

Prajakta Vartak

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 356 OF 2021**

Habib Nadiadwala & Ors.

..Petitioners

Vs.

M/s. Next Constructions & Ors.

..Respondents

Mr. Yatin Shah for Petitioners.

Mr. Shoaib Memon with Mr. Ibrahim Memon and Mr. Ashfaque
Shaikh for Respondent Nos.1 and 2.

CORAM : G.S. KULKARNI, J.

DATE : MARCH 21, 2022.

P.C.:

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act").

2. The petitioners are tenants who are 11 in numbers out of the total 20 tenants of an old building stated to be of the ownership of respondent no.1 of which respondent nos.2 and 3 are Partners. The petitioners are before the Court praying for the following interim measures pending the arbitral proceedings :-

“(a) That this Hon’ble Court be pleased to pass an order thereby directing that the redevelopment proposal of Jai Niketan building situate on property bearing Plot No. 509, Scheme No. VII, Khar Danda, Khar West, Bombay at Junction of 1st Road and 16th Road, in Revenue Village Danda, South Salsette Taluka, BSD admeasuring about 1195 sq. yards equivalent to 999.20 be carried out by the Respondents or by any other fit and proper competent authority or person as decided by this Hon’ble Court under the supervision of the Hon’ble Court Receiver, so that the Petitioners shall get their premises as negotiated and stated in the Permanent Alternate Accommodation Agreement being Exhibit “B” herein without any difficulty;

(b) That this Hon’ble Court also be pleased appoint the Court Receiver High Court Bombay or any other fit and proper

person as Receiver in respect of the property bearing Plot No. 509, Scheme No. VII, Khar Danda, Khar West, Bombay in which the building Jai Niketan was situated at Junction of 1st Road and 16th Road, in Revenue Village Danda, South Salsette Taluka, BSD admeasuring about 1195 sq. yards equivalent to 999.20 sq. mtrs;

(c) That this Hon'ble Court be pleased to issue a permanent Order and Injunction thereby restraining the Respondents, their agents, servants, partners and all other person or persons claiming under or through them from in any manner, carrying on any construction work on the property property bearing Plot No. 509, Scheme No. VII, Khar Danda, Khar West, Bombay in which the building Jai Niketan was situated at Junction of 1st Road and 16th Road, in Revenue Village Danda, South Salsette Taluka, BSD admeasuring about 1195 sq. yards equivalent to 999.20 sq. mtrs except under plans sanctioned by the MCGM;

(d) That that pending the hearing and final disposal of the Petition this Hon'ble Court be pleased to pass temporary Order and Injunction thereby restraining the Respondents, their agents, servants, partners and all other person or persons claiming under or through them, from in any manner, carrying on any construction work on the property property bearing Plot No. 509, Scheme No. VII, Khar Danda, Khar West, Bombay in which the building Jai Niketan was situated at Junction of 1st Road and 16th Road, in Revenue Village Danda, South Salsette Taluka, BSD admeasuring about 1195 sq. yards equivalent to 999.20 sq. mtrs except under plants sanctioned by the MCGM;

(e) That this Hon'ble Court be pleased to pass orders directing the Respondents to pay all the arrears and continue paying the rent/compensation as agreed between the parties under the Agreement for Permanent Alternate Accommodation at Exhibit "B" herein every month without delay or default till the newly constructed premises are allotted to them as per the MCGM approved plan."

3. A landlord-tenant dispute, namely an eviction suit filed by respondent no.1 against the petitioners, was subject matter of the proceedings before the Small Causes Court at Mumbai in RAE Suit No.536/912 of 2012. The said suit was disposed of in terms of the consent terms entered with the petitioners being consent terms dated 22 March, 2017. Under the consent terms, it was agreed between the

parties that the respondents shall provide a permanent alternate accommodation to the petitioners and an agreement to that effect [permanent alternate accommodation agreement (for short, “PAAA”)] would be entered into between the parties. The existing building was to be demolished and the petitioners would be allotted tenements on ownership basis in the new building to be constructed by the respondents.

