon'ble Court may be pleased to direct the Respondent No.1 to pay arrears of interim compensation collectively amounting to Rs.1,63,10,497/- since November 2016 till May 2019, to the 18 members of the Petitioner's Society, as per the calculation set out in detail, in the calculation sheet, at Exhibit-F of the present petition ;

(b) Pending the hearing and final disposal of the present Petition and arbitral proceedings this Hon'ble Court may be pleased to direct the Respondent No.1 to pay arrears of Property tax and other dues in respect to the said property, from date of receipt of vacant and peaceful possession of the said property till date and to

continue to pay to MCGM property tax and other dues, till the issuance of occupation certificate to the building being constructed on the said property.”

15. As recorded in the order dated 16.6.2018, respondent no.1 has admitted his liability to pay the amounts as mentioned in the said order. It is recorded in paragraph-2 of the order dated 16.6.2018 as under :-

“2. He states that within a period of 15 days from today he shall pay Rs.1,63,10,497/- to the members towards compensation in lieu of temporary alternate accommodation for the period November 2016 to May 2019. He states that within a period of four days from today, he shall pay an amount of Rs.20,95,563/- to the Corporation being arrears of property tax. However, he states that in default of such payment, the society shall be at liberty to terminate the Development Agreement dated 11th April, 2013. He states that some of the unsold flats in his other project are mortgaged to Kotak Mahindra Bank against a loan of Rs.6 crores. He undertakes that the entire amount will be used by him towards the suit project.....”

16. Therefore, respondent no.1 having acknowledged its liability as recorded in the order, prayer clauses-(a) and (b) are also allowed.

17. Coming to prayer clauses-(c) and (d), Mr.Singh seeks leave to amend prayer clause-(c) to correct “respondent no.1” to “respondent no.2”. Leave to amend granted. Amendment to be carried out

forthwith. Re-verification dispensed with.

18. In view of the statement of petitioner recorded in Chamber Summons No.130 of 2019 to pay the arrears of property taxes to respondent no.2 with liberty to claim the same from respondent no.1, Mr.Singh states that prayer clauses-(c) and (d) would not be required today.

19. As regards prayer clause-(e), Mr.Singh states that it will be claimed in the arbitration proceedings. As regards prayer clause -(f) is concerned, in the order of 27.6.2018 in paragraph-4 the Court was pleased to order as under :-

“4. Respondent No.1 and its Proprietor shall not sell, alienate, encumber, part with possession and/or create third party rights in respect of any of his movable and immovable properties including ancestral properties, till the next date of hearing.”

20. In view of the conduct of respondent no.1 as recorded in today's order in Chamber Summons No.130 of 2019, respondent no.1 and its proprietor shall not sell, alienate, encumber, part with possession and/or create any 3rd party rights in respect of any of his movable or immovable properties including ancestral property until hearing and

final disposal of the arbitral proceedings.

21. As regards arbitral proceedings, respondent no.1 had filed an application being Arbitration Application (L) No.356 of 2018 under Section 11 of the Arbitration & Conciliation Act 1996. On 14.6.2019 the following order came to be passed :-

“1. Not on board. Upon mentioning taken on production board.

2. The counsel for respondent no.1 states that there is a petition filed by respondent no.1 under Section 11 of the Arbitration and Conciliation Act, 1996 against petitioner herein. The counsel for petitioner states that an Arbitrator can be appointed. The counsel for respondent no.1 and counsel for petitioner suggest that Mr.Vishal V.Kanade, an Advocate practicing in this Court be appointed as Arbitrator.

3. The counsel for respondent no.1 states that Mr.Mahendra B.Mhatre, proprietor of respondent no.1 will remain present in Court on 18th June 2019 and both petitioner and respondent no.1 will file consent minutes of order for appointment of Arbitrator.

4. Stand over to 18th June 2019 to be heard alongwith arbitration application (lodging) no.356 of 2018.”

21. Strangely on 25.6.2019 respondent no.1 refused to accord consent for the person named in the order dated 14.6.2019 as proposed Arbitrator and withdrew section 11 application itself.

22. Mr.Singh states that in view of the withdrawal of the petition by respondent no.1, petitioner is lodging a fresh petition under section 11 of the Arbitration & Conciliation Act,1996 and the same will be lodged within one week from today and will serve copy on respondent no.1.

23. Arbitration Petition No.555 of 2018 accordingly stands disposed.

(K.R.SHRIRAM,J)