

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7063 OF 2022**

Vastukala Developers	...	Petitioner
versus		
The Niwara Co-op. Housing Soc. Ltd.	...	Respondent

Ms. Triveni Jani with Ms. Nilima C. Sarvagod i/by Mr. Onkar Warange for Petitioner.
Mr. Nikhil Wadikar with Ms. Farzia Shaikh, Mr. Malhar Pawar, Mr. Niranjan Kandade
i/by Mr. Nandu Pawar for Respondent.

CORAM: N.J.JAMADAR, J.

DATE : 3 APRIL 2023

P.C.

1. Heard the learned Counsel for the parties.
2. This Petition under Article 226 of the Constitution of India takes exception to the orders passed by the Arbitral Tribunal in the matter of arbitration between the Petitioner and the Respondent, whereby and whereunder the Petitioner's evidence is closed both as regards the claim made by the Respondent and the counter claim of the Petitioner, and the application of the Petitioner dated 4 March 2022 came to be rejected by the learned Arbitrator by an order dated 4 March 2022 and, eventually, the arbitration proceedings came to be closed and reserved for passing of award.
3. By an order dated 26 July 2019, the Arbitral Tribunal consisting of sole Arbitrator to decide all the disputes between the Petitioner and the Respondent has

been constituted. The Respondent is the claimant in the arbitration proceedings and the Petitioner has filed a Counter claim.

4. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the arbitral tribunal.

5. On 17 February 2022, the learned Arbitrator found that the original affidavit in lieu of examination in chief dated 17 September 2020 of Respondent's witness No.1 and the original compilation of documents have not been filed by the Respondent despite adequate opportunities. After ascribing reasons, the learned Arbitrator directed that the Respondent's evidence be closed as regards the claim and counter claim and posted the proceedings for hearing arguments on the premise that the recording of evidence was over.

6. The Respondent preferred an application to set aside the said order dated 17 February 2022 and permit the Respondent to lead evidence. By an order of even date, again ascribing reasons, the learned Arbitrator rejected the Respondent's Application. On 12 April 2022, the learned Arbitrator heard the submissions on behalf of the claimant. On 4 May 2022, the Respondent engaged another Advocate and sought time to advance submissions. The proceedings, thus, stood over to 1 June 2022. The Respondent again preferred an application on 31 May 2022 seeking to recall the order dated 17 February 2022 along with the order dated 4 March 2022 and also to lead evidence in claim and counter claim.

7. By minutes of meeting held on 1 and 2 June 2022, the learned Arbitrator noted that sufficient opportunities had been given to the Respondent to advance the final oral arguments, and, in view of the default, the learned Arbitrator was constrained to close and reserve the arbitral proceedings for passing award. It was further noted that the reasons for rejection of the Respondent's Application dated 31 May 2022 would be pronounced separately.

8. The Respondent has, thus, invoked the writ jurisdiction.

9. I have heard Ms. Triveni Jani, learned Counsel for the Petitioner and Mr. Nikhil Wadikar, learned Counsel for the Respondent at some length. I have also perused the minutes of the meeting and the orders passed by the learned Arbitrator.

10. Ms. Jani submitted that an effective opportunity of hearing has not been provided to the Petitioner. Genuine grounds which prevented the Petitioner from participating in the proceedings on 17 February, 2022, the day the evidence of the Petitioner was closed, have not been properly appreciated. It was urged that the observations of the learned Arbitrator that the Affidavit in lieu of examination in chief was not filed with the learned Arbitrator as of 17 February 2022 is not factually correct. In the event, the Petitioner is not permitted to lead evidence, the Petitioner would suffer an irretrievable prejudice, urged Ms. Jani.

11. In opposition to this, Mr. Wadikar would submit that the persistent defaults on the part of the Petitioner constrained the learned Arbitrator to close the

evidence of the Petitioner. Taking the Court through the minutes of the meeting wherein the learned Arbitrator recorded the reasons which weighed with him in closing the evidence, Mr. Wadikar would urge that the Petitioner does not deserve any further opportunity of hearing, lest the very purpose of arbitration would be frustrated. Mr. Wadikar would further urge that, as recorded in the minutes of meeting dated 1 and 2 June 2022, the Petitioner had, in fact, given up right to lead evidence and had agreed to advance final submissions.

10. I have carefully considered the material on record. The course adopted by the learned Arbitrator, in the circumstances of the case, cannot be said to be wholly unreasonable. The Petitioner may not be fully justified in canvassing a submission that no opportunity of hearing was given to the Petitioner. However, the matter cannot be considered from a technical perspective.

11. The learned Counsel for the Petitioner was justified in advancing a submission that a copy of the Affidavit in lieu of examination in chief was shared with the learned Arbitrator before 17 February 2022. Attention of the Court was invited to the minutes of meeting dated 25 November 2021 wherein it was noted that a scanned copy of the Affidavit was served on the claimant's former Advocate and another scanned copy was served on Mr. Wadikar, during the course of that day's arbitral meeting. This is not to suggest that there was no indolence on the part of the Petitioner, but the matter has to be considered through the prism of advancing the

cause of substantive justice.

12. It is not the case that the Petitioner has not shown inclination to effectively defend the claim and prosecute the counter claim. If the arbitration proceedings is concluded and award is passed without the evidence on the part of the Petitioner, inexorably the Petitioner would suffer prejudice and the award would also be susceptible to challenge on that count alone.

13. Thus in the totality of the circumstances, in my view, it is necessary to provide an opportunity of leading evidence to the Petitioner, subject to certain terms as to costs and the time frame for concluding the arbitration proceedings.

14. Hence, the following order :

ORDER

(i) The impugned order of the learned Arbitrator dated 17 February 2022 closing the evidence of the Petitioner (Respondent in the arbitral proceedings) as regards the claim as well as counter claim and further orders dated 4 March 2022 rejecting the Application for setting aside the said order and dated 1 and 2 June 2022 closing and reserving the arbitral proceedings for award, stand quashed and set aside.

(ii) The order of rejection of the Application dated 31 May 2022 for which the learned Arbitrator was to pronounce his reasons separately, also stands quashed and set aside.

(iii) The arbitral proceedings shall re-commence from the stage ante

order dated 17 February 2022 and the Petitioner shall be permitted to lead evidence in the claim and the counter claim.

(iv) The aforesaid orders shall be subject to the following conditions :

(a) The Petitioner shall bear the entire fees of the arbitral meetings/proceedings held in between and inclusive of 17 February 2022 and 1 and 2 June 2022.

(b) The Petitioner shall pay costs of Rs.50,000/- to the Respondent within a period of three weeks from today.

(c) The Petitioner shall file original Affidavit in lieu of examination in chief and compilation of documents before the Arbitral Tribunal on the next meeting to be scheduled by the learned Arbitrator with one week's advance notice.

(d) The Petitioner shall not seek any adjournment on any count till the conclusion of the final submissions.

(v) The arbitral tribunal shall decide the arbitral proceedings in accordance with law, as expeditiously as possible.

(vi) The Writ Petition accordingly stands disposed.

(vii) The parties concerned and the learned Arbitrator shall act on an authenticated copy of this order.

(N.J.JAMADAR, J.)