4. It appears that the existing building was in a dilapidated condition, hence, a notice was issued by the Municipal Corporation of Greater Mumbai (for short, “MCGM”) dated 16 October, 2019 categorizing the building in “C-1” category. On such backdrop, on 20 January, 2020, the PAAA came to be executed between the petitioners and the respondents.

5. Mr. Shah, learned counsel for the petitioners pointed out various clauses of the PAAA to contend that the redevelopment which was to be taken up, was accepting that the MCGM shall be the planning authority and it is the MCGM which would sanction the building plans. To support such contention, Mr. Shah has pointed out clause 4 of the PAAA, which categorically provides that it shall be the MCGM’s approved plan which shall be acted upon. Clause 4 of the PAAA is required to be noted which reads thus:-

“4. The LANDLORDS/DEVELOPERS agree and undertake to provide to the TENANT that LANDLORDS/DEVELOPERS shall provide and give to the TENANT, in lieu of his/her existing useable area of the said tenanted premises, a new self-contained residential flat, along with one stack car parking space as per MCGM Approved Plan, free of costs and on ownership basis, by way of permanent alternate accommodation viz; Flat No.802 of usable carpet area admeasuring 436 sq. fts. on Eighth Floor, as shown on the floor plan annexed hereto as Annexure “F” and more particularly described in the Third Schedule hereunder written, but does not include projection area and/or chhajas

etc. however, the same is inclusive of fungible FSI area inside the said Permanent Alternate Accommodation (hereinafter referred to as the “said Rehab Premises”), in consideration/lieu of the TENANT agreeing to vacate the said tenanted premises in the said existing building Jay Niketan and hands over peaceful possession thereof to the LANDLORDS/ DEVELOPERS for the purpose of demolition thereof so as to enable the LANDLORDS/ DEVELOPERS to redevelop the said property and construct new building on the said property.”

6. After the PAAA was entered into, the petitioners vacated their respective premises in or about 20 September, 2020. Thereafter, the old building was demolished almost after one year i.e. sometime in February, 2021.

7. The genesis of the disputes between the parties is a “draft consent letter” as demanded by the respondents from the petitioners. It is a letter which the respondents want the petitioners to be addressed to the Chief Executive Officer of the SRA, whereby an irrevocable consent to be given by the petitioners accepting that the proposed development would now be a SRA redevelopment. In paragraphs 7 and 9 of the said draft consent letter, the following consent is sought from the petitioners:-

“7. Majority tenants have already given consent and appointment in favour of M/s. Next Constructions the Owners/ Landlords/Developer to redevelop tenanted building under regulation 33(11) of DCPR-2034 (PTC Scheme).

.....

9. The Owners/Landlords/Developer have agreed to incur all legal costs and expenses to obtain all clearances from all concerned as per M.C.G.M./Govt./**SRA** or any other norms to redevelop the said property by obtaining necessary permissions as per law. The terms and conditions for redevelopment have been elaborated in the duly registered Permanent Alternate Accommodation Agreement dated and I am agree to abide by/stick to the mutual understanding as per same.”

8. Mr. Shah would submit that the consent terms entered between the parties before the Small Causes Court as also the PAAA was clear

that the redevelopment in question was not to be as a slum rehabilitation scheme. He submits that it was never agreed between the parties that the redevelopment would be a re-development as a SRA scheme and/or that in any manner the re-development would be under Regulation 33(11) of DCPR 2034. Mr. Shah would urge that contrary to the express terms and conditions of the agreement, the respondents intend to redevelop the building as a SRA scheme. It is submitted that the very basis of the consent terms and the PAAA is now sought to be unilaterally altered to convert the project as a slums project under the DCPR 2034. It is pointed out that any scheme under the SRA Act would not be the interest of the petitioners for number of reasons, as also, it would diminish the value of the permanent alternate premises, rendering the PAAA and the consent terms into mere piece of paper. It is submitted that now the proposal of the respondents is to offer 9 to 13 floors to the petitioners and the other tenants, and the SRA is proposed to be handed over units from 13 to 17 floors. It is Mr. Shah's contention that in the wildest of the petitioners dreams it was never in contemplation that the consent terms as entered between the parties before the Small Causes Court as also under the PAAA, what was sought to be extracted from the petitioners was a SRA redevelopment.

