

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION APPEAL NO. 3 OF 2022**

Century Rayon Employees Co-op. Hsg. Soc. Ltd. ... Appellant/
Orig. applicant
vs.
M/s. Roy & Associates ... Respondent

**WITH
ARBITRATION APPEAL (STAMP) NO. 2704 OF 2021**

M/s. Roy & Associates ... Appellant/
Orig. respondent
vs.
Century Rayon Employees Co-op. Hsg. Soc. Ltd. ... Respondent/
Orig. claimant

Mr. Sandeep V. Bane for appellant in ARA/3/2022 and respondent in ARA (St.)/2704/2021.

Mr. Vivek Patil, i/by. Vivek Patil & Associates for respondent in ARA/3/2022 and appellant in ARA (St.)/2704/2021.

**CORAM : MANISH PITALE, J
DATE : 9th NOVEMBER, 2022**

P.C. :

. These appeals have been filed under Section 37 of the Arbitration and Conciliation Act, 1996 by both the rival parties, being aggrieved by order dated 4th January, 2021, passed by the Court of Principal District Judge, Thane, whereby an application filed under Section 9 of the said Act by Century Rayon Employees Co-operative Housing Society Limited, which is the respondent in Arbitration Appeal (Stamp) No.2704/2021 and appellant

in Arbitration Appeal No.3/2022, was partly allowed and specific directions were given in the matter.

2. Shorn of unnecessary details, the brief facts leading to filing of the present appeals are that the parties had entered into a development agreement on 6th August, 2009, whereby the appellant in Arbitration Appeal (Stamp) No.2704/2021, who is the respondent in Arbitration Appeal No.3/2022 (hereinafter referred to as the Developer), had agreed to develop the property belonging to the society, as per the terms of the aforesaid agreement. The society claimed that the developer failed to take appropriate steps in the matter. In this backdrop, according to the developer, a supplementary agreement dated 13th November, 2013, was executed between the parties for development of the property. It was *inter alia* agreed that the society would give possession of the property to the developer, who would pay rent to the society during the period when the development work would be undertaken. It is the case of the developer that advance rent was paid for the period from December, 2013 to November, 2016. It was further claimed by the developer that there was no further liability to pay rent as the society itself terminated the agreement with effect from 2nd June, 2019. In this backdrop, disputes arose between the parties and claims and counter-claims were made and the society was constrained to file application under Section 9 of the said Act.

3. By the impugned order, the Court below partly allowed the application in the following manner:

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ORDER

- 1) Application is partly allowed.
- 2) Respondent is hereby restrained from transferring his

development rights in respect of property in question acquired from applicant society to third party.

- 3) The restraining order herein above shall remain in force upto the period of 3 months from the date of order of appointment of Arbitral Tribunal by the Hon'ble High Court.
- 4) Respondent is hereby directed to deposit sum of Rs.1,00,08,000/- towards unpaid rent and difference of transit rent in this Court within a period of four weeks from today.
- 5) Rest of the prayers made in the application stand rejected.
- 6) Dictated and pronounced in open Court.”

4. In the appeal filed by the developer, being Arbitration Appeal (Stamp) No.2704/2021, on 9th February, 2021, while issuing notice, this Court granted ad-interim stay to the impugned order. Thereafter, on a petition moved under Section 11 of the aforesaid Act, this Court appointed a sole arbitrator in terms of the arbitration agreement between the parties for resolving the disputes. It appears that application under **Section 17** of the said Act was filed before the arbitrator, but the orders were kept in abeyance, in view of the pendency of the appeal filed by the developer before this Court. Thereafter, the society filed Arbitration Appeal No.3/2022, challenging the same impugned order before this Court.

5. Mr. Vivek Patil, learned counsel appearing for the developer submitted that despite the ad-interim order dated 9th February, 2021, passed by this Court, whereby the impugned order passed by the Court below was stayed in its entirety, the developer had not taken any steps for transferring development rights of the society to any third party and that in view of the arbitration proceedings having commenced before the sole arbitrator and reached the stage of final arguments, the developer does not intend to create

any such third party rights till the learned arbitrator passes award in the matter. The real grievance of the developer is as regards clause (4) of the operative portion of the impugned order quoted above, whereby the developer has been directed to deposit sum of Rs.1,00,08,000/- towards unpaid rent and difference of transit rent in the Court below. It is submitted that a crucial aspect of the matter pertaining to 29 tenements which, according to the developer, were already sold to it, was not taken into consideration and that therefore, there was a serious dispute about quantum of the unpaid rent and the difference of the transit rent. It was submitted that the parties have adduced evidence before the learned arbitrator and since the matter has reached the stage of final arguments, it would be appropriate if the Arbitration Appeal (Stamp) No.2704/2021 is allowed by setting aside clause (4) of the operative portion of the impugned order quoted above. It was further submitted that the developer would not create any third party rights till the award is pronounced by the arbitrator.

6. On the other hand, Mr. Sandeep Bane, learned counsel appearing for the society submitted that there was no substance in the contentions raised on behalf of the developer, for the reason that as regards 29 tenements, no documents were produced before the Court below, as claimed by the developer. It was submitted that the said issue was at large before the learned arbitrator and that therefore, there was no substance in the relief now sought on behalf of the developer before this Court. It was further submitted that certain observations made in the impugned order were incorrect and that therefore, the society was constrained to file Arbitration Appeal No.3/2022, particularly on the aspect pertaining to the liability of the developer to pay Rs.10 lakhs each to the members of the society. On this basis, it was submitted that while the appeal filed by the developer deserves

to be dismissed, the appeal filed by the society deserves to be allowed in the interest of justice.

