

Prajakta Vartak

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

**ARBITRATION PETITION NO.76 OF 2022
WITH
ARBITRATION APPLICATION NO.146 OF 2021**

Kshipra Co-op. Hsg. Soc. Ltd. ..Petitioner/Applicant
Vs.
M. M. Ideal Infra & Ors. ..Respondents

Mr. Piyush Shah with Mr. Dishang Shah, Mr. Chirag Unadkat and Ms. Hetta Sagar for Petitioner/Applicant.

Mr. Makarand Kale for Respondent Nos.1 and 2.

Ms. Vaishnavi M. i/b. Mhatre Law Associates for Respondent No.3.

**CORAM : G.S. KULKARNI, J.
DATE : APRIL 05, 2022.**

P.C.:

1. Arbitration Petition No.76 of 2022 is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the petitioner has prayed for interim measures against the respondents pending the arbitral proceedings. The respondents are developers as appointed by the petitioner-society to undertake redevelopment of its premises under a Development Agreement dated 24 September, 2013 entered between the parties. The petitioner has prayed for the following reliefs:-

“(a) pending the hearing and final disposal of the Arbitration proceedings, this Hon’ble Court may be pleased to restrain the Respondents, their servants, agents and persons claiming through them from creating any third party right, title and interest in respect of the unsold flats in the newly constructed building known as Kshipra Co-operative Housing Society Ltd. situated at Sums Building, Dr. Maheshwari Road, C.S. No.

13/721, Mandavi till temporary accommodation charges which are stopped by the Respondent No.1 are paid to the members of the Petitioner Society, as per the Annexure being Exhibit "G" hereto;

(b) pending the hearing and final disposal of the Arbitration proceedings, this Hon'ble Court may be pleased to pass an order directing the Respondents, their servants, agents and persons claiming through them to pay the arrears of compensation to each of the members of the society as per the Exhibit "G" annexed hereto and continue to pay till members of the Petitioner's society are put in vacant and peaceful possession of their respective residential premises and full Occupation Certificate is procured from MCGM.

(c) pending the hearing and final disposal of the Arbitration proceedings, this Hon'ble Court may be pleased to pass an order directing the Respondents, their servants, agents and persons claiming through them to pass an order to revalidate and issue the fresh Bank Guarantee as per the Development Agreement to the tune of Rs.1,00,00,000/- (Rupees One Crore only) from the Nationalized Bank.

(d) pending the hearing and final disposal of the Arbitration proceedings, the Respondent be restrained by an Order of Injunction of this Hon'ble Court from letting out the Petitioner Society's premises or any part thereof for any commercial activities like letting out for shooting, selling the water, letting of the premises to various Vendors, Merchants for commercial activities etc.

(e) pending the hearing and final disposal of the Arbitration proceedings, this Hon'ble Court may be pleased to pass an order directing the Respondents, their servants, agents and persons claiming through them to pay all arrears of municipal taxes of Rs. 32,79,180/- (Rupees Thirty Two Lakhs Seventy Nine Thousand One Hundred and Eighty) are shown as arrears of municipal taxes till the period February 2020 and thereafter and statutory dues and such other charges required to be paid under the Development Agreement dated 24.09.2013.

(f) pending the hearing and final disposal of the Arbitration proceedings, the Respondents, his servants, agents and persons claiming through them to disclose the various loans taken from financial institutions such as Reliance Home Finance etc. and to disclose assets and liabilities by producing the audited Balance Sheet and Statement of Accounts of the last three years."

2. The primary grievance of the petitioner is in regard to the non-completion of the redevelopment so as to house its members which according to the petitioner, is contrary to the terms and conditions of the agreement. The second grievance as canvassed by Mr. Shah, learned counsel for the petitioner is in regard to the non-payment of the transit rent and the payment of the municipal taxes by the respondents which according to Mr. Shah, is an absolute obligation on the part of the respondents. It is pointed out by Mr. Shah that as on date, the respondents are in arrears of the municipal taxes to the tune of Rs.87 Lakhs, although in the petition it has been stated to be an amount of Rs.32,79,180/- upto the filing of this petition. The arrears of the transit rent according to Mr. Shah, are to the tune of Rs.2,50,00,000/- till March, 2021. The petitioner's concern is also that the respondent nos.1 and 2 have not renewed the bank guarantee which was of Rs. 1 Crore out of which an amount of Rs.30 Lakhs was encashed and the balance bank guarantee of Rs. 70 Lakhs as per the terms and conditions of the development agreement was required to be renewed.

3. On the other hand, Mr. Kale, learned counsel for respondent nos.1 and 2 (respondent no.2 is the existing partner of respondent no.1) has referred to the reply affidavit of Mr. Ainul Mohammed Islam Shaikh (respondent no.2), who is the Partner of respondent no.1 to contend that the substantial work of the building was undertaken and the

building is almost complete, except internal finishing work. Mr. Kale had submitted that the balance work of the building would be completed within a period of six months from 30 March, 2022. In so far as the arrears of the transit rent is concerned, Mr. Kale states that as and when the financial position of respondent nos. 1 and 2 improves and is suitable, the arrears of the transit rent shall be cleared by his clients including by offering payment in installments. He had submitted that as a security, certain flats can be reserved which shall not be sold by his clients, so that in the event it is not possible for the respondents to clear the arrears of the transit rent as also the municipal taxes etc., the proceeds from the sale of the said flats can be utilized by the petitioner to make such payments.

