

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 273 OF 2020**

Elixir Fitness Pvt Ltd ...Petitioner
Versus
Oakland Park Co-operative Housing Society Ltd ...Respondent

**WITH
ARBITRATION PETITION (L) NO. 138 OF 2020**

WITH
ARBITRATION PETITION NO. 216 OF 2020

Oakland Park Co-operative Housing Society Ltd ...Petitioner
Versus
Elixir Fitness Pvt Ltd ...Respondent

Mr Atif N Shaikh, *for the Petitioner in ARBPL/138/20,
ARBPL/216/20 & for the Respondent in ARBPL/273/20.*
Ms Mamta Sadh, *with Mohit Chaudry & Kainaz Irani, i/b Ms Anju
Mishra, for the Respondent in ARBPL/138/20 &
ARBPL/216/20.*
Mr DN Kher, *Court Receiver, present.*

CORAM: G.S. PATEL, J.
DATED: 26th February 2020

PC:-

1. One of the Society's two Arbitration Petitions assails an interim order passed by learned sole Arbitrator. The other questions the constitution of the tribunal itself. The challenge on that ground is that the Arbitrator was unilaterally appointed by Elixir Fitness Pvt Ltd ("**Elixir Fitness**"), which operates a 5600 sq ft area gym and fitness facility in the premises of the Oakland CHSL. I will turn to the relevant agreement shortly but before I do that, I believe I must exercise my powers to substitute the Arbitrator. The original Arbitrator has on account of some communications between him and one of the members demitted his office. There is a second Arbitrator also directly appointed by Elixir Fitness and in whose appointment too the Society has not concurred. This is a wholly unacceptable way in which to function. Neither of the parties to an arbitration should approach the dispute resolution mechanism with a background of distrust in the tribunal appointment process. The only way to solve this is to have both sides agree. Obviously, they cannot. The only other option then is for me to exercise my powers and to appoint an Arbitrator of my choice.

2. The other issue is about the interim order passed by the first Arbitrator. There is a Leave and License Agreement between Elixir Fitness and the Society. Disputes arose and then rapidly escalated. It seems that one or more members of the society began circulating some material on WhatsApp and through other social media platforms. They also put up some notice boards. I am shown one of these. That notice cautions persons who are not members from entering the premises and then threatens violators with prosecution.

3. The first Arbitrator seems to have concluded at an interim stage that the material put out on social media was defamatory and so too was this notice board. Quite apart from the fact that at least as far as the notice board is concerned (I have not seen the WhatsApp messages, nor do I care to) that order or finding cannot possibly be sustained, the order directing the society to stop circulating such content, and to remove the messages/notices was entirely beyond the powers of the Arbitral Tribunal. The Arbitrator could not have arrogated to himself any such powers in the mistaken belief that an arbitral tribunal has the powers of a civil Court, if this is understood to mean that there are no constraints on what had Arbitrator can do. The arbitrator is a creature of *contract* and he is circumscribed by that contract. He cannot travel beyond it. That law is now too firmly settled to admit of the slightest debate. The allegations of defamation invokes a cause of action rooted in tort, an actionable civil wrong, not a cause of action in contract. The arbitral tribunal has absolutely no powers to entertain a tortious dispute like this. A civil court might. And that is the difference. The fact that the relationship between the parties is contractual in its inception is entirely immaterial. Any claim founded on defamation, whether for damages or injunction, is beyond the powers of this arbitral tribunal to begin with.

4. To make matters worse, having appointed a local commissioner (which the tribunal may do), that arbitrator then directed the police to render assistance. That is clearly beyond the powers of an arbitral tribunal. That is why we have Section 9(3). The police authorities are not required to recognise or acknowledge the authority of a private dispute resolution forum, and quite rightly

refused to act. An arbitral tribunal does not enjoy public law powers of this stripe.

5. Consequently, all interim orders passed in the arbitration between the two sides are quashed and set aside.

6. The Arbitral Tribunal will be reconstituted. The mandate of the second arbitrator appointed by Elixir Fitness is terminated forthwith. That arbitrator is not to act further under any circumstances. The arbitration itself is not terminated or closed. The order of substitution of the arbitrator is below.

7. I come now to the dispute between the parties. It is very simple. There was a Leave and License Agreement in relation to this fitness centre. The first agreement was dated 30th October 2008. That was renewed on 30th October 2013. There was a third renewal and this is dated 14th January 2019. Parties agree that there is mistake or error in the date printed on the first page of this agreement and that is of 14th January 2019 not 14th January 2018.

8. The period of the current Leave and License Agreement is 36 months. There is a renewal option for another 36 months with 5% increase in the license fees after every two years. The stated license fee in Clause 3 is Rs.3.60 lakhs per month. This is to continue for the first two years and there is then to be an increase of 5% in the third year. The Clause itself says that the license fee is exclusive of GST which means that GST as applicable is payable over and above the license fee.

9. The dispute seems to be this. According to Elixir Fitness, the Society held out certain assurances and promises including that its fitness centre premises given on license were in fact lawful; that the entire area of 5600 sq ft was usable and legal, and that the Society would provide free water for Elixir fitness for use in the gym or the pool area. This is one of the claims that is being placed before the Arbitral Tribunal. Obviously Elixir Fitness will need to establish the correctness of this claim and it cannot proceed on the footing that this claim is as good as proved.

