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

ARBITRATION PETITION NO. 121 OF 2012

1 Mrs. Prajakta Mahesh Joshi
Indian inhabitant age 35 years, residing
at Flat No.D-514, Dev-Deveshwar
Society, Telli Gali, Xth Lane, Andheri East,
Mumbai 400 069

2 Mr. Mahesh Shrikrishna Joshi
Indian inhabitant age 36 years, residing
at Flat No.D-514, Dev-Deveshwar
Society, Telli Gali, Xth Lane, Andheri East,
Mumbai 400 069

.... Petitioners

vs

1 Mrs. Rekha Uday Prabhu
104, Apollo Complex, R.K. Singh Marg,
Andheri East, Mumbai 400069

2 Mr. Uday Manjunath Prabhu
104, Apollo Complex, R.K. Singh Marg,
Andheri East, Mumbai 400069

3 The Secretary and Chairman
RNA Hills Co-operative Housing Society Ltd.
Near Sathya Darshan, Gundavali Gaothan,
Andheri East, mumbai 400 069

..... Respondents

Mr. Subodh Gokhale for the petitioners.

Mr. V. Verma i/by S. K. Associates for respondents 1 and 2.

CORAM: ANOOP V. MOHTA, J.

DATE : December 06, 2012

ORAL JUDGMENT:

Heard finally by consent.

2 The Petitioners have invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) and thereby challenged an exparte award. The operative part of Award dated 14 August 2010 is as under :

“(i) I hereby direct and award that the Opponent Nos. 1, 2 be held responsible & accountable for specific breach of their terms of contract along with Op. No.3/RMNA Hills CHS Ltd for its contributory role herein above, hence, are jointly & severally liable & accountable to arrange and to execute a SALE DEED & convey the contracted Flat consisting of 2BHK-admeasuring 1050 SQFT at RNA Hills CHS Ltd., Opp. Satya Darshan, Andheri (E), Mumbai 400 069, if possible Flat no. A-102 or its substitute, main road, facing corner flat on the 1st floor within its complex, on collection of sum of Rs. 38,00,000 (Thirty eight lakhs) from the Disputants, within 30 days hereof. [It is to be expressly

noted by all concerned that the corresponding stamp duty Maximum Rs.1,50,000 (though factually the amount payable as per current valuation of premises / corresponding stamp duty rates may vary & may go up to Rs.5,00,000 (Five lakhs), the difference of which has to be borne by the 3-opponents herein & the Deed Registration charges Rs.30,000/- (Thirty thousand) & Society's Transfer charges Rs. 25,000 (Twenty five thousand) to be advanced solely by the Disputant to the RNA Hills CHS Society on receipt of this Arbitral Award & on issuance of allotment/confirmatory letter to above effect by Opponent No.3/RNA Hills CHS Ltd.

(ii) In the alternative, the Opponents will locate within next 30 days a suitable flat on the first floor, of the same size in a like complex in the same vicinity & complete all formalities, failing which they will be liable to jointly and proportionately pay in advance per month on or before 7th of each month a sum of Rs. 48,000 [Rupees forty eight thousand] towards cost/compensation for non-accommodation to the Disputants, until next 3 [three months] & thereafter every month within an automatic increase of 15% [Fifteen percent] per quarter, on the last paid amount as disturbance allowance until finalization of

the above arrangement.

(iii) The Opponents shall also reimburse the Brokerages & Charges if any payable for arranging an alternate accommodation upto a maximum of 2 months rental or compensation as at Sr. No. (ii) hereinabove, along with initial lease rental advance deposit not exceeding to Rs.5,00,000 [five lakhs], immediately on receipt of demand to pay so to any 3rd party on account of the above and without any further application/representation from the disputants, for the same but refundable on handing over peaceful possession with all the proprietary documents including share certificates registered in its favour and the 2-BHK flat admeasuring 1050 SQFT and on signing of a quit claim deed on satisfactorily completing the above transactions.

