

Vidya Amin

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

**ARBITRATION PETITION (L) NO. 12317 OF 2022**

Relcon Infroprojects Ltd. & Anr. .. Petitioners

Vs.

Ridhi Sidhi Sadan, Unit of Shree Ridhi Co.op.  
Housing Society Ltd. & Ors. .. Respondents

Mr. Karl Tamboly a/w. Akanksha Mishra, Jiu Rathod i/b. Dinanath Tiwari for the petitioners.

Mr. Sarosh Bharucha a/w. Mr. Ameet Mehta, Ms. Jayashri Manjrekar, Ms. Smriti Pal i/b. M/s. Solicis Lex for respondent no.1.

Mr. Anil D'souza a/w. Valentine Mascorenhas for respondent nos. 2 and 4.

Mr. Vaibhav Charalwar a/w. Ms. Shweta R. Rathod i/b. Elixir Legal Services for respondent no. 3.

Mr. Udayan Jain for respondent no. 6.

**CORAM : G.S. KULKARNI, J.**

**DATE : JULY 15, 2022.**

**ORAL ORDER:**

1. This is a petition filed under section 9 of the Arbitration and Conciliation Act, 1996 whereby the petitioner who has been appointed as a developer by respondent no.1-"Ridhi Sidhi Sadan, Unit of "Shree Ridhi Sidhi Cooperative Housing Society Ltd." (for short "the Society") is before the Court praying for the following interim measures pending the arbitral proceedings:

"a) The respondent no. 1 and its members (respondent nos. 2 to 5 herein) and respondent no. 6 be ordered and directed to handover quiet, vacant and peaceful possession of their respective flats, i.e. Flat No. 13 (2<sup>nd</sup> floor) of respondent no. 2, Flat no. 19 (1<sup>st</sup> floor) of respondent no. 3 and Flat No. 28 (1<sup>st</sup> floor) of respondent no. 4 and Flat No. 14 (2<sup>nd</sup> floor) of the respondent nos. 5 and 6 to the petitioner

on or before 03.05.2022 for the purpose of demolition and commencing and completing the redevelopment of the building of respondent no. 1.

b) The respondent nos. 2 to 5, their legal heirs, successors, servants, agents, authorized representatives, occupants etc. by an Order Direction of Injunction, be restrained from doing any act of Obstruction/Non-Cooperation, which shall amount jeopardizing the terms of the Development Agreement dated 11.12.2014 and Supplementary Development Agreement dated 29.11.2021 or any other acts which are contrary or coercive to the terms of the said Development Agreement dated 11.12.2014 and Supplementary Development Agreement dated 29.11.2021.

c) In the alternative to prayer clause (a) hereinabove, this Hon'ble Court be pleased to appoint any competent authority or grant rights to the petitioners and its representative to take physical possession of the individual flats of respondent no. 2 to 5 with the police assistance and in the presence of representative of the Society. In such an event, Hon'ble Court may please to order the petitioners to take custody of things/articles and belongings of respondent nos. 2 to 5 kept in their individual flats and shall keep the same at safe custody and storage maintained at site/or any other suitable place.

d) In the alternative to prayer clause (c) hereinabove, the Court Receiver, High Court, Bombay be appointed a Receiver in respect of the individual flats of respondent nos. 2 to 5 in the building of respondent no. 1 along with all the powers under Order XL Rule 1 of Code of Civil Procedure, 1908 in respect of the individual flats of respondent nos. 2 to 5, including the power to take quiet, vacant and peaceful physical possession of their respective flats, i.e., Flat No. 13 (2<sup>nd</sup> floor) of respondent no. 2, flat No. 19 (1<sup>st</sup> floor) of respondent no. 3 and Flat No. 28 (1<sup>st</sup> floor) of respondent no. 4 and Flat No. 14 (2<sup>nd</sup> floor) of respondent no. 5 and to the petitioner on or before 03.05.2022 with the police assistance and after making the complete inventory of all the articles lying therein to handover the same to the petitioner forthwith, for the purpose of demolition followed by commencing and completing the re-development project of the building of respondent no. 1.

e) Respondent nos. 2 to 5 be directed to execute their Individual Agreements (Permanent Alternate Accommodation Agreements) with the petitioner, with respect to their respective flats, on the same terms and conditions as the Individual Agreements (Permanent Alternate Accommodation Agreements) executed by other members of respondent no. 1, for the purpose of commencing and completing the redevelopment of the building of respondent no. 1.

