

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 103 OF 2021
WITH
COMMERCIAL ARBITRATION PETITION NO. 3 OF 2022**

Tatva Corporate Solutions Private Limited ... Petitioner
vs.
Jidnyasa Co-operative Housing Society Limited ... Respondent

**WITH
INTERIM APPLICATION NO. 780 OF 2022
IN
ARBITRATION PETITION NO. 103 OF 2021**

Jidnyasa Co-operative Housing Society Limited ... Applicant/Petitioner
vs.
Tatva Corporate Solutions Private Limited ... Respondent

Mr. Sandeep Sheregar a/w. Mr. Mangesh Dongre, Ms. Mita Rudani,
Mr. Abhishek Bhoir and Mr. Amod Panchal for petitioner in both the petitions.

Mr. S. G. Deshmukh a/w. Mr. Vikas Kolekar, Mrs. Pooja Dahibhate and
Mr. Ganesh Padalkar for respondent in both the petitions and applicant in
IA/780/22.

**CORAM : MANISH PITALE, J
DATE : 6th APRIL, 2023**

P.C. :

. Heard learned counsel for the parties. This order shall dispose of two petitions i.e. Arbitration Petition No.103/2021 and Commercial Arbitration Petition No.3/2022. Although the Arbitration Petition No.103/2021 is styled as a petition, it is actually an appeal filed before this Court, under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996. Commercial Arbitration Petition No.3/2022 is filed under Section 11 of the said Act, for appointment of arbitrator.

2. The petition filed by the petitioner, which is actually an appeal under Section 37(1)(b) of the said Act, challenges an order dated 8th October, 2021, passed by the District Court at Thane, in an application filed under Section 9 of the said Act, for interim measures. It is relevant to mention here that on an earlier occasion also, the petitioner was constrained to approach this Court by filing Arbitration Petition No.81/2021. In the backdrop of the fact that the application filed under Section 9 of the said Act, on behalf of the petitioner, had been allowed by the Court of Civil Judge Senior Division at Thane, this Court found that the aforesaid application filed under Section 9 of the said Act, could have been placed only before the Court of District Judge, as per the provisions of the said Act and therefore, placing the same before Civil Judge Senior Division at Thane, was unacceptable. The said Arbitration Petition No.81/2021 was, therefore, disposed of, by directing the Registrar of District Judge at Thane to place the same before the District Judge for appropriate orders.

3. It was thereafter that the District Court at Thane, passed the impugned order dated 8th October, 2021. A perusal of the said order shows that it is nothing, but a recording on *Roznama*, simply adjourning the application to 27th October, 2021. The petitioner rushed to this Court, by filing petition under Section 37(1)(b) of the said Act, claiming that since it had prayed for urgent ad-interim reliefs, in the backdrop that the respondent-Society was likely to appoint another developer, the District Court, by simply adjourning the application to 27th October, 2021, had deprived the petitioner of an interim order, thereby giving rise to sufficient cause for the petitioner to move the petition/appeal under Section 37(1)(b) of the said Act.

4. On 13th October, 2021, this Court took note of the earlier round of litigation and thereafter, found that there was urgency in the matter and while granting time to the respondent-Society to file its reply affidavit, granted interim relief to the extent that the respondent-Society would not appoint a new developer for developing the property in question.

5. In the present case, the petitioner and the respondent-Society entered into a development agreement dated 1st September, 2020, whereby the petitioner was engaged for developing certain properties of the respondent-Society for its members. There is no dispute about the fact that the said agreement contains an arbitration clause at Clause No.2.8. Evidently, disputes arose between the parties, as a consequence of which, the petitioner filed the aforementioned application under Section 9 of the said Act, before the District Court at Thane, seeking interim measures. The situation was further complicated, due to the fact that there were *inter se* disputes within the members of the respondent-Society as a consequence of which, an administrator was appointed. This Court was informed that subsequently, the administrator had to be changed, due to complaints against the said administrator. In this situation, the petitioner rushed to this Court by filing the aforementioned petition, which is actually an appeal under Section 37(1) (b) of the said Act.

6. It appears that the said petition was not taken up for effective hearing after 13th October, 2021 and while being adjourned on some occasions, the interim order was continued. It is the case of the respondent-Society that such interim order continued only till July, 2022 and thereafter, the petition was not listed. It was only on 5th January, 2023 that the petition was listed before this Court and while adjourning the same, this Court observed that

the ad-interim order will continue to operate till the next date of listing.

