

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 5738 OF 2020
WITH
COMM ARBITRATION PETITION NO. 989 OF 2019**

Borivali Anamika Niwas CHSL ...Petitioner
Versus
Aditya Developers & Ors ...Respondents

**WITH
COMM ARBITRATION PETITION (L) NO. 1077 OF 2019**

Aditya Developers & Ors ...Petitioners
Versus
Borivali Anamika Niwas CHSL ...Respondent

Mr Mayur Khandeparkar, *with Umesh Tawari, Hetal Vithlani & Hitakshi Patel, i/b S Ashwinikumar & Co, for the Petitioner in CARBPL/5738/2020 and CARBP/989/2019 and for the Respondent in CARBPL/1077/2019.*

Mr Karl Tamboly, *with Omkar Kulkarni, for Respondents Nos. 1 to 3 in CARBPL/5738/2020 and CARBP/989/2019 and for the Petitioner in CARBPL/1077/2019.*

Ms Yamuna Parekh, *with Sagar Patil, for MCGM.*

CORAM: G.S. PATEL, J

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Date: 2020.12.16
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(Through Video Conference)
DATED: 15th December 2020

PC:-

1. Heard through video conferencing.
2. The Petitioner in Commercial Arbitration Petition (L) No. 5738 of 2020 and Commercial Arbitration Petition (L) No. 989 of 2019 is a cooperative society. The Respondent is a developer and is the Petitioner in Commercial Arbitration Petition (L) No. 1077 of 2019. The society has filed two petitions under Section 9 of the Arbitration and Conciliation Act 1996. The second was necessitated because it seeks further reliefs in view of the subsequent events.
3. On site, the members of the society have been out of possession since 2013. There has been no construction since December 2015, although the earlier structure was demolished and a partial construction was completed up to seventeenth floor. Mr Tamboly says that only the free-sale eighteenth floor remains and all the rest has been completed. That may be inaccurate, because a structure left partly built and incomplete for five years will undoubtedly have deteriorated. The also fact is that the members of the society have not been paid transit rent or displacement compensation since at least 2018.
4. On 24th February 2020, I passed the following order in Commercial Arbitration Petition No. 989 of 2019:

“1. Final Consent Terms will take some time because there are some details to be worked out.

2. However it is agreed that an amount of Rs. 82.5 lakhs is to be paid by the Respondent-developer to the Petitioner society in full satisfaction of the current claim for arrears of transit rent. This is expressly agreed to be a conditional understanding. For, the actual amount of arrears is nearly Rs. 1.40 crores according to the Petitioner society. The understanding is that if Rs. 82.5 lakhs is paid in full in the manner and on the due dates that are to be agreed, that payment will represent full and final satisfaction of the claim for arrears of transit rent. However, it is also agreed that should there be a single default in paying any instalment of this amount of Rs.82.5 lakhs, then the consequences of such a default are to be: (1) that the Petitioner-society will immediately be entitled to recover the entire amount of its claim for transit rent arrears up to the date of default with interest at 12% per annum from the date of the default; and, (2) that the 1st Respondent will accept without protest or demur the termination of the Development Agreement by the society. That termination is currently held in abeyance or is suspended pending the completion of the Consent Terms.

3. Other amounts may also be payable by the developer. For instance, the society has paid some part of the property tax dues. This will have to be recovered or paid back by the developer. This amount is not included in the figure of Rs. 82.5 lakhs mentioned above.

4. List the matter on 3rd March 2020 for filing Consent Terms.”

5. It is true that the time for payment of the amount of Rs. 82.5 lakhs was to be decided. However, the amount was not in dispute. Mr

Khandeparkar states that when the society, around the mid-March, asked the developer to sign the Consent Terms, he claims that on account of Covid this could not be done.

6. The pandemic and the lock down did not prevent either the signing of consent terms or the actual movement of money from the developer to the society members. What is now starkly clear, is that the society in accepting this amount of Rs. 82.5 lakhs gave a considerable concession to the developer. The society members have also been without any payment of any kind for the ensuing period from February or March 2020 until date. There is also the question of property tax dues over and above the amount of Rs. 82.5 lakhs.

7. Mr Tamboly's instructions are to say that the money cannot be paid until consent terms are signed. That seems to me to be putting the cart before the horse. The money must be paid at the time of filing the consent terms or before, and then there must be some agreement for the rest. It is always open to the developer to negotiate the instalments to be paid. But I do not see how the developer can claim any rights in his Section 9 Petition and not pay anything at all towards the society's admitted dues.

8. I was willing to give the developer one further opportunity and said that the amount of at least Rs. 50 lakhs must be paid by 18th December 2020. This may seem like very short notice. Indeed it is not. The developer has known since February 2020 that it has a commitment to make this payment. I gave Mr Tamboly time to take

instructions and further indicated that the balance amount would have to be paid by the end of January 2021 on the same terms.

