psv

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

COMMERCIAL ARBITRATION PETITION NO.553 OF 2017

Abdul Aziz Choudhary & Anr. ..Petitioners
Vs.
Mohammed Ali Mohammed Salih & Anr. ..Respondents

WITH
ARBITRATION PETITION NO.769 OF 2017

Shadab Yusuf Mukadam & Anr. ..Petitioners
Vs.
Mohammed Ali Mohammed Salih & Anr. ..Respondents

WITH
ARBITRATION PETITION NO.772 OF 2017

Ikram Khamil Qureshi ..Petitioner
Vs.
Mohammed Ali Mohammed Salih & Anr. ..Respondents

WITH
ARBITRATION PETITION NO.773 OF 2017

Islammuddin Bahadur & Anr. ..Petitioners
Vs.
Mohammed Ali Mohammed Salih & Anr. ..Respondents

WITH
ARBITRATION PETITION NO.774 OF 2017

Roshan Najruddin Khan & Anr. ..Petitioners
Vs.
Mohammed Ali Mohammed Salih & Anr. ..Respondents

Mr.Mutahhar Khan i/b. Mr.Lokesh Zade for Petitioners.
Mr.E.A. Sasi for Respondent No.1.
Mr.Rishikesh Soni and Ms.Raveena Yadav with Ms.Aditi Yadav for Respondent No.2.

CORAM : G.S. KULKARNI, J.

DATE : 7th MARCH, 2019

P.C.:

Leave to amend the prayers as per draft amendments. Amendment be carried out during the course of the day. Copy of draft amendments is already handed over to the respondents.

2. This is a batch of five petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996. The petitioners are flat purchasers under a construction scheme undertaken by respondent No.2-M/s.Rajaram Chavan Real Estate Pvt. Ltd. in an agreement with the owner of the land-respondent No.1 Mohammed Ali Mohammed Salih titled as joint development agreement dated 20 August 2009. Perusal of the said agreement shows that 50% of the built up area was to come to the absolute entitlement of respondent No.1-owner and 50% to the respondent No.2-developer. Some of the clauses in the said agreement are required to be noted which read thus:-

> "II. Consideration
> For grant of development rights in the manner mentioned hereafter, the Developers and the Owner have agreed to the following consideration:
> a) ......
> b) Consideration for the owner granting development rights to the developer, the Developers shall out of the entire constructed area after providing an aggregate area of 4500 sq. ft. to the 22 nos. of tenants (except an area of 3000 sq. ft. to be provided to one tenant Mr.Pandurang Wagh in

C.T.S. No.372/B) as per the statement annexed hereto marked 'Annexure B', the developer shall provide free of cost 50% of the fully constructed flats out of the area available for free sale (free saleable Area/FSI means the area available for free sale to the Owner and the Developers after deducting the area to be provided to the tenants as mentioned hereinabove) to the Owner (hereinafter referred to as the “Owner Area”) as and by the way of consideration for granting development rights to the developer and the developer shall be entitled to the balance of 50% of the constructed area available for free sale for their own share absolutely and forever (hereinafter referred to as the “Developers Area”) and the developer will be entitled deal and dispose of the same as they may deem fit and proper and without being accountable to the Owner.

c) …..

d) It is however also expressly agreed between the parties herein that in the event the developer at its costs is successful in getting the aid reserved area of the said property de-reserved, the developer shall be as mentioned herein be entitled to carry out construction or structure/building/s on the said portion (now under reservation of garden) by utilizing its total FSI which may be available with TDR by utilizing the Slum TDR or any other benefit or right which may accrue on the same permitting additional construction thereon as per the prevailing rules and regulations now or as in force in future and for granting the developer development rights to develop the same. The developer shall provide the Owner 50% of the constructed area on the said portion now under reservation of garden by utilizing FSI and TDR benefits of the same as mentioned hereinabove free of cost and on ownership basis and the developer shall be entitled to deal with, dispose the balance 50% constructed area as they may deem fit and proper without being accountable to the owner. It will be the sole responsibility of the Owner to settle with one tenant Mr.Pandurang Wagh occupying a structure admeasuring 3000 sq. ft in the said reserved portion within a period of 30 days of de-reserved of the said reserved area. If the said tenant is to be provided any alternate accommodation in the new construction to be constructed on the reserved area, the developer shall provide such constructed area agreed with the Tenant from the owner's area and to that extent the owner's area shall stand reduced.