f) In the alternative to prayer clause (d) hereinabove, the Court Receiver, High Court, Bombay be appointed a Receiver in respect of individual flats of respondent nos. 2 to 5 in the building of respondent no. 1 along with all the powers under Order XL Rule 1 of Code of Civil Procedure, 1908 in respect of the individual flats of respondent nos. 2

to 4, including the power to execute the Individual Agreements (Permanent Alternate Accommodation Agreements) on behalf of each of respondent nos. 2 to 4 with the petitioner and the respondent no. 1 and all other ancillary and incidental agreements, documents, forms, applications etc. as may be required, throughout the entire process of redevelopment, including any further Supplementary Development Agreement, Power of Attorney, Individual Agreement etc. if any, and further to admit the execution thereof and otherwise to complete the registration process of the same before the competent Sub-Registrar of Assurances;

(g) Respondent nos. 2 to 5 herein be ordered and directed to furnish security to the petitioner equivalent to the amount of expenses incurred by the petitioner (annexed at Exhibit 'Z' hereto) as may be deemed fit and proper by this Hon'ble Court.

(h) for ad-interim reliefs in terms of prayer clauses (a) to (f)

(i) Respondent nos. 2 to 6 be restrained by an order and injunction from dealing with transferring, encumbering and/or creating any third party rights of any nature whatsoever with respect to their respective flats, pending disposal of the matter herein."

2. Mr. Tamboly, learned counsel has completed his arguments on behalf of the petitioners, Mr. Charalwar, learned counsel concluded arguments on behalf of respondent no.3.

3. At this stage, Mr. D'Souza, learned counsel for respondent nos.2 intends to tender an affidavit dated 17 June, 2022 on behalf of his client. Such affidavit being thrown at the Court, at the last moment and that too when it has been affirmed almost a month back, cannot be accepted. There is no reason as to why such affidavit could not be filed earlier. The only inference is that there was no seriousness in regard to the court proceedings. Considering the nature of the proceedings, such affidavit can be taken on record only on the condition of payment of cost

of Rs.25,000/- to be deposited by respondent no.2 by 18 July, 2022 with the Bar Council of Maharashtra & Goa to be utilized for the medical funds for advocates as separately created. Intimation of deposit be given to the petitioners as also to the registry. In the event, such amount is not deposited, it would be presumed that there is no affidavit on behalf of respondent no.2 on record.

4. The case of the petitioners needs to be set out. The petitioner no. 1, under a Development Agreement dated 11 December, 2014 entered between petitioner no. 1 and the Society, was appointed as a developer for carrying out the redevelopment of the premises/building of the Society, which was constructed in the year 1965 and which is stated to be in a dilapidated condition. The name of the building in respect of which the redevelopment is proposed is titled as "Ridhi Sidhi Sadan" which consists of 29 members and there are 32 units/tenements. Petitioner no. 2 is the Special Purpose Vehicle (SPV) formed by petitioner no. 1 to carry out such redevelopment.

5. Some prior background to the said development agreement can be noted. On 27 November, 2011 a Special General Body Meeting was held by the Society where a resolution was passed in regard to redevelopment of the said building of the Society. The Society then had

appointed one M/s. Bhavin M. Shah & Associates as their Project Management Consultants (PMC). PMC on 19 April, 2013 published a tender in three newspapers inviting bids from the prospective developers. Amongst the bids received, one of the developer did not show any interest and backed out. Consequent thereto, on 10 November, 2013, a Special General Body Meeting of the Society was held whereby an offer dated 16 May, 2013 as made by petitioner no. 1 as also a revised offer dated 17 October, 2013 made by petitioner no. 1 came to be accepted. The proceedings of such meeting are stated to be video recorded. The minutes of the said meeting dated 10 November, 2013 along with the video recording were submitted to the Deputy Registrar, K East Ward, who passed an order dated 11 November, 2013 accepting the appointment of petitioner no. 1 as a developer. After such approval was received from the Deputy Registrar Cooperative Societies, on 8 May, 2014 a Special General Body meeting of the Society was held whereby the Managing Committee was authorized to execute necessary documents such as Development Agreement, Power of Attorney etc. with the petitioner no. 1 so as to proceed with the decision of redevelopment.

6. On the above backdrop, on 11 December, 2014, the said Development Agreement was entered between petitioner no. 1 and the Society. There were benefits conferred on the members of the Society

on such Development Agreement in relation to purchase of an additional area, provision for two car parkings, hardship compensation at the rate of Rs.3,900/- per sq.ft. to be paid to each member, transit rent as also cash guarantee of Rs. 1 crore and bank guarantee of Rs.11 crores to be furnished by the developer. The Development Agreement also annexes a list of members of the Society, which includes the names of respondent nos. 2 to 5.