9. Mr Tamboly's instructions are that neither is possible. The consequences are inevitable.

10. The developer's Commercial Arbitration Petition (L) No. 1077 of 2019 is dismissed.

11. As regards Commercial Arbitration Petition (L) No. 5738 of 2020, this being a second Section 9 Petition filed by the society, the prayers at page 38 are indeed wide but I believe they are now inevitable. First, the society demands possession of Plot No. S, 1121.4 sq mtrs at CTS No. 6A, Survey Nos. 8 to 13 of Village Magathane, Taluka Borivali, Mumbai Suburban District Borivali (West) along with any existing structures thereon. Then the society asks that the Receiver be appointed of the property and deliver the property to the Petitioner. The third prayer is for an injunction against the developer from creating any third party rights in respect of the property or any part of it. The other injunctions sought are to restrain the Respondents from interfering or intervening with the redevelopment of the property by the Petitioner society itself and from interfering with the possession of the plot by the society. Finally, the society seeks a mandatory order against the Respondent to deliver all original documents, including development agreement, power of attorney, original approvals, original sanctions, original payment receipts and all other writings executed between the Petitioner and the Respondent.

12. Before I turn to these prayers a very quick look at the relevant dates and only to the extent necessary.

13. The Petitioner has 28 members. The development agreement in question is of 1st March 2011. On 19th March 2013, the developer submitted a proposal for demolition and reconstruction. The Petitioner members vacated around end-March 2013. The developer executed alternative accommodation agreements with the Petitioner Society's members.

14. There are allegations that the developer siphoned off considerable amounts and diverted these to other projects. It is Mr Khandeparkar's submission on behalf of the society that this is now almost a routine practice with this particular developer and that all his projects are facing the same situation. I need not deal with these aspects. They will undoubtedly be addressed in any ensuing arbitration.

15. On 27th March 2019 the society terminated the development agreement and revoked the power of attorney in favour of the developer. Then there were police complaints and so on and ultimately on 8th November 2019, the Petitioner invoked arbitration. It is thereafter that the Petitioner filed previous Commercial Arbitration Petition No. 989 of 2019 on which I made the order of 24th February 2020.

16. I do not believe that it is possible to accept the submissions of the developer that it has invested a large amount in this project and,

therefore, there should be a restraint against the society. Apart from anything else, I note that the Respondent/developer was present on 24th February 2020 and specifically accepted that in default it would accept unconditionally the termination of the development agreement effected by the society.

17. I have in a recent decision¹ already set out my understanding how these competing equities are to be balanced. On the one side is the purely monetary claim of a developer. As against this, there is a continually unfolding human tragedy of indescribable proportions. For, the society members' community has been fractured and shattered. They are scattered throughout the city in temporary accommodation and have been there, as the foregoing narrative shows, for the better part of the decade.

18. But it is not just that. For a very long time, these society members have been expected to fend for themselves and not even been provided the contractually due transit rent or displacement compensation. If this was only a question of delay for this or that technical reason in obtaining an occupation certificate, perhaps different considerations would arise. But non-payment of transit rent not only has the effect of leaving the society members twisting in the wind, but is a material breach of a core obligation under the development agreement. It is impossible to accept that a party that is in breach of a material contractual obligation should be entitled to any kind of equitable or discretionary relief. No Court of equity will ever

¹ *Goverdhangiri CHSL v Bharat Infrastructure & Engineering Ltd*, Arbitration Petition (L) No. 3237 of 2020, decided on 2nd November 2020.

countenance any such thing. The argument of the developer, in effect, runs like this: “I may be in breach. I may have not fulfilled my obligations, including my financial obligations. But because I have put some money into the project, the society members must continue to suffer so that I can, perhaps, some day, make a huge profit. Until I do so, the plight and condition of the society’s members, some middle-class of limited means, some in retirement, should matter not at all.” This is not a plea for justice. It is a demand that the court do injustice. On one side, money; on the other side, lives. It is clear to any court which matters the more.

19. The mere fact that the developer has put money into the project cannot and does not create equity in and of itself. After all, the objective of the developer is not to do this for a charitable purpose. It is to make large financial gains. The expenditure on the project is not, therefore, a handout to the society members. It is very much in the nature of an investment. But that investment is clearly coupled with a contractual obligation that the developer is bound to discharge. Without discharging this obligation, it can claim no rights in equity or in law.

20. The countervailing perspective is that of the society members. Quite apart from the human element to this, and to which I have referred earlier, there is the fact that they are the sufferers of a failure of a contractual obligation on the part of the developer. That alone must entitle them to both equitable and discretionary relief.