e) …..

f) …..

g) …..

h) …..

i) The owner shall subject to whatever mentioned herein and subject to the terms and conditions of this agreement be at liberty to deal with, dispose off the said flat/area coming to his share as the full and absolute owner thereof and he alone shall be entitled to appropriate entire consideration amount receivable in respect of the said flat to himself without being accountable to the developers, however subject to the charge and lien of the Developers of the amount due and payable by the Owner to the Developers and the Developers shall be entitled to deal with and dispose of the flat coming to their share as the full and absolute owner thereof and they alone shall be entitled to appropriate entire consideration amount receivable in respect of the said flat for themselves without being accountable to the owner.

j) …..

k) …..

l) …..

m) …..

n) …..

o) …..

I. The cost incurred by the Developer till the utilization of F.S.I. potential – 1 but before utilization of T.D.R. and 33% incentive F.S.I. and advance payments paid by the developer. It is agreed by the owner that the owner shall be liable to pay/contribute all such expenses within 7 days of issue of R.A. (running bills) by contractors and suppliers of developer as mentioned in clause no. II (f) hereinabove. It is agreed that till the entire amount is repaid to the developers including the advance payments of Rs. 35,00,000/- (Rupees Thirty Five Lakhs only) paid to the owner. The Owner shall not sell or create 3rd party rights in respect of 25% of the owners free sale component. From the sale of remaining 75% of Owner's free component, the Owner agrees to immediately on receipt pay any amounts as earnest money, advance payments, part payments etc. received from the prospective purchasers to the developer. Till the full amount is repaid, the owner agrees not to create any 3rd party rights in the 25% owner's free sale component.

II. …..

III. It is agreed that till the entire amount is repaid by the owner to the developer, the owner shall have a lien and charge on the owner's share in the free sale premises to the extent of the amount outstanding and the owner shall not be entitled to deal with, sell and dispose the same till any such amount is due and payable to the developer.”

3. It appears that exercising the entitlement and the rights under the above development agreement, respondent No.1/owner sold Flat Nos.103, 201, 203, 206 and 208 to the petitioners. There appears to be no dispute on this arrangement or any dispute whatsoever at the relevant time on the respondent no.1 selling these flats to the petitioners. In fact respondent No.2 by its letter dated 4 September 2013 (Exhibit-B, page 39 of the paper-book) agreed to this arrangement. The contents of the said letter of respondent No.2 addressed to the respondent No.1 are required to be noted which read thus:-

> "In the past, as agreed between us under clause II(e) of the aforesaid Agreement, the sale area as per the presently sanctioned plans shall be allocated between ourselves on alternate floor wise basis, hence we were entitled to the saleable area on the 1st floor and you were entitled to the saleable area on the 2nd floor i.e. Wing 'A', 'B' & 'C' and flat nos.201 to 211, save and except flat nos.202, 205 and 206 which you were not to sell as per clause II(O)(I) of our aforesaid agreement.
>
> Further, it was also agreed that on sanction of the upper floors likewise we will retain the saleable area on the 3rd floor as our share and allocate saleable area on the 4th floor to yourselves subject to purchase of T.D.R./ D.R.C by ourselves (i.e. yourself and us) as per clause II (O)(II) of our Agreement and likewise the 5th floor being an odd number floor and the last floor, if approved the saleable area will be divided among ourselves as per 50:50 basis i.e. flat nos.501, 502, 503, 505 & 511 for ourselves and flat nos.504, 506, 507, 508, 509 & 510 to yourselves subject to clause II (O) (II) of our Agreement. The same was also expressly agreed and recorded in our earlier letter.
>
> The Wing 'D' of each typical floor is being constructed for rehabilitation of tenants and there is no saleable component in the same.