9. On the other hand, Mr. Memon, referring to clause 21 of the consent terms read with clauses v (page 45), viii (page 46) and xiii (page 48) as also referring to paragraphs 3 and 14 of the PAAA as entered between the parties, would submit that it was always open for the respondents to change the nature of the scheme and what is sought to be done under the Regulation 33 (11) of the DCPR 2034 is certainly permissible under the consent terms as also PAAA. It is Mr. Memon's contention that the tenants have limited rights and they have to be rehabilitated as per the PAAA and thus, the tenants cannot have any

objection to the scheme being undertaken by the petitioners in a particular manner and as would be permissible in law for the respondents to so undertake. He submits that there was no assurance whatsoever to the petitioners under the consent terms as also under the PAAA, that the redevelopment ought not to be under the DCPR 33(11), and that the planning authority would only be the MCGM. Thus the entire thrust of Mr. Memon's arguments is to the effect that what is now sought to be done by the respondents by seeking consent of the petitioners/tenants in the draft consent letter (page 70) is completely a permissible action. It is his submission that there is no irregularity in that regard affecting the petitioners' right in any manner in respect of their entitlement.

10. I have heard learned counsel for the parties. I have gone through the record including the respondents' reply affidavit as also the petitioners' rejoinder affidavit. It is not in dispute that the petitioners were tenants and in the proceedings before the Small Causes Court, and that consent terms were entered between the parties whereunder the respondents had agreed to provide a permanent alternate accommodation to the petitioners. This was followed by the respondents acting under the consent terms and entering into a PAAA which had clear and distinct terms of allotment of a flat on ownership basis to each of the petitioners. Thereafter the old building was demolished. In my opinion, these subsequent developments namely of the petitioners vacating their respective tenements and the building being demolished, would not entitle the respondents to unilaterally change the complexion of the PAA agreement to convert the project into a SRA project.

11. There is much substance in the contentions as urged by Mr. Shah that, as to what was not expressly agreed between the parties is now sought to be foisted by the respondents on the petitioners, by changing the entire complexion of the redevelopment scheme. From a perusal of the terms and conditions of the PAAA, I am of the prima facie opinion that Mr. Shah is also correct in his submission that although the petitioners were the tenants, however, once the PAAA was entered into, the rights of the parties as set out in the PAAA are the rights and obligations, which bind the parties namely the terms and conditions of the PAAA.

12. If PAAA does not in any manner explicitly specify that the scheme would be a SRA scheme as also when there is no categorical inclusion of the respondents undertaking the scheme as a SRA scheme under the provisions of Regulation 33(11) of DCPR 2034, then there is no warrant for the respondent to deceptively change the scheme. It thus prima facie appears that the petitioners were kept in absolute dark by the respondents, by utilizing the vague expressions in the PAAA, which are to be understood as to how the parties would normally understand in a plain and common parlance, that the redevelopment scheme is being undertaken in accordance with law and normally as per Development Control Rules and Regulations, 2034. However, Regulation 33(11) of the DCPR 2034 is now sought to be applied by the respondents, to the disadvantage of the petitioners by changing the nature of the scheme into a scheme under the SRA. It is not disputed by the Mr. Memon that the consent letters were sought to be obtained specifically incorporating that the scheme would now be undertaken under Regulation 33(11) of the DCPR 2034. It is quite difficult to accept as to how DCPR 33 (11) can be made applicable to the existing building when the land/building was never declared a slum under the Slums Act. It was not in the

faintest of the petitioners imagination that such jugglery of words was possible that a normal old building can be now categorized as a slum redevelopment, although being vehemently contended by Mr. Memon that the situation in hand is such that the respondents can take recourse to DCPR 33(11) and undertake the redevelopment as a slum scheme.

