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Court : Mumbai

Decided On : Sep-16-2013

Judge : The Honourable Mrs. Justice Roshan Dalvi

Appeal No. : Arbitration Petition No. 693 of 2013

Appellant : Shree Krishna Homes Pvt. Ltd.

Respondent : The Perpetual Co-operative Hsng. So. Ltd. and Others

Judgement :

1. The petitioner is a developer who entered into an agreement with defendant No.1 who is society consisting of 11 members having 12 flats being respondent Nos. 2 to 12. The members of the respondent No.1 sought to redevelop their society building. They entered into an agreement with the petitioner dated 14th December, 2011. Thereafter in lieu of the change in the DC Rules with regard to the additional area to be given to the existing members in the newly constructed building they resolved to consider certain changes in their agreement under the meeting held by them on 2nd March, 2012. They have assigned the plan of the construction as finalized by and between the petitioner and the members and sent under the petitioner's letter dated 3rd March, 2012. They have entered into a supplemental agreement on 15th October, 2012 altering certain terms of the initial development agreement.

2. Five out of eleven members holding six out of twelve flats in the society are thereafter stated to have backed out of the agreement entered into with the petitioner. The petitioner has invoked the arbitration clause under the agreements between the parties and have sought appointment of an arbitrator.

3. Pending the arbitration the petitioner has applied for interim reliefs of appointment of Court Receiver in respect of the flats of the dissenting members with the power to take possession, peaceably if allowed, by breaking open the lock if required and with police help if necessary and to handover possession of the same to the petitioner for redevelopment as per the development agreement.

4. The dissenting members accept the initial development agreement dated 14th December, 2011. They claim that the rights which they had got in the supplemental agreement are to their prejudice and to the benefit of the developer which is not agreeable to them.

5. Under the initial development agreement the respondent No.1 society and the other respondents who were the members appointed the petitioner as the developer to redevelop their building by demolishing the existing building Krishna Niwas, utilizing the FSI as also the TDR to construct the new building and to provide a new flat to each of the members along with various other covenants mentioned therein within 18 months from receiving vacant and peaceful possession from the members and within an extended period of 21 months as specified in the agreement. The society had to handover vacant possession within 60 days of the agreement to the developers subject to the developer making certain payments specified in the agreement.

6. Consequently the liability of the members to vacate is accepted by the dissenting members since the execution of the agreement dated 14th December, 2011 is itself accepted.

7. Some time later and after the Development Control Regulation for Greater Mumbai, 1991 (DC Rules) came to be amended by the MMC in its circular dated 12th January, 2012, the members held another meeting on 2nd March, 2012. Two of the dissenting members, Parul Gala and Haresh Sawla attended the meeting.

The minutes of the meeting show the novatio between the parties. The builders were to offer an area up to 10% more than the 30% offered to the tenants. A revised plan was submitted showing the area given to the members. The aforesaid two dissenting members signed the revised allotment of plans.

8. On 15th October, 2012 the supplemental agreement came to be entered specifying the novatio. Haresh Sawla, one of the aforesaid dissenting members, signed the agreement before the Registrar of Assurances along with two other members. That agreement also shows the new allottable carpet area that each of the twelve members would be entitled to. The earlier development agreement executed by inter alia by Haresh Sawla, the aforesaid dissenting member was annexed to that agreement.

9. After the execution of the supplemental agreement the dissenting members have dissented. Two of the members were not in Mumbai and are stated to be residing in Muscat. They would have to follow the rule of majority in the society.

10. The members dissented on the ground that the novatio gives them a much lesser area. Mr. Purohit on behalf of the members showed the Court the difference in what was to be provided in the initial agreement dated 14th December, 2011 and in the supplemental agreement dated 15th October, 2012. Essentially the members would be given a flat of their carpet area plus 30% additional area, twelve covered car parkings (one for each member), elevation area as may be permitted by the appropriate authority and compensation for any shortfall and 10% free FSI balcony area. In the supplemental agreement as per the new DC Rules the members would be provided their carpet area plus 40% of the carpet area instead of 30% agreed under the earlier agreement, but without elevation area and the 10% free FSI balcony area. It is also argued that instead of twelve car parking spaces, which would give each member one car parking space, twelve car parkings comprising 1/2 of the covered car parking are to be given in the supplemental agreement and the definition of the carpet area has changed therein. Nevertheless this is the agreement between the parties and the area under the revised plans which would be granted is signed by the members including two of the dissenting members along with the resolution of the society

which is also signed by those two members and one of whom has even executed the registered agreement.

11. The dissenting members have refused to vacate as per their obligation under Clause 8 of the initial agreement which, aside from the variation in the supplemental agreement, would be valid and binding between the parties and which is accepted by the dissenting members.

12. The petitioner has appointed an arbitrator; the dissenting members did not accept the arbitrator. The arbitration has not proceeded. The arbitral tribunal would have to decide whether the novatio between the parties under the supplemental agreement is binding upon the dissenting members and if not how they could be protected.

13. The rights, if any, of the dissenting members to extra area than what is agreed in the supplemental agreement and accepted by at least two of them and by a majority of the society members would have to be decided in the arbitration.

14. Indeed the circular of the MMC of 2012 showing the change of the DC Rules requires fungible compensatory FSI for rehabilitation component which cannot be used for free sale component and can only be used to give additional area to the existing tenants/occupants and cannot also be used for working out a salable FSI for the free sale component. To that extent, and subject to the agreement between the parties, the disputes between the parties would require to be adjudicated by the arbitral tribunal.