(iv) In the alternative, the opponents should arrange to pay a lump sum compensation of Rs.77,50,000 to the opponents shared equally by all the three opponents, being the difference in the cost of like flat of same size in the same vicinity, within the next 60 [sixty days]. Current market price being Minimum @11,000/- per sq.ft. {Eleven thousand} x 1050 SQFT = Rs.1,15,50,000, less amount that was payable by the disputant

i.e. Rs.38,00,000. Hence the compensation/liquidated damages comes to Rs.77,50,000/- (Rupees seventy-seven lakhs fifty thousand) along with simple interest @ 10% (ten percent) per annum from 30 days after the date of receipt of this Arbitral Award until physical payment and if the compensation is settled after 90 days of receipt of the arbitral award & beyond then interest has to be calculated @ 12% {Twelve per cent} per annum payable/compounded on monthly rest basis, until payment.

(v) Disputant's further representation with respect to claim for additional compensation against Harassment and Mental agony coupled with cost of increased operations including litigations initiated and for making alternate accommodation, in the process of above transaction has been rejected as the compensation considered per contracted terms have been fairly & thoroughly taken in view & weighed upon against the interest that must have earned /accrued on the Rs.38,00,000/- (Thirty eight lakhs) while lying with the disputants when in he above process & also while arriving per above determinations.

(vi) Cost of this Arbitration proceedings is Rs.15,000 {Fifteen thousand}, payable by the entire, 2 Disputants as well as by the

3 opponent parties, proportionately.

(vii) The opponents shall comply with the above Arbitral Award within 30 days of receipt thereof, failing which recovery proceedings may be adopted.

(viii) Copies of this Arbitral Award, is being supplied to all the parties accordingly.”

The basic events, as per the Petitioners, are as under :

3 On 28 February, 2007, a MOU (Memorandum of Understanding) for a sale of a 2 BHK flat was signed between the Petitioners and the Respondents. The Respondents made initial payment of Rs. 50,000/- and handed over the documents. On 23 June, 2007, as the Respondents delayed balance payment, the Petitioner on request refunded the advance of Rs.50,000/- to the Respondents by a Bank transfer. On 19 August, 2007, the Respondents filed a Consumer Complaint No. 149 of 2007 before State Consumer Disputes Redressal Commission, Maharashtra against the Petitioners. On 10 January, 2008, the complaint was dismissed by the State Commission. On 17 February, 2008, the Respondents file First Appeal No. 100 of 2008 before the National Consumer Commission, New Delhi, challenging the State Commission Order. The same is pending.

4 On 10 May, 2010, the Petitioners received a Notice of Arbitration. The Petitioners sent a reply through its Advocate-cum-Arbitrator. On 18 June, 2010, the Petitioners received a reply notice from the learned Arbitrator posing as an Advocate for the Respondents. On 26 August, 2010 a copy of the Arbitral award received by the Petitioners.

Unilateral appointment of Arbitrator-cum-Advocate by one party:

5 There is no dispute that there exists the arbitration clause in the agreement between the parties. As dispute arose, Respondents 1 and 2 invoked arbitration clause and thereby unilaterally appointed Advocate Shri Shailendra S. Gandhi as the Arbitrator.

6 The Petitioners immediately by letter dated 24 May 2010 replied to the notice issued by the Arbitrator dated 10 May 2010 by which he fixed the first hearing/meeting at his office and also directed the parties to deposit Rs.50,000/- towards the initial payment. The Petitioners resisted every aspects of the invocation and the appointment of the Arbitrator and specifically mentioned that they would not be participating in the arbitration proceedings. It was

specifically pointed out about the dismissal of the Respondents' consumer complaint. It was also mentioned about the refund of Rs.50,000/- to the Respondents. Therefore, there existed no dispute. The Petitioners thereby also contended that having once invoked the judicial proceedings, there was no question of invoking of arbitration clause apart from unilateral appointment of the Arbitrator.

Dual capacity of Arbitrator and Advocate of one party is impermissible:

7 Strikingly, the Arbitrator who was an Advocate of the Respondents by its reply dated 18.6.2010 referring to the above communication/reply of Petitioners, insisted the Petitioners to participate in the arbitration proceedings on 28 June, 2010 by stating it to be the last and final call. Surprisingly, the learned Arbitrator, who appears to be the Advocate of the Respondents, even replied in detail to the contentious issues specifically raised by the Petitioners in communication dated 24 May 2010. The tenure of the reply/communication of Arbitrator dated 18.06.2010 was like an Advocate replying on behalf of the client. If we overlook last paragraph of the communication of the Arbitrator, the denial and the assertion are as that of contesting Respondents.