7. The petitioners have contended that respondent no. 3 being aggrieved by the amounts being agreed to be accepted by the Society under the development agreement, for the petitioner to undertake the redevelopment, approached the Deputy Registrar with a complaint dated 24 October, 2013. Respondent no. 3 contended that the decision for redevelopment as taken by the Society was not in accordance with law. The Deputy Registrar did not accept the complaint of respondent no. 3 and allowed the Society to award the development rights by conducting a Special General Body meeting. Such decision of the Deputy Registrar was challenged by respondent no. 3 before the Joint Registrar by filing a Revision Application. The Joint Registrar stayed the order of the Deputy Registrar till 12 November, 2012 . The said order of the Joint Registrar was appealed by the Society before the Hon'ble Minister for Cooperation, who by an order dated 8 November, 2013 vacated the stay

to the extent of allowing a Special General Body Meeting to be held on 10 November, 2013. Thereafter on 27 March, 2014, the Divisional Registrar dismissed respondent no. 3's complaint on merits. This was appealed by respondent no. 3 by filing Writ Petition No. 5978 of 2014. This Court by an order dated 30 September, 2019 has permitted respondent no. 3 to withdraw the said Writ Petition unconditionally. The petitioners have contended that on this backdrop, such litigation qua respondent no. 3 has come to an end. As on 30 September, 2019 respondent no. 3 has withdrawn all his complaints against the developer and the Society.

8. On such backdrop, on 31 October, 2021, a Special General Body Meeting of the Society was held whereby a decision was taken in the said meeting that a Supplemental Development Agreement be entered by the Society with petitioner no. 1 inter alia to make modifications to the Development Agreement dated 11 December, 2014. The Special General Body Meeting was attended by respondent no. 3 and 4 but not by respondent nos. 2 and 5. Accordingly, on 29 November, 2021, the Supplemental Development Agreement was entered into between petitioner no. 1 and Society. All the members of the Society except respondent nos. 2 to 5 have executed the Supplemental Development Agreement. The petitioners thereafter have acted upon

the Supplemental Development Agreement in as much as a full IOD was obtained on 22 December, 2021 from the Municipal Corporation for Greater Mumbai to proceed with the redevelopment in question. Thereafter, the petitioner and the Society have taken steps to execute Permanent Alternate Accommodation Agreements (PAAA) with about 28 members of the Society.

9. By letter dated 17 January, 2022, the petitioner no. 2 intimated the Society of the receipt of an IOD from the Municipal Corporation and also informed that respondent nos. 2 to 5 have not executed the PAAA with the petitioner, hence appropriate steps in that regard be taken. Considering such letter of the petitioners, the Society addressed a letter dated 18 January, 2022 to respondent nos. 2 to 5 requesting them to execute the PAAAs. By letter dated 31 January, 2022 addressed to the Society, respondent no. 4 inter alia raised objections to the terms of the Supplemental Development Agreement contending that such terms and conditions are not agreeable to respondent no. 4. Respondent no. 6 vide its letter dated 22 February, 2022 replied to the Society to the effect that it is respondent no. 6 and not respondent no. 5 who is the real owner of flat no. 14.

10. Thereafter on 9 March, 2022, the petitioner no. 2 issued a notice to the Society/its members to vacate their tenements as per Clause 7(f)



of the Development Agreement and the Supplementary Development Agreement thereby requesting the members to vacate and handover the possession to the petitioner within 45 days and to collect the amounts towards hardship compensation, rent, shifting charges and brokerage charges. Such notice to vacate was also addressed to respondent nos. 2 to 5.

11. The petitioner has contended that the records of the Society bears that respondent no. 5 is a member, who had addressed an undated letter to the Society that he is agreeable to execute PAAA. On 26 March, 2022, respondent nos. 3 and 4 replied to the petitioner's notice thereby objecting to the redevelopment thereby refusing to vacate their respective tenements. The petitioner has contended that as on date 20 tenements have already been vacated.

12. Thus, respondent nos. 5 and 6 are the persons who are concerned qua Flat no. 14 on the second floor of the building. On the record of the Society, respondent No.5-Late Mr. Shrigopal Jhunhunwala was the member. Respondent no. 5(a) and 5 (b) are his sons. The share certificate as issued by the Society stands in the name of Late Shrigopal Jhunhunwala. However, respondent no. 6-Sanjay Jhunhunwala is in occupation of the flat, who is asserting his rights in respect of the said flat and who is stated to be obstructing the redevelopment. It is on such

backdrop, respondent no. 2 to 4 and 6 are stated to be not cooperating in the redevelopment of the premises, as they are not vacating their flats, hence the petitioners are before the Court praying for the reliefs as noted above.

