# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION No. 1035 of 2018

M/s Ssaksh Developers and Builders & Ors ..Petitioners.
v.
Upendra CHS Ltd. ..Respondent.

Mr. S.C. Naidu a/with Mr. Dipesh Siroya, Advocates for the Petitioners.
Mr. Piyush Shah a/with Ms. Meetal P. Savla and Mr. Aamir Attare, Advocates for the respondent.

**CORAM : B. P. COLABAWALLA, J.**
**DATED :- 5th March, 2019.**

**P.C. :**

1. This arbitration petition has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short **"the Act"**) taking exception to the order passed by the arbitral tribunal dated 3rd May, 2018 under Section 17 of the Act.

2. In the Section 17 application filed by the claimants before the arbitral tribunal (the petitioners herein), the following reliefs were sought.

> “a. The Hon'ble Tribunal be pleased to order Respondent society be ordered and decreed to pay to the Claimant sum of Rs.130,83,00,000/- (Rupees 130.83 crores only) as per particulars of Claims annexed and marked as Exhibit S hereto with further interest on Rs.130,83,00,000/- (Rupees 130.83 crores only) @ 24% per annum from the date of filing of the claim till payment and cost of the claim;
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> b. That pending the hearing and final disposal of this claim be pleased to issue an order of permanent injunction thereby restraining Respondent their servants, agents, assignee and/or any person claiming through or under them from appointing New Developer.
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> c. In alternative to prayer clause (a) that pending the hearing and final disposal of this claim be pleased to issue an order of permanent injunction thereby restraining Respondent their servants, agents, assignee and/or any person claiming through or under them avail security in any form with respect to the claim amount,
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> d. That pending the hearing and final disposal of this claim be pleased to direct the parties to maintain status-quo.”

3. An application under Section 17 was also filed by the respondent seeking various reliefs. The arbitral tribunal noted the submissions made by the claimants as well as the respondent and thereafter considered both the applications in the impugned award. The detailed consideration by the arbitral tribunal can be found from Paragraph 43 onwards. As far as the claimants' application is

concerned, the discussion of the same can be found from Paragraphs 43 to 57 of the impugned order. It is in view of the aforesaid discussion that the tribunal records that the relief in terms of prayer clauses (a) to (d) as claimed by the claimants is rejected.

4. Mr. Naidu, the learned Counsel appearing on behalf of the petitioners ( the claimants before the tribunal) submitted that he is restricting his challenge to the impugned order insofar as it rejects prayer clause (c) (as reproduced by me above). He submitted that this prayer ought to have been granted at least to the extent of the amount of Rs.36,41,67,317/- which was the money actually expended by the claimants by carrying out construction of the buildings which forms the subject-matter of the development agreements. He submitted that there was voluminous evidence to show that these amounts have been expended by the claimants and which has been totally ignored and not considered by the tribunal at all. In these circumstances, Mr. Naidu submitted that the Tribunal was incorrect in rejecting the prayer clause (c) which sought a security for the amounts that were actually expended by the claimants.

5. On the other hand, Mr Piyush Shah, the learned Counsel appearing on behalf of the respondent-Society submitted that there was no reason to interfere with the impugned order. The impugned order takes into consideration all the aspects of the matter and thereafter comes to a conclusion that no prima facie case has been made out by the claimants and hence rejects the prayer for interim reliefs, was the submission. Mr. Shah also submits that for seeking a security, the underlining principle as set out under Order 38 Rule 5 of the Code of Civil Procedure ( for short "**the CPC**") have to be complied with before the claimants can seek security. In the facts of the present case, he submitted that admittedly, there is not even a pleading to that effect in the Section 17 application and hence the tribunal was completely justified in rejecting the aforesaid prayer. For all the aforesaid reasons, the learned Counsel submitted that there is no merit in this petition and the same ought to be dismissed.