The consent is a must for appointment of arbitral tribunal:

8 The arbitration clause referring to the Arbitration Act permits the parties to resolve their dispute through a sole Arbitrator. Considering the scheme and object of Arbitration Act, in my view, first requirement is that the Arbitrator must be appointed by the consent of the parties. The consent of Petitioner was never obtained. Therefore, the unilateral appointment of Arbitrator, in such fashion itself is impermissible mode to resolve the disputes by this alternative dispute resolution mode through the Arbitration. The requirement of consent so provided and/or clause so mentioned above, in no way, permits any one party to appoint Arbitrator unilaterally. It is contrary to the terms and the law. Apart from this clause, it is necessary for both the parties to appoint and/or nominate and/or select sole Arbitrator by consent. The appointment of the Arbitral Tribunal without consent itself was contrary to the agreed terms of the contract.

9 The Arbitrator's role is quite limited though appointed by the parties, basically at the stage of fixing the meeting of arbitration proceedings. He is not empowered and/or even permitted to deal with the merit of the matter in such fashion on behalf of other party while calling or fixing the meetings. At this stage, the requirement is

simply to give intimation and/or call upon the parties to attend in arbitration proceedings. Such notice/intimation in no way can be denial and/or assertion of other side's case. From the contents of the communication dated 18.06.2010, it is clear that the Arbitrator who was Advocate of the Respondents, acted also as the Advocate and also as the Arbitrator. It is just impermissible. Such dual capacity of Advocate and/or even of the Arbitrator is against the basic provisions of the Arbitration Act and/or the arbitration scheme itself. The Advocate by consent can act as Arbitrator, but cannot act in such dual capacity for only one party.

The award is illegal.

10 The learned Arbitrator, by the impugned Award, directed the Petitioner to provide flat to the Respondents and in the alternative, directed to pay compensation and/or liquidated damages to the extent of Rs. 77,50,000/- along with simple interest at 10% and also awarded 12% interest, if amount as awarded is not paid within 90 days. He also proportionately awarded the cost of Rs.15,000/-. The whole approach is contrary to law and the record.

11 As recorded above, the Petitioners, considering the facts and circumstances, immediately after receiving of arbitration notice,

denied the claim as well as the initiation of arbitration in such fashion and specifically opposed even the participation in the arbitration proceedings. The Petitioners therefore never attended the arbitration proceedings. The learned Arbitrator noting this absentee, has passed the ex parte award by holding that the Respondent/disputant proved “beyond reasonable doubt” that the Petitioners breached and failed to perform the terms and conditions of MOU. This itself means the learned Arbitrator has passed the award based upon the documents provided by the Respondents and the averments so made in the statement of claim. The award must be based on the materials available on the record and the law. There is reason to only follow the concept of “beyond reasonable doubt” in such circumstances.

12 Admittedly, there is nothing on record to show that the Respondents led any evidence to support their claim. The learned Arbitrator ought to have considered the reply filed by the Petitioners resisting the claim of the Respondents on all counts. The unilateral acceptance of the case of the Respondents, in such fashion, resulted into the Award whereby direction is to provide one flat and/or in the alternatively, to pay Rs.77,50,000/- with interest towards compensation and liquidated damages though there was no such

specific agreement between the parties. The aspect of compensation and/or liquidated damages means supporting evidence and material. It is necessary for the party one who claims such compensation and liquidated damages to show how they suffer loss and the basis for claiming such damages, apart from proving the proved default by the other side. Mere averments itself are not sufficient. The Arbitral Tribunal ought to have considered the averments as well as the documents placed on record and the basis for arriving at and/or granting such compensation for the first time in the present facts and circumstances of the case.