7. On the basis of the impugned order passed by the Court below, this Court has considered the rival contentions and the material made available at this stage, as regards the reliefs sought in the application filed under Section 9 of the said Act. The Court below has been careful to qualify its observations by stating that the same were prima facie and obviously, subject to the findings that would be rendered in the arbitration proceedings. The relevant observations pertaining to the aspect of transit rent are found in paragraph 17 of the impugned order and the directions contained in clause (4) of the operative portion of the impugned order are discussed in paragraph 18 of the impugned order. The aforesaid paragraphs read as follows:

“17] It is not the case of the applicant that the respondent is not in a financial capacity to complete the project and from the material on record, prima facie it seems that the respondent has made advance payment of transit rent to the members from November, 2013 to December, 2016 and subsequent payment except rise of 10%. The period of non payment of transit rent is only for 5 months i.e. from January, 2019 to May, 2019. So far as contention of the applicant about non payment of Rs.10 lakh per member is concerned, prima facie the said claim is not correct in view of the terms of agreement. In clause No.4 of the Development agreement it is specifically mentioned that the respondent would pay Rs.10 lakh to the owner and the owner has been defined as applicant society and not individual members. Prima facie therefore the said claim of the applicant is not sustainable and hence no breach of agreement appears to have been committed by the respondent in that regard.

18] However, from the documents placed on record it is clear that transit rent of Rs.84 lakhs and odd amount from 01/01/2019 to 31/05/2019 and difference of transit rent of Rs.16,68,000/- is unpaid and thus there is breach of this term of the agreement for the period of 5 months. The said amount is towards payment of rent for transit accommodation payable to the members of the applicant society, as they have vacated premises and handed over possession of plot to respondent. Considering the nature of payment and its urgency for a person who has vacated his premises, it is just and necessary to secure the said amount by way of interim measures. In any event this payment cannot be deferred and even payment made at any later stage will not be sufficient to compensate the loss caused to the members of the applicant society. The contention of the respondent about 29 tenements being transferred in his name cannot be accepted at this stage for want of any document of title filed on record and the said issue is subject matter of decision by Arbitral Tribunal. The respondent therefore deserves to be directed to deposit such entire arrears in respect of all 139 tenements in this Court within specific time.”

8. This Court is of the opinion that in the facts and circumstances of the present case and the material that was made available before the Court below, it cannot be said that the impugned order suffers from any errors requiring interference at the hands of this Court exercising jurisdiction under Section 37 of the said Act. As noted above, the Court below has only made prima facie observations in the impugned order.

9. Insofar as clause (2) of the operative portion of the impugned order is concerned, the developer has itself come forward before this Court to state that no third party rights have been created and that it does not intend to do so till the arbitration proceedings culminate into an award. To that extent, there is no question of interference in the impugned order.

10. Insofar as the quantum specified in clause (4) of the operative portion of the impugned order, this Court is of the opinion that the observations made in paragraphs 17 and 18, quoted above, sufficiently demonstrate the reasoning of the Court below. It is vehemently submitted on behalf of the developer that even if at the stage when the impugned order was passed, relevant documents may not be available as regards the 29 tenements, sufficient documents were now produced before the learned arbitrator to demonstrate that 29 tenements were indeed transferred in the name of the developer and therefore, to that extent, quantum of unpaid rent directed to be deposited as per the impugned order deserves to be reduced.

11. This Court is of the opinion that since the aforesaid issue is itself at large and open for consideration before the learned arbitrator, it would not be appropriate to modify the quantum specified in clause (4) of the operative portion of the impugned order, particularly when there appears to be a dispute about period for which the said transit rent and difference of transit rent is claimed by the society.

12. The parties agree that the arbitration proceedings before the learned arbitrator have reached the stage where evidence is already recorded and final argument are to be addressed. In this situation, it cannot be said that the direction given in clause (4) of the operative portion of the impugned order needs to be modified, because it is only a direction to deposit a particular amount before the Court below in specified period of time, which is obviously subject to the award that shall be rendered by the learned arbitrator upon culmination of the arbitral proceedings.

13. It is clarified that the deposit of the amount in the Court below shall be subject to the award that shall be rendered by the learned arbitrator, upon culmination of the arbitral proceedings.

14. As regards the grievance raised on behalf of the society, this Court is not at all impressed that the society can raise any contention about alleged errors committed by the Court below because the impugned order is reasonable and it is found to be correct in the facts and circumstances of the present case.

15. Accordingly, both the appeals are dismissed. The developer i.e. the appellant in Arbitration Appeal (Stamp) No.2704/2021 is directed to deposit the amount of Rs.1,00,08,000/- towards unpaid rent and difference of transit rent as directed by the Court below, within six weeks before the Court i.e. the Court of Principal District Judge, Thane.

16. The learned arbitrator is requested to proceed with the arbitral proceedings expeditiously so that the disputes between the parties can be resolved at the earliest.

(MANISH PITALE, J)

Priya Kambli