

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO.507 OF 2020
IN
COMMERCIAL ARBITRATION PETITION (L) NO.104 OF 2020

Mahavir Developers and others ... Applicants / Petitioners
Vs.
Mahavir Jaina Vidyalaya and others ... Respondents

Mr. Navroz Seervai, Senior Advocate a/w. Mr. Chetan Kapadia, Mr. Rohan Savant, Mr. Kausar Banatawala, Mr. Chirag S. and Mr. Viraj Bansod i/b. Mr. Tushar Goradia for Applicants.

Mr. Dinyar Madon, Senior Advocate a/w. Ms. Bindi Dave, Mr. Ieshan Sinha and Ms. Dhruvi Mehta for Respondents.

CORAM : MANISH PITALE, J.
DATE : JANUARY 04, 2023

P.C. :

. Heard learned counsel for the parties.

2. By this application moved on behalf of the petitioners, interim relief is sought to the extent of restraining the respondents from taking possession of the subject property on the basis of the impugned award passed by the learned arbitrator. It is significant that the award was passed as far back as on 01.10.2019 and the present interim application, although filed in January 2020, was urgently moved for consideration before the Vacation Bench on 27.12.2022 and thereafter listed by consent of the parties before this Court on 02.01.2023, which came to be adjourned to today.

3. Mr. Seervai, learned senior counsel appearing for the applicants vehemently submitted that the findings rendered in the impugned award are self-contradictory and if the reasoning given in findings on issue Nos.1, 9 and 10 are to be juxtaposed with the reasoning given for findings on issue No.5, it would become clear that the award is *prima facie* unsustainable.

4. Learned senior counsel placed much emphasis on interpretation of certain clauses of the development agreement executed between the parties on 30.04.2007. It was emphasized that a proper reading and interpretation of clauses 28 and 29 of the development agreement would show that while on the one hand, learned arbitrator correctly interpreted that the respondents (original claimants) could not have terminated the development agreement, but on the other hand, proceeded to hold that since the petitioners had failed to make out a case for grant of specific performance, they were obliged to vacate the property as they had lost their entitlement for development of the property. It was submitted that such an interpretation of clauses 28 and 29 of the development agreement is in the teeth of the said clauses and an absolute perversity.

5. It was submitted that a proper and reasonable interpretation of clauses 28 and 29 of the development agreement would show that the respondents could, at the most, have claimed specific performance of the agreement, as also damages and there was no question of holding that the petitioners had lost their right to develop the property and that they were obliged to vacate the same. On this basis, it was submitted that a strong *prima facie* case is made out by the petitioners for grant of interim reliefs as prayed for, as the impugned award, on the face of it, is unsustainable.

6. On the other hand, Mr. Madon, learned senior counsel appearing for the respondents was at pains to point out the detailed findings rendered by the learned arbitrator as regards the manner in which the petitioners had failed to abide by the terms of the development agreement and the obligations cast upon the petitioners under the arrangement envisaged under the agreement. It was submitted that clauses 28 and 29 could not be interpreted in the manner claimed by the petitioners, for the reason that it would lead to an incongruous situation. It was submitted that the petitioners had miserably failed to prove their

case for grant of specific performance and, in fact, there were series of findings rendered by the learned arbitrator demonstrating the extent of breaches committed on the part of the petitioners, thereby indicating that if the contentions raised on behalf of the petitioners while seeking interim reliefs were to be accepted, it would lead to a situation where the petitioners despite their failure to abide by the agreement would insist upon squatting on the property in question. On this basis, it was submitted that the present application deserved to be dismissed, as the petitioners had failed to make out a *prima facie* case in their favour.

7. This Court has considered the contentions raised on behalf of the rival parties. Much has been said about the two crucial clauses of the development agreement i.e. clauses 28 and 29. The said two clauses read as follows:-

“28. It is hereby specifically agreed by and between the parties hereto that in the event of default on the part of a party to discharge its obligations, the other party would be entitled to claim specific performance of this Agreement and claim damages as provided hereinabove.

29. It is hereby agreed by and between the parties hereto that the arrangement recorded in this Agreement shall continue and shall not come to an end unless and until the said property is fully developed in all respects as aforesaid and all the flats / premises / commercial premises in the buildings constructed by the Developers have been given to the Tenants as per scheme and all the premises in the sale building are sold to the prospective purchasers and the full amount in respect thereof has been received and / or realized by the Developers and Conveyance or Lease is executed in favour of the Society. The Developers shall not be entitled to transfer and assign the benefits of this Agreement to any third party under any circumstances whatsoever.”

8. There is no doubt about the fact that the learned arbitrator has indeed rendered a finding that the respondents (original claimants) could not have terminated the agreement in view of the above-quoted clauses, but it is significant that while discussing issue Nos.1, 9 and 10 pertaining to the aspect of the terms of the development agreement

being breached by the petitioners and the aspect of their readiness and willingness to perform their part of the contract, the learned arbitrator has given detailed findings as to the manner in which the petitioners committed breach of the terms of the agreement and the manner in which they failed to abide by the obligations under the said agreement. In fact a positive finding has been rendered by the learned arbitrator to the effect that the respondents were not in breach and that the petitioners were in breach of the said agreement.

9. In this situation, this Court is not convinced that clauses 28 and 29, read together, can lead to a situation where the petitioners themselves having miserably failed to perform their part of the contract, would yet be entitled to continue in possession of the property. There is substance in the contention raised on behalf of the respondents that the respondent-Trust had entered into the aforesaid agreement with the intention of constructing hostels for its students and that the whole purpose has been frustrated by the approach adopted by the petitioners and the manner in which they committed breach of the development agreement.

10. The petitioners have failed to make out a *prima facie* case in their favour and therefore, there is no question of this Court examining the aspects of grave and irreparable loss or balance of convenience.

11. In view of the above, the application is rejected. It is made clear that the findings rendered in the present order are *prima facie* findings and these findings will obviously not influence the hearing of the petition for admission.

12. The learned senior counsel appearing for the petitioners desires to place on record additional affidavit. The same be filed within a week from today.

(MANISH PITALE, J.)