10. It appears that on account of these grievances, from May 2019 until today Elixir Fitness has actually paid nothing at all towards license fees. This caused the rift between the society and Elixir Fitness. This is the third cycle or iteration of this Leave and License Agreement, which means that these parties are not exactly unknown to each other. It is entirely unclear to me how Elixir Fitness can claim a contractual, equitable, legal or legally enforceable right to continue to run a profit-making enterprise without making any payment of license fees and without even depositing any part of it. It is not as if the Society has yet asked for an increase. Some of its committee members are present today and they confirm that their Society has made no such demand. They stand by the agreement. They say that the license fee will continue at Rs. 3.60 lakhs per annum until January 2021 when there will be a 5% increase operative until January 2022. Obviously, Elixir Fitness seeks a reduction or an adjustment for the alleged non-provision of these services and facts in respect of which it now makes a claim in arbitration. Whether it seeks this as a reduction in the license fee or a claim in damages is

for the Arbitral Tribunal to consider. But that does not justify Elixir Fitness withholding the license fees.

11. Ms Sadh on behalf of Elixir Fitness, on taking instructions, states that the amount of license fee due up to January 2020 is Rs. 32.40 lakhs. With the amount of Rs. 3.60 lakhs computed for February, the total is Rs. 36 lakhs. She says that the entire amount will be paid in the course of the day today by RTGS transfer to the society's bank account.

12. In order to avoid any such disruption in future, I am directing Court Receiver, High Court Bombay to take symbolic possession of the fitness centre. I do this for two reasons. First, to avoid any further issue regarding access, and second as a precautionary measure because Clause 1 of the current Leave and License Agreement has a provision for a renewal and the agreement itself has some provision for resuming possession at the end of the agreement. Whether this agreement will be renewed or not is yet uncertain. Hence the need for a Receiver. The Receiver is however not to put up his board on the outside of the premises. He may place the board on some inconspicuous part of the premises inside and will officially notify the Society once he has done so. The Society will keep that communication on record.

13. I am making it clear that in the ensuing arbitration (before the substituted arbitrator named below), Elixir Fitness is not to make any claim in regard to any defamatory or WhatsApp contents. It is

free to pursue those remedies in a Court of competent jurisdiction. All contentions are expressly kept open in that regard.

14. Elixir Fitness will inform the Court Receiver once the payment/transfer of Rs. 36 lakhs is done. Once that payment is made and the Receiver confirms from the Society that it is received, Elixir Fitness may resume operations.

15. As far as the notice board that has been placed on the grill door is concerned, the Society agrees that the notice will, in view of this order, be removed. Obviously the lock placed by the society and (which I notice from some photographs has been wrapped up in some cheesecloth signed by the Society's office bearers) will also be removed. Nobody is to interfere with the possession of the premises. For the benefit of both sides, I am now making it clear that this entire area is in custodia legis, i.e. in the custody of this Court.

16. The Society agrees that upon payment being made, it will permit Elixir Fitness to resume its gym operations. It will not obstruct members of the gym from accessing the gym. However Elixir Fitness will ensure that all its gym members are issued valid identity cards for the gym so that they can be identified by the Society's security guards. Those proposing to take membership may be allowed entry but for that limited purpose alone. This arrangement is to continue pending arbitration.

17. If the Elixir Fitness fails to make monthly payment of the license fee on time as per the agreement even once, the Society will

not lock the premises or take the law into own hands. It will immediately inform the Receiver and the Receiver will then proceed to shut down the premises entirely. The parties will then make the necessary application before the learned sole Arbitrator.

18. As to the substitution of the arbitrator, I make the following order:

(a) Appointment of Arbitrator:

- (i) Mr Cyrus Ardeshir, learned Advocate, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Leave and License Agreement dated 14th January 2019.
- (ii) I am putting both sides notice that I expect them to conduct themselves individually or through their Advocates with the utmost restraint before the Arbitral Tribunal. The society committee members are present in Court. They confirm that they have no objection to the appointment of Mr Ardeshir, Advocate of this Court as the sole Arbitrator and will not challenge his appointment or the constitution of this tribunal.

(b) Communication to Arbitrator of this order:

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates

for the Applicant within one week from the date this order is uploaded.

- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s Mr Cyrus Ardeshir, Advocate.

Address Vardhaman Chambers, 2nd Floor, Office No. 217, Cawasji Patel Street, Fort, Mumbai 400 001

Mobile 9820097671

Email cardeshir@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.

(d) Appearance before the Arbitrator:

- (i) Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (ii) The statement of claim so far filed by Elixir Fitness will be re-filed before Mr Ardeshir. A statement of defence will be filed before him.

(e) Contact/communication information of the parties:

Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.

(f) Section 16 application: The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) Interim Application/s:

- (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration &

Conciliation Act, 1996 before the learned Sole Arbitrator.

- (ii) Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
- (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.
- (j) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.

19. All three Petitions are disposed of in these terms.

(G. S. PATEL, J)