15. The main question for the grant of interim relief is whether a mandatory interim relief calling upon them to vacate and failing which to appoint Court Receiver to enforce the vacation of their flats should be granted pending the arbitration. Upon the acceptance of the initial agreement the obligation to vacate is clear. The refusal to vacate is, therefore, lacking in bonafides. Their claim not to vacate because of the difference allotted in the agreement which is prejudicial to them is seen to delay the reconstruction of the society building. The arbitration does not call for retaining possession of the flat of any member and not handing over vacant possession as agreed by the society and its members.

16. In the interest of all the members, including the dissenting members, the counter productive act of not allowing the construction by not vacating the premises is seen.

17. It is argued on behalf of the dissenting members that grant of the reliefs prayed for would be like a decree executed prior to arbitration and the demolition of the building would be irreversible. It is also argued that the building is not dilapidated and, therefore, there is no urgency. It is argued on behalf of the other members that the agreements would have to be abided and not breached. The dissenting members may be compensated if they being prejudiced by the developer's acts is seen in arbitration. Court Receiver be appointed to take possession of the flats of all the members so that construction can proceed.

18. It would have to be seen if such reliefs can be granted and how it must be moulded. Under Section 9(ii)(d) appointment of Court Receiver as an interim relief is contemplated pending an arbitration proceeding. Under that the Court would have the same power for making orders as it has in relation to any proceedings before it.

19. In the case of **AdhunikSteel Ltd. Vs. Orissa Manganese and Minerals (P) Ltd 2007 (7) SCC 125** also the object of the interim reliefs to be granted pending the arbitration is set out being to promote efficacy of the arbitration and hence it is observed in para 24 of the judgment that the Court must be guided by the underlined principles governing the exercise of analogous power in the CPC and strike a balance between the rigors of the procedural law and the interest of justice.

20. Drawing upon the observations of the Supreme Court in the case of **Arvind Constructions Company (P)Ltd. Vs. Kalinga Mining Corporation 2007 (6) SCC 798** it observed that the general rules of the grant of interim injunction and the general rules of procedure would apply to proceedings under Section 9 of the Arbitration and Conciliation Act, 1996. This is more so in view of Section 9(ii)(e) which enjoins the Court to pass any interim measures of protection which is just and convenient, the same principal upon which the Court Receiver can be appointed. Consequently it is observed that the ordinary rules of procedure govern

the exercise of power conferred under the Arbitration Act.

21. Further drawing from the case of **Raman Tech. and Process engg. Co. and Anr. Vs. Solanki Traders 2002(2) SCC 302** the Court specified that interim order inter alia of appointment of Court Receiver would be required to be passed to prevent ends of justice being defeated in arbitration in the case of **Deccan Chronicle Holdings Ltd. Vs. L and T Finance Limited in Appeal (L) No.130 of 2013 in Arbitration Petition No. 1095 of 2012 judgment dated 8th August, 2013.**

22. Had the same dispute come up before the Court for judicial adjudication relief in terms of the prayer (a) of the petition or a mandatory order of injunction of vacating the premises by all the members subject to making a provision in accordance with their case would be made out. It would be just and convenient in this case to see that the members vacate, the society building is demolished, the plans are submitted and approved and the construction begins as soon as practicable. During this time the arbitration which is invoked would proceed and would be even expected to be completed. It may be mentioned that it is conceded by Counsel that the rights of the parties would essentially be dependent upon and considered upon the documentary evidence contained in the aforesaid agreements and the minutes of the meetings between the parties. The oral evidence would stand excluded by such documentary evidence with regard to the resolution of the society and the execution of the agreement. The ambit of the arbitration is, therefore, extremely narrow. The additional rights of the dissenting members, if any, as per the circular dated 12th January, 2012 constituting the change in the DC Rules would have to be considered. Nevertheless the admittedly executed agreements between the parties would have to be executed. Consequently the opposition to the grant of the reliefs merely because it is in the nature of mandatory reliefs is not seen to be bona fide. The Court would have to decide the grant of such mandatory reliefs or even appointment of Court Receiver upon the same parameters as applied in case of judicial adjudication since the Court has the same power for making orders under Section 9 of the Act.

23. A further test is whether the Court would have protected the dissenting members by grant of an injunction against demolition of their building and allowed them not to vacate as per the admittedly executed agreements had they sued. No such injunction could be granted in the facts of this case.

24. The case for grant of the relief of appointment of Court Receiver, but with additional safeguard for making provision for grant of additional area to the dissenting members, if so held in the Arbitration is, therefore, made out as an interim measure of protection being just and convenient in the facts and circumstances of the case under Section 9(e) of the Arbitration and Conciliation Act, 1996.

25. Six members of the society are liable to vacate their flats. They have not vacated only because the dissenting members have opposed vacating their flats. Counsel on their behalf made a statement that they would vacate their flats so soon as the dissenting members vacate their flats so that there would not be prejudice after vacating the flats if the society building cannot be demolished and the reconstruction cannot soon begin.

26. Hence the following order:

1. The dissenting members shall vacate the flats in their occupation as per their obligation under Clause 8 of the admittedly executed agreement dated 14th December, 2011 within 4 weeks from today.

2. The other members shall vacate their flats immediately thereafter.

3. If the dissenting members do not vacate their flats themselves Court Receiver is appointed after a period of four weeks from today in respect of the flats of the dissenting members.

4. The Court Receiver shall take physical possession of the flats of the dissenting members, with police help if required and by breaking upon the locks if required.

5. The members shall proceed to arbitration.

6. The respondent No.1 shall get the plans sanctioned taking into account the plinth area as would be required, if the dissenting members were to be given additional area as per their rights under the circular dated 12th January, 2012 in the new D.C. Rules, if so, held by the Arbitral Tribunal.

7. The Petition is disposed of accordingly.

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