7. During the pendency of the aforesaid petition, the petitioner filed Commercial Arbitration Petition No.3/2022, under Section 11 of the said Act, for appointment of arbitrator. It appears that the said petition was filed and kept pending. It was only when the hearing of Arbitration Petition No.103/2021 was taken up from January, 2023 onwards, that this Court was apprised about the fact that the aforementioned petition, under Section 11 of the said Act was also filed. Accordingly, by specific order, this Court directed the petition filed under Section 11 of the said Act to be listed with the above petition. It is for this reason that both the petitions have come up for hearing together.

8. It would be appropriate to first take up Arbitration Petition No.103/2021 for consideration. The said petition, as noted hereinabove, is actually an appeal filed under Section 37(1)(b) of the said Act.

9. Section 37(1)(b) of the said Act reads as follows:

“37. Appealable orders.-(1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

- (1) xxx
- (b) granting or refusing to grant any measure under Section 9;”

10. A bare reading of the above-quoted provision shows that an appeal is provided against an order granting or refusing to grant any measure under Section 9 of the said Act. This clearly indicates that the occasion to file such an appeal would arise when the Court either grants or refuses to grant measure. It is in this backdrop that the impugned order dated 8th October,

2021, passed by the District Court at Thane, needs to be examined.

11. The said order is a recording in the *roznama* of the District Court at Thane, which records as follows:

Today's Date	Roznama	Next/Disposal Date
08-10-2021	Before the Court, Applicant present Opponent present 6 V. P. Filed by Mudhakar (Filed) 7 Memo of address (Seen) Case Adjourn for: First Order Sd/- Judge	27.10.2021

12. A perusal of the above-quoted “order” of the District Court at Thane, shows that the application filed by the petitioner was simply adjourned to the next date i.e. 27th October, 2021. While recording the *roznama* that the case was adjourned to the said date, it was recorded that it was adjourned for “First Order”. Although Mr. Sheregar, learned counsel appearing for the petitioner vehemently submitted that in the peculiar facts of the present case, when there was extreme urgency in the matter, the District Court at Thane, has passed the impugned order in such a manner and that therefore, there was enough cause for the petitioner to knock the doors of this Court, under Section 37(1)(b) of the said Act.

13. This Court is not convinced by the said contention raised on behalf of the petitioner. A bare perusal of the above-quoted “order” dated 8th October, 2021 of District Court at Thane, would show that it neither granted nor refused any measure, under Section 9 of the said Act. In fact, the very life of the order dated 8th October, 2021, expired on 27th October, 2021, which was

the next date of listing before the District Court at Thane.

14. This Court is of the opinion that the Arbitration Petition No.103/2021, which is actually an appeal under Section 37(1)(b) of the said Act, is not maintainable, considering the nature of order of the District Court at Thane, challenged by the petitioner. Only on this ground, the petition deserves to be dismissed.

15. An attempt was made on the part of the petitioner to contend that as in the impugned order dated 13th October, 2021, this Court found *prima facie* urgency in the matter, this Court may consider entertaining the petition and/or continuing the interim order dated 13th October, 2021.

16. Mr. Deshmukh, learned counsel appearing for the respondent-Society, vehemently opposed the said contention raised on behalf of the petitioner. It was submitted that in the reply affidavit, the respondent-Society has pointed out that although there were certain difficulties in the management of the Society, eventually, the respondent-Society finalized a development agreement with another developer. Details of the same were given in paragraph No.48 of the reply affidavit. It was further submitted that the development agreement executed on 20th August, 2021 with the said new developer, has been registered with the Sub-Registrar of Assurances for the purpose of stamp duty and registration of the documents. It was reiterated that the interim order of this Court was discontinued some time in July, 2022 till January, 2023 and that therefore, this Court may not direct continuance of the interim order.

17. Insofar as the contention raised on behalf of the respondent-Society that the interim order was not continued after July, 2022, is concerned, this

Court is not inclined to accept the said contention, for the reason that although the order dated 1st July, 2022 does adjourn the petition for consideration to 28th July, 2022, continuing the interim relief till the said date, there is nothing to indicate as to whether the petition was indeed listed on 28th July, 2022 or not. It is also evident that the respondent-Society did not make any effort to pursue the matter or get the petition listed before this Court.

18. Subsequently, on 5th January, 2023, when the petition was listed, it was adjourned to the next date and a specific observation was made that the interim order would continue to operate till the next date of hearing. In this situation, it may not be appropriate to hold that the interim order dated 13th October, 2021 had indeed lapsed.