4. On 30 March, 2022, this Court, after hearing the parties at some length, had passed an order recording such statement as made by Mr. Kale that the balance work of the building including its final finishing work shall be completed by respondent nos.1 and 2 within a period of 6 months from 30 March, 2022 and a Part Occupation Certificate would be obtained by respondent nos.1 and 2. It was observed that such statement on behalf of respondent nos.1 and 2 as an undertaking on affidavit be placed on record by the said respondents on or before the adjourned date of hearing. Accordingly the following order was passed by the Court:-

“1. Stand over to **04 April, 2022 (H.O.B.)**.

2. Mr. Kale, learned counsel for respondent nos.1 and 2 makes a statement that respondent no.3 has retired from the partnership on 20 March, 2017.

3. Mr. Kale, on instructions of his clients whose representative is present in the Court, has made a statement that the balance work of the building including the final finishing work of the building shall be completed by respondent nos.1 and 2 within a period of 6 months from today and a Part Occupation Certificate would be obtained by respondent nos.1 and 2. Mr. Kale states that an undertaking of his clients to this effect on an affidavit shall be placed on record on or before the adjourned date of hearing.

4. In so far as the arrears of transit rent are concerned, Mr. Kale intends to take instructions, as to the time limit and the installments within which such amounts shall be cleared by his clients. Mr. Kale has also informed that there are 17 unsold tenements in the building in question. Mr. Kale would make a statement as to how many of these unsold tenements can be kept as security to be not dealt with by his clients, in any manner whatsoever, till the amount of the transit rent is cleared. Let the appropriate position in that regard be taken by respondent nos.1 and 2 and the same be also placed on record on an affidavit.

5. On the adjourned date of hearing, the Court shall pass further appropriate orders, after hearing the parties.”
(emphasis supplied)

5. In pursuance of the above order, two affidavits on behalf of respondent nos.1 and 2 are placed on record. The first affidavit is dated 04 April, 2022 which is in the nature of the affidavit making an undertaking to the Court wherein in paragraph 2 of the affidavit, respondent nos.1 and 2 have made the following statement:-

“2. The building is complete in all respect except minor internal finishing work. I further undertake that the balance work of the building including the final finishing work of the building shall be completed by respondent nos.1 and 2

within a period of 6 months from 30.03.2022 and a Part Occupation Certificate would be obtained by respondent nos.1 and 2.”

6. In paragraph 3 of the above affidavit, respondent nos.1 and 2 had undertaken to reserve two flats namely Flat Nos. 1502 and 1503 the details of which are set out in the said paragraph as a security to the petitioner-society for arrears of rent. However, Mr. Shah contended that the amount of arrears of the transit rent is quite large as also there is an outstanding amount payable to the Municipal Corporation by way of municipal taxes. He, hence, submitted that reserving two flats as and by way of security would not be proportionate to secure the liability of respondent nos.1 and 2 as it exists today. The proceedings were accordingly adjourned to enable respondent nos.1 and 2 to reserve two more flats and furnish an undertaking to the Court on an affidavit that in all four flats would be maintained as a security for clearing such amounts. Accordingly, a further affidavit of Mr. Ainul Mohammed Islam Shaikh dated 05 April, 2022 has been filed in which in paragraphs 2 and 3 the following statements are made as an undertaking to the Court:-

“2. I say that, the Respondents have completed the construction of 21 storey building out of his own pocket by taking loan from bank. The building is complete in all respect except minor internal finishing work. I further undertake that the balance work of the building including the final finishing work of the building shall be completed by Respondent nos.1 and 2 within a period of 6 months from 30.03.2022 and a Part Occupation Certificate would be obtained by Respondent nos.1 and 2.

3. I further say that with regard to arrears of rent as alleged

I undertake to this Hon'ble court to not to deal with four 1BHK flats viz flat no. 1502 having area admeasuring 405 SQ.FT, flat no. 1503 having area admeasuring 405 SQ. FT, flat no.1703 having area admeasuring 360 SQ. FT & flat no. 1803 having area admeasuring 360 SQ. FT as a security to the Petitioner society for arrears of rent in case the Petitioner is successful in establishing their claim with regard to arrears of rent before the Arbitrator.”

7. Accordingly, respondent nos.1 and 2 have now reserved four flats i.e. Flat Nos.1501, 1502, 1703 and 1803 the details of which are set out in paragraph 3 of the said affidavit as and by way of security to the petitioner-society for arrears of the rent as also for clearing of the municipal taxes as informed by Mr. Kale. The undertaking as set out in the affidavit dated 05 April, 2022 is accepted and it is ordered that respondent nos.1 and 2 shall not deal with Flat Nos.1501, 1502, 1703 and 1803, in any manner whatsoever till the arrears of the transit rent payable to the members of the society and the property taxes are cleared.