6. I have heard the learned Counsel for the parties at length and perused the papers and proceedings in the arbitration petition. I have also carefully gone through the impugned order. As noted above, the impugned order is a detailed one. It records the pleadings of the parties from Paragraphs 5 to 9 of the impugned

award. Thereafter, from Paragraphs 10 to 27 the tribunal records the submissions made on behalf of the claimants. The submissions of the respondent-Society are recorded from Paragraphs 28 to 42. Thereafter, the reasoning of the tribunal starts from Paragraph 43 onwards. Whilst dealing with the submissions in Paragraph 45, the tribunal notes certain admitted facts which are thus :

> "45. Before dealing with the submissions made by the parties, certain admitted facts are required to be noted:
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> (a) The parties had entered into the said Redevelopment Agreement (Agreement for Redevelopment dated 20th February, 2010 and Supplemental Agreement dated 20th February, 2010).
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> (b) The Respondent Society has 113 members. Under the said Redevelopment Agreement, the Developer is required to pay compensation for temporary transit and alternate accommodation in advance (clause 8).
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> (c) Under clause 16 (jj), the Claimant / Developer is not entitled to raise any financial assistance by creating any kind of mortgage / charge on the property save and except on the saleable area subject to the developer completing the construction for the existing members and with prior approval of the Society.
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> (d) The members of the Respondent Society had handed over possession of the first Claimant on 16th October, 2010.
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> (e) The demolition of the building commenced on 17th October, 2010.
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> (f) The Claimant by its letter dated 16th February, 2011 had raised issues of non-availability of quality sand on account of

government policy due to which the construction work on site had slowed down.

(g) The Claimant in March 2017 had paid part of property tax in respect of Respondent's property [paragraph 1 (ix) of Claimant's written submissions)

(h) The Claimants have defaulted on payment of compensation in lieu of transit accommodation from December 2015.

(i) The Respondents Society by its letter dated 28th November 2017 had contended that it had terminated the Development Agreement."

7. In the background of the aforesaid admitted facts, the tribunal then goes on to consider whether any interim prayers ought to be granted in favour of the claimants. The tribunal after examining the case, comes to a prima facie conclusion that the claimants have failed in its obligation to pay compensation for alternate accommodation, admittedly since December, 2015. For the past two and half years, the claimants were not able to make payment to the members of the respondent-Society who have vacated their accommodation since 2010. Looking to this conduct, the tribunal comes to a prima facie finding that the claimants cannot be said to have complied with the terms of the agreement. The tribunal further rejects contention of the claimants that the Society ought to have given its No Objection Certificate for raising

additional loans etc. In this regard, the tribunal relies upon Clause 16 (jj) of the Development Agreement which stipulates that before creation of any further mortgage the construction of the premises meant for the existing Society Members ought to be completed and additionally, consent of the Society has to be obtained. The said Clause therefore did not obligate the respondent-Society to grant their consent or No Objection Certificate. In the facts of the present case, the tribunal came to a prima facie conclusion that the respondent-Society had rightly refused to grant consent for raising additional loan on the suit property. In fact, In Paragraph 50 of the impugned order the tribunal even at the hearing of Section 17 application enquired from the claimants whether they were willing to pay amount of compensation as well as the present dues. The response to the aforesaid by the claimants was that only upon the grant of No Objection Certificate by the respondent-Society (for raising finance) such payment can be made. Looking to the conduct of the claimants, the tribunal came to a prima facie finding that the claimants have not made out any prima facie case and hence disentitled to any injunctive reliefs.

8. On going through the impugned order, in quite some detail, I find that there is nothing wrong in the order passed by the

tribunal. It is now well settled that when a party seeks a security (i.e. to secure the claim in the arbitration) the principles underlining Order 38 Rule 5 of the CPC have to be followed. In the facts of the present case, Mr. Naidu fairly conceded before me that there is no pleading which complies with the provisions of Order 38 Rule 5 of the CPC. This being the case, I do not find that the tribunal was unjustified in rejecting the prayer of the claimants seeking security from the respondent-Society. To put it differently, I do not find that the discretion exercised by the tribunal suffers from any perversity that would require my interference under Section 37 of the Arbitration and Conciliation Act, 1996.

9. In these circumstances, I find no merit in the arbitration petition. It is accordingly dismissed. However, there shall be no order as to costs.

**(B.P. COLABAWALLA, J.)**