13. Mr. Tamboly, learned counsel for the petitioners has made extensive submissions. His contention is that the petitioners need to proceed to undertake the redevelopment under the two agreements – firstly, the Development Agreement dated 11 December, 2014 and secondly, the Supplementary Development Agreement dated 29 November, 2021 executed between the petitioner, the Society and its majority members in regard to the redevelopment of the premises which the petitioners are undertaking. It is his contention that respondent nos. 2, 3, 4 and 6 cannot take a position that they would oppose the redevelopment on the ground that they are aggrieved by the Supplementary Agreement being a decision taken by the majority members on the redevelopment to be undertaken by the petitioners. It is his submission that respondent nos. 2, 3, 4 and 6 cannot obstruct the redevelopment which would be prejudicial to the other members of the Society who have already vacated their respective flats and others who are also willing to cooperate under the redevelopment. Mr. Tamboly submits that as on date, there are no substantive proceedings filed by

any of the members in a manner known to law assailing the Development Agreement in question except for what is filed by respondent no. 3, namely, a complaint made before the Deputy Registrar as also filing of a Writ Petition before this Court, which has attained finality, as the said Writ Petition was withdrawn by respondent no. 3 in 2019. In these circumstances, it is his submission that considering the settled position in law as laid down in the decisions of this Court in **Girish Mulchand Mehta & Anr. vs. Mahesh S. Mehta<sup>1</sup>**, **Kamla Homes & Lifestyle Pvt. Ltd. vs. Pushp Kamal Co-op. Housing Society Ltd. & Ors.<sup>2</sup>**, **Chirag Infra Projects Pvt. Ltd. vs. Vijay Jwala Cooperative Housing Society Ltd. & Anr.<sup>3</sup>**, **Choice Developers vs. Pantnagar Pearl CHS Ltd. & Ors.<sup>4</sup>** the decisions taken by a majority of the members of Society cannot be set to naught by respondent nos. 2, 3, 4 and 6, who are minority members of the Society, hence, the reliefs as prayed for ought to be granted. It is his contention that substantial amounts are spent by the petitioners in reaching a step to commence redevelopment. He submits that stalling of the project by these respondents who are opposing the redevelopment would adversely affect not only the petitioner but also the majority members of the Society. It is hence his submission that the reliefs as prayed for be granted so that the redevelopment can commence without any delay.

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1 2010(2) Mh. L.J. 657

2 2019 SCC Online Bom 823

3 2021 SCC Online Bom 364

4 2022 SCC Online Bom 786

14. Learned counsel for the Society has supported the contentions as urged on behalf of the petitioners. It is his submission that the building is in a dilapidated condition. He would also contend that respondent nos. 2, 3, 4 and 6 not vacating their flats is adversely affecting the rights of other members of the Society. Thus, the reliefs as prayed for by the petitioner ought to be granted.

15. Insofar as respondent no. 2 and 4 are concerned, Mr. D'souza has limited submissions to make. It is his submission that the Court ought not to exercise jurisdiction under section 9 considering the provisions of sub-section (3) of Section 9 of the Act. This for the reason that respondent no. 2 has already invoked arbitration by issuing notice to the petitioner and Society on 17 May, 2022, and as the same was not responded within a period of 30 days, respondent no. 2 has filed in this Court an Application under section 11 of the Act praying for appointment of an arbitral tribunal. It is submitted that such application came to be filed by respondent no. 2 on 29 June, 2022. Thus, Mr. D'souza's contention is that once the Section 11 Application was required to be filed by his clients, certainly it needs to be presumed that the petitioner and Society have no real intention to commence arbitration. He submits that such conduct of the petitioners and the Society would show that they are not willing to go for arbitration, for

such reason a relief under section 9 of the Act ought not to be granted and the petitioners as also the Society ought to be directed to approach an arbitral tribunal and raise such contentions before the arbitral tribunal and not in Section 9 proceedings. It is his submission that the powers of the Court under section 9 are discretionary and in the facts of the present case, the Court ought not to exercise its discretion in favour of the petitioners. In support of this contention, learned counsel has placed reliance on the decision of the Supreme Court in **Arcelor Mittal Nippon Steel India Ltd. vs. Essar Bulk Terminal Limited**<sup>5</sup> and more particularly the observations of the Court in paragraph 70 of the said decision wherein the Court has accepted the submissions as made on behalf of the petitioner in the said proceedings, that a party invoking Section 9 of the Act must be ready and willing to go to arbitration affirming the view taken by the Supreme Court in a prior judgment in **Firm Ashok Traders vs. Gurumukh Das Saluja**<sup>6</sup>. It is thus his submission that no reliefs ought to be granted in this petition, and instead appropriate orders be passed on Section 11 application filed by respondent no. 2, which is also listed today, and permit the present proceedings under section 9 to be converted into an application under section 17 to be adjudicated by the arbitral tribunal.