Further, for the sake of clarity we confirm to have received a sum of Rs.95,00,000/- (Rupees Ninety Five Lacs only) from yourself i.e. the Owner Mr.Mohammed Ali M. Sali as per the provisions of the Agreement.

However, as we intend to now purchase T.D.R. and commence/complete construction of ground + 3 upper floors pending approval and construction of 4th upper floor, the area agreed to be shared between us is proposed to be divided as follows (the tentative Typical Plan is annexed hereto and marked Annexure 'A'):

Sl. No.	Floors	Area to be allotted to the Owner i.e. Mohd. Ali	Area to be Sold by the Developer i.e. us	Remarks
1	First	101,103,104,109 & 111	102,105,106,107, 108 & 110	Entire First floor to be divided among Mohd. Ali & us.
2	Second	Flat No.s201, 202, 203, 204, 205, 206, 207, 208, 209, 210 & 211.	Nil	Entire Second floor to be retained by Mohd. Ali.
3	Third	Nil	Flat No.301. 302, 303, 304, 305, 306, 307, 308, 309, 310 & 311.	Entire Third floor is to be retained by Developer i.e. us.

4. Similarly there was another letter dated 4 September 2013 addressed by respondent No.2 to respondent No.1 confirming the entitlement of respondent No.1 to sell the said flats. It is vital to note the contents of the said letter which reads thus:-

" In continuation of our earlier letter of even date and as per clause II (e) of the Agreement dated 20th August, 2009 you are entitled to flat no. 101, 103, 104, 109 & 111 on the 1st floor and flat nos.201 to 211 on the 2nd floor of

> Wing 'A', 'B' & 'C', save and except flat nos.111 and 207 which you are not to sell as per clause II(o)(I) of the aforesaid Agreement.
>
> You are requested to agree to and confirm the aforesaid terms by signing at the foot of this letter.”

5. Accordingly, respondent No.1 entered into a registered agreement of sale of the said flats with the petitioners in or about December 2013 and March 2014. The respective registered agreements are annexed to each of the petitions. Substantial amounts were paid to respondent No.1 under these agreements and some amounts are required to be paid at the time of handing over the possession.

6. Learned Counsel for the petitioners submits that in fact between October to December 2015 the respondent Nos.1 and 2 permitted the petitioners to enter the flats to carry out interior and fitting work and thereafter on 4 May 2016 Occupancy Certificate was received in respect of the said building. It is submitted that by virtue of the said agreements, the petitioners were entitled to occupy the flats in the month of May 2016 on paying the balance amount which the petitioners were always ready and willing to pay.

7. Learned Counsel for the petitioners would however submit that the dreams of the petitioners to occupy their flats was short lived. Some disputes had arisen between the respondent No.2 in regard to the

certain monetary claims as made by respondent No.2 against the respondent No.1, and the appropriation of amounts from the flats which came to entitlement of both the parties.

8. Case of the petitioners is that they are the bonafide flat purchasers having registered agreements and having substantially paid the amounts, are immensely suffering on account of the disputes between the respondent No.1 and respondent No.2, this for the reason that respondent No.2 is now refusing to hand over the possession of flats to the petitioners as there are some amounts which are due and payable by respondent No.1 to respondent No.2.

9. Learned Counsel for the petitioners submits that also some amounts were demanded by respondent No.1 from the petitioners, and in such a situation, the petitioners had no alternative but to unnecessarily invoke arbitration against the respondent No.1 in regard to certain money claims as made by respondent No.1 and dispute in that regard is pending before the arbitral tribunal. It is submitted that however the said dispute has nothing to do with petitioners' entitlement to occupy the flats. It is stated that admittedly, respondent No.2-developer is not party to the said arbitration.