8. Mr. Kale, learned counsel for respondent nos.1 and 2 has stated that it would be difficult for respondent nos.1 and 2 to clear the amounts of the arrears of the transit rent immediately, however, Mr. Kale on instructions, submits that such amount shall be cleared till the time of handing over of the flats, as undertaken to the Court, which is within 6 months from 30 March, 2022, however, this would not preclude them from making any early payment, if financial situation improves.

9. For the present, the undertaking as furnished on behalf of respondent nos.1 and 2 is accepted as a sufficient measure of protection to the petitioner-society which is accepted so as to enable respondent nos.1 and 2 to complete the balance work within a period of six months. However, it would be open to the petitioner to raise any other issues, in the event, if the petitioner is of the opinion that there is non-compliance of the provisions of the agreement as and when such situation arises. Also the contention of the respondents in that regard are expressly kept open.

10. There is a Section 11 application as filed on behalf of the petitioner praying for appointment of an arbitral tribunal. There is no dispute in regard to the arbitration agreement between the parties as contained in clause 41 of the agreement. As submitted on behalf of the parties, it appears that as on date, the dispute is in regard to the quantum of the transit rent on which according to Mr. Shah, arbitration would become necessary. Mr. Kale would also contend that his clients are also desirous that the dispute in regard to the amount of the transit rent as payable to the members being a disputed issue, the same be referred to arbitration. Although learned counsel for the parties have taken such position, they would also agree that an attempt can be made by the parties to resolve the issues and avoid arbitration, in as much as

now there is a sufficient security in view of four flats being kept vacant and an undertaking of respondent nos.1 and 2 not to deal with such flats has been recorded in the present proceedings filed on behalf of the petitioner/applicant. In my opinion, such appreciation of the position on the part of the parties is fair and an attempt can be made by the parties to resolve the dispute on the arrears of the transit rent and which shall be arrived on or before the possession of the premises is handed over, so that once the possession is handed over, there is no subsisting dispute between the parties. Let an attempt in that regard be made by the parties. However, in the event such attempt fails and no settlement can be brought about between the parties, in that event, the parties have suggested that an arbitrator be appointed so that the dispute on the arrears of the transit rent or any other dispute can be then adjudicated in arbitral proceedings.

11. In view of such consensus between the parties, to have the disputes adjudicated in the arbitral proceedings, in the event the disputes are not resolved in the manner as suggested by the parties, an arbitral tribunal can be appointed. Accordingly, both the proceedings are disposed of by the following order:-

ORDER

- (i) The Section 9 petition filed by the petitioner-society is disposed of

accepting affidavits of undertaking dated 04 April, 2022 and 05 April, 2022 of Mr. Ainul Mohammed Islam Shaikh. Accordingly, respondent nos.1 and 2 shall complete the balance work of the project within a period of six months from 30 March, 2022 and obtain an Occupation Certificate.

(ii) In so far as the arrears of the municipal taxes is concerned, it is open to respondent nos.1 and 2 to take up the issue with the Municipal Corporation and resolve any issue in regard to the actual amount being payable, however, let the entire amount of the municipal taxes be cleared at the earliest so that respondent nos.1 and 2 can make a proposal for part Occupation Certificate.

(iii) The parties are at liberty to engage themselves in a dialogue to settle their dispute on the arrears of the transit rent. Such an effort be made and completed within a period of three months from today.

(iv) It would be open for respondent nos.1 and 2, if the financial condition improves, to make payment of arrears of the rent in installments as also contended by Mr. Kale on behalf of respondent nos.1 and 2. However, the arrears of rent be cleared before the possession of redevelopment premises is handed over to the petitioner-society and/or its members.

(v) In the event the dispute on arrears of rent or any other issue under the agreement survives, the disputes are referred to arbitration by appointing Mr. Phiroz Bharucha, Advocate of this Court as a sole Arbitrator who shall enter reference after a period of 5 months from today and who shall adjudicate the disputes which remain unresolved. A Statement of Claim in that regard be placed before the arbitrator within 15 days of the learned arbitrator entering the reference.

(vi) The learned prospective sole arbitrator, before entering the reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of these proceedings with a copy to be forwarded to both the parties;

(vii) All contentions of the parties on any arbitral proceedings, which may be undertaken by the learned sole arbitrator are expressly kept open.

(viii) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.

(viii) The petition is disposed of, however keeping all other contentions of the parties open and subject to the orders passed hereinabove.

(ix) Needless to observe that Mr. Shah has assured that all cooperation shall be meted to respondent nos.1 and 2 to complete the balance work of the project. It is also assured by Mr. Shah that henceforth his clients shall also not make any complaint to any of the authorities and all issues *inter se* between the parties shall be resolved by mutual negotiations.

(x) Disposed of. No costs.

[G.S. KULKARNI, J.]