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5 (2022) 1 SCC 712

6 (2004) 3 SCC 155

16. Mr. Charalwar has made submissions on behalf of respondent no. 3. It is his submission that there is a long lapse of time between the Development Agreement which came to be entered between the petitioner and Society on 11 December, 2014 and Supplementary Agreement which came to be entered on 29 November, 2021, i.e., after a long gap of 7 years. His contention is that as to what had happened in the intervening period, is more relevant. In support of such contention, he has drawn the Court's attention to Clause (b) of the Supplementary Agreement to contend that there is no reference to the meetings which had taken place in such intervening period. His next contention is that the terms and conditions in the Supplementary Development Agreement concern the entitlement of respondent no. 3 as also the other members of the Society which are prejudicial to them in comparison to what was agreed in the original development agreement, hence, no orders be passed which would in fact permit the petitioners to proceed with the development under the Supplementary Development Agreement. On a query made to Mr. Charalwar, he has fairly accepted that no proceedings so far have been filed by his clients to assail the Supplementary Development Agreement. He in fact submits that such rights and contentions be kept open to be agitated by respondent no. 3 in the appropriate proceedings.

17. Insofar as respondent no. 6 is concerned, Mr. Jain has made submissions. His contention is that respondent no. 6 is occupying Flat No. 14. He does not dispute that in the record of the Society, Late Shrigopal Jhunjhunwala is shown as a member. His contention is that as respondent no. 6 is in occupation of the flat in question, he ought to be entitled to transit rent and other benefits, namely, the corpus fund. Mr. Tamboly, learned counsel for the petitioner submits that the corpus amount has already been paid to respondent no. 5-Late Shrigopal Jhunjhunwala, hence there would be no question of corpus fund to be paid for the second time. Insofar as the entitlement of respondent no. 6 to receive transit rent is concerned, Mr. Jain would submit that his clients can subject themselves to the orders which may be passed by the appropriate Court in the inter se disputes between respondent nos. 5(a), 5(b) and 6.

#### **Analysis & Conclusion**

18. On such conspectus, I have heard learned counsel for the parties. I have also perused the documents on record. There is no dispute that the Society had taken a decision as far back in 27 November, 2011 in its Special General Body Meeting that its building/premises are required to be redeveloped. In pursuance of such decision, further steps were taken by the Society which culminated into a Development Agreement dated

11 December, 2014 being entered between petitioner no. 1 and the Society. It also appears that the proceedings as initiated by respondent no. 3 before the Cooperative Authorities as noted above, namely, the complaint filed on 24 October, 2013 had attained finality in the year 2019. Since, respondent no. 3 aggrieved by the order dated 27 March, 2014 passed by the Divisional Registrar, had approached this Court by filing Writ Petition No. 5987 of 2014 which was ultimately withdrawn. It also appears to be not in dispute that subsequent thereto, i.e., on 31 October, 2021, the majority members of the Society resolved in a Special General Body Meeting that a Supplementary Development Agreement be entered with the petitioners which came to be ultimately entered on 29 November, 2021.

19. Perusal of the recitals of the Supplementary agreement clearly indicate that there were circumstances which necessitated not only the petitioners but also the Society to reconsider the terms and conditions as agreed in the Development Agreement dated 11 December, 2014 and modify the terms and conditions of the previous agreement by entering into a Supplementary Development. It needs to be noted that except respondent nos. 2 to 5, all other members of the Society are signatories to the said agreement. Thus, the intention of the majority members of the Society as reflected in the Special General Body Meeting culminating



into Development Agreement dated 11 December, 2014 and thereafter Supplementary Development Agreement dated 29 November, 2021 is consistent that the redevelopment of the building be undertaken by having the petitioner as the developer.

20. It also appears to be not in dispute that the Supplementary Development Agreement was acted upon by the petitioners and IOD was obtained on 22 December, 2021 and accordingly, a notice to vacate was issued by the petitioner to the Society as per clause 7(f) of the Development Agreement asking the members to vacate and handover possession of their respective flats.