13 The learned Arbitrator has in fact noted the pendency of Appeal No.100/2008 before the higher forum under the Consumer Protection Act. **In National Seeds Corporation Limited v. M. Madhusudhan Reddy and another**,¹ , the Supreme Court has reiterated that arbitration proceeding is an additional remedy, when it comes to selecting between the Consumer Act and the Arbitration Act. The remedy under consumer Act as chosen already and as the complaint of the Respondents was dismissed for same contract and the cause and the Appeal is pending, the award so passed therefore also

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bad in law. The competent consumer court has already rejected the complaint of the Respondents. The Arbitrator, ought not to have decided the arbitration petition in such fashion. The Award is perverse. The Supreme Court has clarified that such proceeding is permissible though there exists arbitration clause. Therefore, even at this stage of passing of Award, the dispute/conflict so raised was pending before the judicial authority between the parties arising out of the same contract towards the same, still proceeded with the matter and passed the award without giving basic opportunity of any kind to the other parties. The award is against the principles of natural justice. It is necessary to note that the Petitioners, as recorded above, deliberately not attended the arbitration proceedings basically for the reason that the proceedings so initiated and the way in which the Arbitrator was appointed and proceeded further itself was contrary to the settled principles of arbitration law. I am not inclined to accept that the Petitioners deliberately not participated in the arbitration proceedings. The case is illegal inception and/or invocation of the arbitration proceedings itself. The Respondents have already invoked judicial proceedings to recover their amount and the amount was refunded long before, and, therefore, there was no arbitrable dispute pending at the relevant time. The learned

Arbitrator, knowing fully the case of the Petitioners, proceeded further and has passed the impugned award which, in my view, is contrary to the provisions of the Arbitration Act, Evidence Act, Code of Civil Procedure apart from the principle of natural justice.

No deliberate non-participation.

14 Admittedly, the Arbitrator is not party in the present proceedings.

15 In a given case, the Petitioner would have participated in the arbitration proceedings and resisted the claim in all respects. The Arbitrator would have passed the appropriate order. But in this case, as recorded above, the Petitioners having made their position clear in writing and had resisted every steps taken by the Respondents including the steps taken by the Arbitrator, who was no one else, but the Advocate of the Respondents and, therefore, the non-participation, in no way, can be treated as deliberate action to avoid the settlement of disputes through the arbitration proceedings. I am inclined to observe that both the proceedings so initiated and concluded is illegal, contrary and perverse. The Award so passed is unsustainable and liable to be quashed and set aside on all counts.

The cost for the first time in Section 34 Petition by the Court.

16 The learned counsel appearing for the Petitioners submitted that this is a case where the cost should be awarded as the Petitioners required to pay the court fee of Rs.75,000/- apart from other expenses, because of such illegal initiation of the proceedings by the Respondents. The learned counsel appearing for the Respondents resisted the same. He has pointed out that the Award is dated 14.08.2010 and the Petition under Section 34 of Arbitration Act was filed on 16.11.2010. No further steps were taken to proceed with this arbitration proceedings immediately. This Court on 9.2.2012 after removal of office objections by the Petitioners and as matter listed, issued notice for final disposal. On 23.02.2012, rule was made returnable. The Petition is now listed for final hearing and, therefore, there is no question of awarding any costs as prayed. Considering the fact that though initiation of the arbitration proceedings was not as per the scheme of Arbitration Act, but non-participation of the Petitioners and not initiating proceedings within reasonable time, in my view dis-entitle him to claim the cost of this proceedings as prayed, because of delay in pursuing the present arbitration petition.

The Respondents in fact have initiated execution proceedings and even attached some property of the Petitioners. However, now in view of this order, as Award goes so also all the execution proceedings arising out of the same. This Court, after considering the averments of both the parties and though the Petitioners inspite of service failed to appear before the Arbitrator, but considering the above circumstances, inclined to quash and set aside the impugned Award including the cost awarded by keeping all points open for the parties to initiate and/or continue with their proceedings, if any, therefore also not awarding the costs as prayed.

17 Resultantly, the following order :

- (I) Award dated 14.08.2010 is quashed and set aside and also the execution proceedings and actions arising out of it;
- (II) The Petition is allowed accordingly. There shall be no order as to costs.

(ANOOP V. MOHTA, J.)