21. The existence of the arbitration agreement is not in dispute. The execution of the development agreement is undisputed. The arbitration clause contained in clause 40 of the development agreement requires the reference of the disputes to a sole Arbitrator. Obviously, the arbitration will have to be in Mumbai.

22. At this stage, both sides agree that even without requiring a formal Section 11 Application, the disputes and differences between the parties can be referred to a Counsel of this Court to be named by this Court.

23. Accordingly, I nominate and appoint Mr Gautam Ankhad, subject to his concurrence, as a sole Arbitrator to decide the disputes and differences between the parties arising from the Development Agreement dated 1st March 2011.

24. The Section 9 petition by the society will be treated as an application under Section 17 in arbitration. The developer's Section 9 petition is dismissed. Subject to leave of the learned Sole Arbitrator, the developer may, however, make whatever counter-claim it thinks fit.

25. In the meantime and subject to confirmation in the Section 17 Application, there will be an order in terms of prayer clauses (b) to (f) of Commercial Arbitration Petition (L) No. 5738 of 2020. To avoid any ambiguity, those prayers are set out below:

“(b) That this Hon’ble Court be pleased to appoint a Court Receiver, High Court, Bombay and/or any other fit

and proper person to act as a Receiver having all powers under Order XL of the Code of Civil Procedure, 1908 to take possession of the said property, i.e. Plot No. S admeasuring 1121.4 sq. mtr as per property card equivalent to 12070.64 sq. ft. bearing CTS No. 6A, Survey Nos. 8 to 13 of Village Magathane, Taluka Borivali, Mumbai Suburban, District Borivali (West) and any structures thereon, (with police assistances, if required) and hand over the said project and property to the Petitioner herein;

(c) That this Hon'ble Court be pleased to restrain the Respondent, its Partners, officers, servants, agents and/or all or any persons claiming through and under them by an order of temporary injunction from creating third party rights i.e. mortgages, sale, lien, leave and license, lease, gift and/or encumbrance of any kind whatsoever in respect of the said property i.e. Plot No. S admeasuring 1121.4 sq. mtr as per property card equivalent to 12070.64 sq. ft. bearing CTS No. 6A, Survey Nos. 8 to 13 of Village Magathane, Taluka Borivali, Mumbai Suburban, District Borivali (West);

(d) That this Hon'ble Court be pleased to restrain the Respondent, its Partners, officers, servants, agents and/or all or any persons claiming through and under them by an order of temporary injunction from intermeddling, interfering, obstructing in the redevelopment process, construction by the Petitioner by appointment of a third party developer, contractor, completion by self-development process and/or all or any other acts done on the said property and the said project by the Petitioner and/or its assignees, nominees, agents, contractors, developers;

(e) That this Hon'ble Court be pleased to restrain the Respondent, its Partners, officers, servants, agents and/or all or any persons claiming through and under them by an

order of temporary injunction from interfering in the possession of the Petitioner Society and/or in manner dispossessing the Petitioner Society and its members and/or its assignees, nominees, agents, contractors, developers etc from the said project and said property;

(f) That this Hon'ble be pleased to direct the Respondents, its Partners, servants, agents, contractors and/or all or any persons claiming through and under them to hand over possession to the petitioner of all the Original Documents (i.e. Development Agreement, Power of Attorney, original approvals, original sanctions, original payment receipts and/or all or any documents in relation to the said property and said project) in the custody and possession of the Respondent and/or all or any other writing executed between the Petitioner and Respondent.”

26. All three Petitions are disposed of in these terms. There will be no order as to costs.

TERMS OF APPOINTMENT

(a) Appointment of Arbitrator: Mr Gautam Ankhad, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under the Development Agreement dated 1st March 2011.

(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 Petitioner within one week from the date this order is uploaded.

- (ii) The Advocates for the Petitioner will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s Mr Gautam Ankhad,
Advocate

Address C/o. DJ Khambata,
Mulla House, 3rd Floor,
51, MG Road, Fort,
Mumbai 400 001

Mobile 022-66541576

Email gautam.ankhad@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward, in hard copy or soft copy (or both), the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to Advocates for the parties as soon as possible. The Advocates for the Petitioners will arrange to file the original statement in the Registry. If the statement is forwarded in soft copy, a print out of the covering email is also to be filed in the registry.
- (d) **Appearance before the Arbitrator:** 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.

- (e) **Contact/communication information of the parties:**
Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. The information is to include functional email addresses and mobile numbers.
- (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. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
 - (ii) The present Petition under Section 9 of the Arbitration Act will be treated, heard, and disposed of as an application under Section 17 of the Act. All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.

- (iii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
- (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.
- (l) **Procedure:** These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

27. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)