21. It is thus the petitioners' case that the majority members of the Society have already vacated their respective flats, which also has not been disputed by respondent nos. 2, 3, 4 and 6. It is the petitioner's case that the impugned actions of respondent nos. 2, 3, 4, and 6, subject matter of the present proceedings are actions against the intention of the majority members of the Society, namely, to proceed with the redevelopment under the agreement in question. It is thus clear that respondent nos. 2, 3, 4 and 6 would be required to be held to be minority members, who are obstructing the redevelopment by not vacating their premises. It needs to be stated that respondent no. 5 was not against the redevelopment and was in fact agreeable for the same,

he also received the corpus amount in that regard, however unfortunately he expired.

22. In regard to the minority members of the Society obstructing the redevelopment and acting against the will of the majority members of the society, the position in law is quite well settled {see : **Girish Mulchand Mehta (supra)**, **Kamla Homes & Lifestyle Pvt. Ltd. (supra)**, **Chirag Infra Projects Pvt. Ltd. (supra)** and **Choice Developers (supra)**}. It has been the consistent view of the Court that minority members cannot obstruct the will and the decision of the majority members. The petitioners have rightly placed reliance on these decisions. Even learned counsel for respondent nos. 2, 3, 4 and 6 would not dispute such well settled position in law.

23. The contentions as urged on behalf of respondent no. 2 and 4 as to whether it would be appropriate for this Court not to exercise jurisdiction under section 9 of the Act, needs to be first addressed. The contention is to the effect that no relief on this petition filed under section 9 of the Act ought to be granted, and the parties be referred to the arbitral tribunal, before whom an interim application for such reliefs can be filed. The contention is also that such a position is now recognized by the Supreme Court in **Arcelor Mittal Nippon Steel India Ltd. (supra)**. In my opinion, in the facts of the present case, such

contention as urged on behalf of respondent nos. 2 and 4 cannot be accepted for more than one reason. Firstly, it is required to be noted that the present petition came to be filed on 13 April, 2022 and the same was served on the respondents on 22 April, 2022. There is no dispute in this regard. It can be seen from the record of the present proceedings that at the relevant time, as limited time was available before this Court closed for the summer vacation (2022), the Court adjourned the proceedings to 16 June, 2022, however, with a liberty to the petitioners to move the Vacation Court in the event of any pressing urgency. Thereafter, the proceedings were listed before this Court on 5 July, 2022 when it was directed to be placed on 13 July, 2022 H.O.B. On 13 July, 2022, the Court had passed the following order:

- “1. Stand over to **15 July, 2022**, as it is informed that there is urgency in the proceedings as the building is in a dilapidated condition and out of 31 members, 28 members have already vacated.
2. Arbitration Application No. 19658 of 2022 be also listed along with this proceeding.”

Accordingly, the petitions are listed today.

24. The above orders passed by this Court on the present proceedings show that the Court was completely seized of the proceedings. What is interesting to be noted is that after the notice of the petition was served on respondent no. 2 on 22 April, 2022, almost a month thereafter, i.e., on 17 May, 2022 notice under section 21 came to be issued by

respondent no. 2 on the petitioner and the Society, invoking the arbitration agreement and calling upon the petitioners and Society, to refer the disputes for adjudication by appointing an arbitral tribunal. This was clearly during the period after the present proceeding were moved before this Court on 20 April, 2022 as noted above and such notice of respondent no. 2 invoking arbitration was issued during the summer vacation.

25. It is not the case of respondent nos. 2 and 4 that the petitioners had given up their contention that the urgency on the present proceedings had ceased to exist and therefore Section 9 proceedings would cease to be urgent proceedings for a relief of urgent interim measures to be passed. Such is not the case of respondent no. 2 and 4. The insistence on behalf of respondent no. 2 and 4 is that merely because a notice under section 21 of the Act to refer the disputes to arbitral tribunal was issued, the sequel to it would be that the Court ought not to exercise jurisdiction under section 9 and refer the disputes to arbitration. Such a contention as urged on behalf of respondent nos. 2 and 4 is totally unfounded to say in the least. Such contention is not only against the principles of law governing the powers of the Court to pass appropriate interim orders under section 9, as the facts and circumstances of the case may warrant, however, it goes contrary to the

very statutory provision. Such contention also is not supported by the decision of the Supreme Court in *Arcelor Mittal Nippon Steel India Ltd. (supra)* on which reliance is placed on behalf of respondent nos. 2 and 4. In the facts of the present case, in my opinion, reliance on such decision is required to be held to be totally unfounded, since the controversy before the Supreme Court was such that the Section 9 proceedings were already heard and were reserved for orders and at such stage of the proceedings, the appellant had taken a position in the Section 9 proceedings, that the Court ought not to pass any order and the arbitral tribunal having been constituted, Section 9 proceedings be converted into Section 17 application to be adjudicated by the arbitral tribunal. Such contention was negated by the Supreme Court and the orders passed by the High Court were upheld thereby directing that the Court can proceed to adjudicate and pass final orders on the Section 9 proceedings, as the Section 9 proceedings were already entertained and heard at length. It is observed in paragraph 79 of the report that the Court would be obliged to exercise power under Section 9 of the Act, if the Arbitral Tribunal is yet to be constituted. The observations in that regard can be noted, which reads thus:

“79. We fully approve the view taken by the Single Bench of the Delhi High Court in *Avantha Holdings Limited (supra)* except for the observation that the Court, while exercising jurisdiction under Section 9, even at a pre-arbitration stage, cannot usurp the jurisdiction which would, otherwise, be vested in the arbitrator, or the Arbitral Tribunal, yet to be constituted. **The bar of Section 9(3)**

**operates after an Arbitral Tribunal is constituted.** There can therefore be no question of usurpation of jurisdiction of the Arbitral Tribunal under Section 17 before the Arbitral Tribunal is constituted. The Court is obliged to exercise power under Section 9 of the Arbitration Act, if the Arbitral Tribunal is yet to be constituted. Whether the Court grants interim relief or not is a different issue, for that would depend on the facts of the case - whether the Applicant has made out a good prima facie case, whether the balance of convenience is in favour of relief being granted to the applicant, whether the applicant would suffer irreparable injury by refusal of interim relief etc.

.....

90. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard relief would have to be declined and the parties be remitted to their remedy under Section 17.

**91. When an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different Arbitrators constituting an Arbitral Tribunal could be located at far away places and not in a position to assemble immediately. In such a case an application for urgent interim relief may have to be entertained by the Court under Section 9(1).**

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98. It is reiterated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate Court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act. The bar of Section 9(3) operates where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Ofcourse it hardly need be mentioned that even if an application under Section 9 had been entertained before the constitution of the Tribunal, the Court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has for all practical purposes, to be heard afresh, or the hearing has just commenced and is likely to consume a lot of time. In this case, the High Court has rightly directed the Commercial Court to proceed to complete the adjudication.”

(emphasis supplied)

26. It needs to be noted that reliance on behalf of respondent no. 2 on the decision has been on a pick and choose basis. An earnest attempt is not made to examine as to what is the ratio of the decision. What is being picked up are only two lines in paragraph 70. The following two lines in paragraph 70 reads thus:

“70. Mr. Khambata rightly submitted that a party invoking Section 9 of the Act must be ready and willing to go to arbitration. The law enunciated in Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors. (supra) is well settled. In this case, both the Appellant and the Respondent have invoked the jurisdiction of the Commercial Court under Section 9 of the Arbitration Act.”

(emphasis supplied)

27. Thus, the decision of the Supreme Court in fact would assist the petitioners and not respondent nos. 2 and 4. It also needs to be stated that neither the petitioners nor the Society are averse to take the issue to arbitration and thus it cannot be said that there is no inclination on the part of the petitioners or Society for a reference of disputes to arbitration. Thus, the contention of respondent nos. 2 and 4 that there is no willingness or readiness on behalf of the petitioners or Society to take the matter to arbitration on such count is also untenable. This apart, respondent no. 2 has not instituted any proceedings either to challenge the Development Agreement dated 11 December, 2014 nor is there any challenge to Supplementary Development Agreement dated 29 November, 2021 in a manner known to law and in fact intends to have a relief in the present proceedings. In these circumstances, none of the

contentions as urged on behalf of the respondent nos. 2 and 4 can be accepted to deny any relief to the petitioners.

28. Insofar as the contention as urged on behalf of respondent no. 3 and 4 are concerned, the contention is to the effect that the Supplementary Development Agreement dated 29 November, 2021 is not beneficial to respondent no. 3 as also the other members of the Society. Such contention cannot be urged in the present proceedings. Respondent no. 3 if aggrieved by any actions of the society, he has all rights to initiate appropriate proceedings for redressal of his grievance on such count. Thus, for such reasons, respondent no. 3 cannot take a position that he would not vacate the premises or take any position which would be opposed to the redevelopment of the premises of the Society.