19. Be that as it may, this Court is not inclined to continue the ad-interim order dated 13th October, 2021, simply for the reason that the Arbitration Petition No.103/2021, which is actually an appeal under Section 37(1)(b) of the said Act, is found to be not maintainable by this Court. As discussed hereinabove, the impugned order dated 8th October, 2021, was nothing, but recording *roznama* of the adjournment of the application before the District Court at Thane to 27th October, 2021, and it neither granted nor refused any measure under Section 9 of the said Act. Hence, the petition is found to be not maintainable. Accordingly, the Arbitration Petition No.103/2021 is dismissed as not maintainable. Needless to say that the order dated 13th October, 2021 stands vacated.

20. As regards the Commercial Arbitration Petition No.3/2022, the same is a petition filed under Section 11 of the said Act, for appointment of

arbitrator for resolution of disputes between the parties.

21. There is no dispute about the fact that Clause No.2.8 of the said development agreement provides for resolution of disputes between the parties. The said clause reads as follows:

“2.8 As per the above, the construction contract is given to the second party by the first party and in return they bear all the expenses as above. And the second party (Developer) will have the right to decide how much to charge for new proposed construction for his new proposed members. Also, during the construction, the second party (Developer) will have the sole responsibility to protect the insurance of the concerned workers as well as to comply with the applicable labor laws and regulations. And in that case, it will not apply to the first party. It has been decided to carry out all the works and complete all the constructions within the stipulated time. In case of any dispute arising out of or in connection with or in connection therewith, the sole arbitrator shall be the Society's legal advisor. The arbitration case will be in Marathi language and will be conducted in the area near Khidkali-Desai Thane. All expenses incurred by the arbitrator shall be borne by both parties and the person to whom the arbitration is to be appointed shall be appointed in the general meeting / special general meeting and even during the proceedings of the arbitration, the second party (Developer) will complete the construction of the existing 780 members of the society, if they are incomplete and will not delay it. The above provisions are amended bye-law no. 158 (h). For the convenience of the developer, any contractor / company, joint venture / LLP / partner like them can be hired without any affiliation with the society. Also, in case of any dispute between the developer and his partner, will not apply to the society The Society considers only the second party (Developer) as the "developer".”

22. A bare perusal of the above-quoted clause would show that the same is

hit by Section 12(5) of the said Act, read with Seventh schedule thereof. Learned counsel appearing for the petitioner could not seriously dispute the fact that such a clause is indeed unworkable, in the light of the amendment in the said Act, in the year 2015. Therefore, even if the petition is to be allowed, a neutral arbitrator would have to be appointed.

23. In the backdrop of the above-quoted clause found in development agreement, learned counsel invited attention of this Court to the notice dated 14th December, 2021, issued to the respondent-Society, invoking the arbitration clause. Although the material placed on record shows that the said notice, sent by RPAD, was returned, it is also pointed out that by e-mail dated 5th January, 2022, the petitioner had invoked the arbitration clause and forwarded the said notice dated 14th December, 2021 as attachment to the e-mail. This Court is satisfied that there was proper invocation of the arbitration clause on the part of the petitioner. It is also an admitted position that the respondent-Society did not respond to the said notice as a consequence of which, the petitioner was constrained to file the present petition.

24. The respondent-Society was served and it has appeared through counsel. The existence of the arbitration clause is not disputed and it is also admitted that the parties are having disputes, which need to be referred to arbitration. It is relevant that the arbitration clause provides that the proceeding be conducted at Thane. In that light, it would be appropriate that a neutral arbitrator available at Thane, is appointed as a sole arbitrator for resolution of disputes between the parties.

25. In view of the above, Mr. Sadashiv S. Deshmukh, retired District Judge

available at Thane, is appointed as the sole arbitrator. The details of the learned arbitrator are as follows:

403, Jupiter Building No.9,
(Gavandbaugh), Pokhran Road No.2,
Thane (West) – 400 610.
Mob.: 9820 553 525.

26. The parties undertake to inform the learned arbitrator about the order passed today, at the earliest.

27. The learned arbitrator is requested to submit his consent and disclosure statement in terms of Sections 11(8) and 12(1) of the aforesaid Act within four weeks from today to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per the Fourth Schedule to the said Act.

28. All questions are left open for determination by the learned arbitrator.

29. In view of the above, Commercial Arbitration Petition No.3/2022 also stands disposed of.

31. In the light of both the petitions being disposed of, all interim applications also stand disposed of.

(MANISH PITALE, J)

Priya Kambli

**PRIYA
KAMBLI**

Digitally
signed by
PRIYA KAMBLI
Date:
2023.04.11
10:42:24
+0530