10. Learned Counsel for the petitioner would submit that in the inter-se disputes/proceedings between the respondent No.1 and respondent No.2, there are certain orders which have been passed and taking recourse to these orders, respondent no.2 is refusing to hand over the possession of the petitioners' flats. It is submitted that the petitioners are accordingly deprived of benefits under their respective flat agreements and to take possession of the flats despite having paid substantial and valuable consideration. The petitioners therefore have prayed for the following reliefs:-

> "(a) That pending the commencement of the arbitration proceedings between the Petitioners and Respondents this Hon'ble Court be pleased to direct Respondents to hand over possession of the said Flat to the Petitioners or this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay as receiver of the said Flat more particularly described in Schedule annexed to EXHIBIT D hereto with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1940 including power to take physical possession of the said Flat more particularly described in Schedule annexed to EXHIBIT D hereto, from the Respondents, its members, representatives, agents, employees, executors, assigns, and/or any other person claiming by, through and/or under them or anyone or more of them and/or any person found in possession with Police Assistance, if necessary;
>
> a-1 That pending the commencement of the arbitration proceedings between the Petitioners and Respondents this Hon'ble Court be pleased to direct Respondents to hand over possession of the said Flat to the Petitioners or this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay as receiver of the said Flat more particularly described in Schedule annexed to EXHIBIT D hereto with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1940 including power to take physical possession of the said Flat more particularly described in Schedule annexed to EXHIBIT D hereto, from the Respondents, its members, representatives, agents, employees, executors,

> assigns, and/or any other person claiming by, through and/or under them or anyone or more of them and/or any person found in possession with Police Assistance, if necessary and permit Petitioners to occupy the said flat as an agent of the Court Receiver on such terms and conditions as this Hon'ble Court may deem fit & proper;
>
> (b) That pending the commencement and culmination of the arbitration proceedings between the Petitioners and the Respondents, this Hon'ble Court be pleased to grant an order of injunction thereby restraining the Respondents, its members, representatives, agents, employees, executors, assigns and/or any other persons claiming by, through and/or under them or anyone or more of them and/or any person found in possession, from in any manner transferring, inducting and/or alienating any third party and/or creating third party rights in respect of the said Flat premises more particularly described in the Schedule annexed EXHIBIT "D" hereto or any part thereof and/or creating any third party rights and/or incumbrances and/or parting with possession thereof and/or inducting any third party therein;
>
> (c) That pending the commencement and culmination of the arbitration proceedings between the Petitioners and the Respondents, this Hon'ble Court be pleased to direct the Respondent No.1 to pay the amount of compensation to the Petitioners as this Hon'ble Court may deem fit & proper."

11. Mr.Sasi, learned Counsel for respondent No.1 at the outset would not dispute the above position that the flats are sold to the petitioners under registered agreements and the miserable position in which the petitioners stand today, despite having paid the substantial amount to the respondent No.1. Mr.Sasi would not dispute that his client has legitimately entered into an agreement with the petitioners for sale of flats in question, and that the petitioners have parted with substantial amounts which are received by his client. Mr.Sasi would also not dispute that the petitioners are bonafide purchasers of the flats and that

they have obtained loans as also that the petitioners are suffering because of disputes between the respondent No.1 and respondent No.2. Mr.Sasi has expressed his full sympathy for the petitioners. Mr.Sasi however submits that in view of the disputes between the respondent No.1 and respondent No.2 which are subject matter of the arbitral proceedings, though the respondent No.1 has a complete desire that the petitioners should be put in possession of their respective flats, the respondent no.1 is unable to do so on account of the disputes as raised by respondent no.1.