29. Insofar as respondent no. 6 is concerned, it is quite clear that he intends to raise a dispute against the legal heirs of respondent no. 5- Shrigopal Jhunjhunwala, who was admittedly a member of the Society. The share certificate of the Society in respect of the flat in question is in the name of Late Shrigopal Jhunjhunwala. Learned counsel for respondent no. 6 has rightly contended that all contentions of respondent no. 6 to assert his rights in respect of the flat in question be



expressly kept open to be agitated in appropriate proceedings. Insofar as the corpus amount of flat no. 14 is concerned, the same has already been paid by the petitioner to respondent no. 5-Shrigopal Jhunjunwala, who expired on 23 December, 2021, i.e., after the Supplementary Development Agreement was entered into between the petitioner and the Society. Insofar as the transit rent which is required to be paid to respondent no. 6 for vacating the said premises is concerned, the view taken by this Court in **Sai Krupa Cooperative Housing Society Ltd. vs. M/s. Osho Developer & Ors.**,<sup>7</sup> would be applicable, as in my opinion, as respondent no. 6 who is in occupation of the flat is required to vacate the premises and would be dishoused and would be without a roof over his head. Hence, the transit rent ought to be paid to respondent no. 6 who on vacating the premises would be required to find out a temporary alternate accommodation. Such transit rent however shall be paid to respondent No.6, keeping open all contentions of respondent no. 5(a) and 5(b) to claim such amounts, if respondent nos. 5(a) and 5(b) intend to assert their claim in that regard in any inter se proceedings between respondent nos. 5(a) and (b) and respondent no. 6. Hence, the payment of transit rent shall be subject to such orders which would be passed by the Competent Court in proceedings of any disputes inter se between respondent nos. 5 and 6. All contentions of respondent nos. 5(a) and (b) and respondent no.6 in that regard are expressly kept

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<sup>7</sup> Commercial Arbitration Petition (L) No. 1097 of 2022

open.

30. In the above circumstances, in my opinion, it is quite clear that respondent nos. 2, 3, 4 and 6 cannot take a position adverse to the intention of the majority members of the Society and obstruct the redevelopment of the premises in question. Moreso, when the condition of the building is dilapidated, which was also clear from the photographs which are tendered on behalf of the petitioner. On a query made to learned counsel for respondent nos. 2 and 4 as to whether he would agree that the building is in good condition, learned counsel for respondent nos. 2 and 4 has refused to make any comment on such query, nor his clients who are in the Court dispute the photographs which were tendered before this Court. In the light of the above discussion, the petition would be required to be allowed, however, by the following order:

**ORDER**

- (i) Respondent nos. 2, 3, 4 and 6 are directed to handover the possession of their respective flats to the petitioner/the Society, along with the other members of the Society who have not vacated so far;
- (ii) It is informed that other members shall vacate within a period of four weeks. If that be so, respondent nos. 2, 3, 4

and 6 also shall vacate within four weeks along with such members or within a period of two weeks from the date a copy of this order is available, whichever is later;

(iii) In the event, respondent nos. 2, 3, 4 and 6 fail to vacate their premises/tenements, the Court Receiver, High Court, Mumbai shall stand appointed to take appropriate action to take over possession of the respective flats of the said respondents and handover the same to the petitioner/Society. For such purpose, the Court Receiver is permitted to seek police assistance from the concerned police station. In such event, the petitioner is directed to deposit in the the Court Receiver's office an amount of Rs.50,000/- which shall be utilized for the purpose of taking such appropriate action to get the tenements of respondent nos. 2, 3, 4 and 6 vacated.

(iv) In so far as respondent No.6 and 5(a) and (b) are concerned:-

(a) The rights and contentions of respondent nos. 6 and 5(a) and (b) in any *inter se* proceedings between them are expressly kept open. The payment of transit rent as permitted by this order shall be subject to appropriate orders which may be passed in any such proceedings.

(b) In the event any adverse order is passed against respondent no. 6, from the date of such order, payment of

transit rent shall be made by the petitioner in favour of respondent nos. 5(a) and (b). This shall however be without prejudice to any legal remedy available to respondent No.6 to assail such orders.

- (v) Needless to observe that the issue of possession qua the redeveloped premises being an inter se dispute between respondent nos. 5 and 6 the same shall also be subject to the orders and outcome of the inter se proceedings between respondent nos. 5(a) & (b) and respondent no. 6.
- (vi) Also, no orders are required to be passed as to with whom the petitioner needs to enter into the PAAAs as rights and contentions of respondent No.5(a) and (b) and respondent No.6 in that regard are expressly kept open.
- (vii) Needless to observe that till respondent nos. 2, 3, 4 and 6 vacate, their respective premises, they shall not create any third party interest or part with the possession of their respective flats.
- (viii) All contentions of the parties in the proposed arbitration are expressly kept open.

31. The petition is disposed of in the above terms. No costs.

**[G.S. KULKARNI, J.]**