13. DCPR 33(11) of the Development Control Regulations of Greater Mumbai, 2034 provides for a Permanent Transit Camp tenements for Slum Rehabilitation Scheme and inter alia provide that total FSI on plot area may be allowed to be exceeded up to 4 for construction of Transit Camp tenements for SRA. It provides that on the plot area excluding area to be handed over to MCGM/Appropriate Authority in lieu of Reservation/Existing amenity in the DP/ proposed DP roads/ prescribed RL under MMC Act. It further stipulates that such Schemes shall not be permissible on lands reserved/ existing amenity in the DP& in SDZ/GZ. Clause (C) of the DCPR 33(11) provides that Transit tenements for SRA out of additional FSI could be used for construction of Transit Camp of tenements having carpet area of 27.88 sq. m (300 sq. ft.). Ground floor shall be used for commercial tenements having carpet area of 20.90 sq. m (225 sq. ft.) for project affected commercial tenements and the same shall be handed over free of cost to SRA and that alternatively, residential tenements can be used for Government Staff Quarters etc.

14. If such is the nature of DCPR 33(11), then certainly any prudent person would specifically incorporate that the redevelopment would be in accordance with such provision, when entering into a PAAA such as the present. This more particularly when this provision in the DCPR 2034 was very much available on the date the respondents entered into a PAAA with the petitioners, as the DCPR-2034 were brought into effect on 08 May, 2018. However, the respondents were totally deceptive

about the nature of the scheme and taking advantage of the consent terms and having entered into the PAAA and ousted the petitioners from the building, which later on was demolished have taken advantage of the vagueness of the terms of the PAAA to convert the redevelopment into a slum redevelopment. In these circumstances, the respondents have sought to foist upon the petitioners a slum redevelopment scheme, in the teeth of the PAAA under the provisions of DCPR-2034.

15. Before parting it needs to be observed that the contentions as urged on behalf of the respondents if accepted, would lead to an extremely dangerous trend in respect of the redevelopment projects, when the nature of the redevelopment is such as in the present case, and which is likely to be a scenario in hundreds of other developments in the city of Mumbai. It would be preposterous to accept that the redevelopment which was conceived to be a normal redevelopment as agreed between the parties is completely changed to be a redevelopment in the nature of a slum rehabilitation scheme. This may, however, be permissible, except in cases where the parties explicitly agree to take recourse to a redevelopment which would be in the nature of a SRA development and not otherwise. Any redevelopment agreement is required to be interpreted in the manner as would be commonly understood by the parties. It cannot be conceived that certain vague terms in the contract are utilized to change the complexion of the development. This would be ex-facie contrary to any reasonable rationale and prudence, if the developers are permitted to exploit such ambiguity and that too brazenly as in the present case. It is certainly a matter of serious concern.

16. In view of the above discussion, in my opinion, a strong prima facie case has been made out by the petitioners for grant of interim measures pending the arbitral proceedings. Accordingly, the following

order:-

ORDER

i. The petitioners having invoked the arbitration agreement, shall now proceed to take further appropriate steps to commence the arbitral proceedings within a period of two weeks from today.

ii. Pending the arbitral proceedings, there shall be interim reliefs in terms of prayer clauses (c) and (e) which read thus:-

“(c) That this Hon’ble Court be pleased to issue a permanent Order and Injunction thereby restraining the Respondents, their agents, servants, partners and all other person or persons claiming under or through them from in any manner, carrying on any construction work on the property property bearing Plot No. 509, Scheme No. VII, Khar Danda, Khar West, Bombay in which the building Jai Niketan was situated at Junction of 1st Road and 16th Road, in Revenue Village Danda, South Salsette Taluka, BSD admeasuring about 1195 sq. yards equivalent to 999.20 sq. mtrs except under plans sanctioned by the MCGM;

(e) That this Hon’ble Court be pleased to pass orders directing the Respondents to pay all the arrears and continue paying the rent/compensation as agreed between the parties under the Agreement for Permanent Alternate Accommodation at Exhibit “B” herein every month without delay or default till the newly constructed premises are allotted to them as per the MCGM approved plan.”

iii. Disposed of in the above terms. No costs.

17. At this stage, Mr. Memon, learned counsel for the respondents prays for stay of the order. In the facts of the case, the request for stay is rejected.

[G.S. KULKARNI, J.]