12. On the other hand, Mr.Soni, learned Counsel for the respondent No.2, would submit that there are amounts payable to respondent No.2 by the respondent No.1 and therefore, respondent No.2 would have certain lien as specified in clause 3 of the agreement entered between respondent No.1 and respondent No.2 as noted above. Mr.Soni would not dispute, that at the appropriate point of time, communications dated 4 September 2013 were issued to the respondent No.1 whereby the entitlement of respondent No.1 to deal with the flats in question was recognized. However, his contention is that this would be subject to the rights which have accrued to his client under the development agreement dated 20 August 2009 and more particularly clause 3 as noted above. Mr.Soni would draw my attention to the proceedings

which have taken place between respondent No.1 and respondent No.2 being arbitration petition (l.) No.60 of 2017 as filed by respondent No.1 against respondent No.2, and more particularly the order dated 26 May 2017 passed by the learned Single Judge, whereby, when respondent No.1 was intending to assert his rights in respect of the flats, which are entitled to be sold by respondent No.1, the Court has made the following order:-

> "7. The disputes between the Petitioner and the Respondent in regard to possession of the 16 flats which come to the Petitioner's share and any adjustment or reversal of those transactions shall be referred to arbitration. Both parties will maintain status quo as regards these flats till they are able to obtain an order in that regard from the Arbitral Tribunal."

13. It is submitted by Mr.Soni that the above order was also subject matter of challenge in appeal filed by respondent No.1 (Appeal (l.) No.77 of 2017) which came to be dismissed by Division Bench of this Court by an order dated 13 October 2017. It is Mr.Soni's contention that as arbitral proceeding between respondent No.1 and respondent No.2 are pending and in view of the above orders as passed by learned Single Judge, the petitioners would not be entitled for any reliefs as prayed for. Mr.Soni would accordingly pray for dismissal of these petitions.

14. Having heard learned Counsel for the parties and having perused the record in my opinion, the petitioners definitely are in a situation of

being completely sandwiched in the litigation between respondent No.1 and respondent No.2. It is not in dispute that the petitioners have paid substantial amounts to respondent No.1 to purchase their respective flats, which under the development agreement entered between respondent no.1 and respondent no.2, respondent no.1 was entitled to sell in the project in question. At all material times, respondent No.2 was aware about the rights of respondent No.1 as also was aware about the rights which were created by respondent No.1 in favour of the petitioners. In fact, respondent No.2 permitted the petitioners to enter into the flats in December 2015 to undertake the interior work, although now, this is being orally disputed by Mr.Soni. However, this may not be so relevant in as much as the respondent No.2 is not oblivious to the rights which are created in favour of the petitioners. Respondent No.2 does not say that the agreements entered by respondent No.1 with the petitioners are illegal. Respondent No.2 has not taken any steps, to challenge the agreements which was entered by respondent No.1 with the petitioners and admittedly there are no proceedings to that effect. Thus the plain and simple consequence is that agreements entered by the petitioners with respondent No.1 are valid and they are surely under the development agreement, under which, the rights of respondent No.1 are recognized by respondent No.2 to sell these flats to the petitioners, as can be clearly seen in the various clauses noted above. It is purely a money claim of respondent No.2 against respondent No.1, which prima facie has nothing to do with the flats as sold by respondent no.1 to the petitioners.

15. This being the clear scenario, this is a case where the Court would have certainly granted a relief to the petitioners who are bonafide purchasers of their respective flats. However, it appears from the order dated 26 May 2017 (supra), whereby the learned Single Judge in the inter-se dispute between respondent No.1 and respondent No.2 (to which the petitioners were not parties) has directed that the parties will maintain status quo as regards the flats which are sold to the petitioners, till they are able to obtain an order in that regard from the arbitral tribunal. This order passed by the learned Single Judge was not interfered by the Division Bench in an appeal filed by respondent no.1, where again the petitioners were not the parties, and the proceedings being purely between respondent no.1 and respondent no.2. In the abovesaid situation although the petitioners would be correct in their contention, no relief can be granted to the petitioners.

16. The petitions are accordingly rejected. No costs.

[G.S. KULKARNI, J.]