



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

COMMERCIAL ARBITRATION PETITION (L) NO.34078 OF 2023

Gulshan Townplanners LLP

A Limited Liability Partnership Firm
Registered under the provisions of
Limited Liability Partnership Act 2007
Through Auth. Partner Milind Madhukar
Masdekar, having registered Office
address at Office No 6, Arihant Complex
Building No. 2, Old Viva College Road,
Virar (W), Tal - Vasai, Dist - Palghar,
Maharashtra - 401303.

... Petitioner

V/s.

**1. Gulshan Co-operative Housing
Society Limited**

A Co-operative Society registered under
Provisions of Maharashtra Cooperative
Societies Act, 1960 having its office at
Gulshan Apartment, CTS No. 1163, F.P.
No. 282, TPS II, Dixit Road, besides
Sathaye College, Vile Parle (East),
Mumbai- 400 057.

2. Baiju Mahendra Doshi

Age: Major; Occ: Business;

B-Wing, Gulshan Apartment, Dixit Road,

Besides Sathaye College, Vile Parle (E),

Mumbai- 400 057.

... Respondents

Mr. Shanay Shah a/w Smit K. Nagda for the Petitioner.

Mr. Mayur Khandeparkar a/w Pankaj S. Pandey for Respondent No.1 (Society).

Mr. Simil Purohit, Senior Advocate a/w Arshil Shah i/by Parisha Shah a/w Smita Durve, Rasesh Shah, Tanmay Gujarathi, Vishal Pattabiraman and Rutwij Bapat for Respondent No.2.

CORAM	:	ARIF S. DOCTOR, J.
RESERVED ON	:	10TH SEPTEMBER 2024
PRONOUNCED ON	:	30TH SEPTEMBER 2024

JUDGEMENT :

1. While at first blush the captioned Petition would appear to be the usual Petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 ("Arbitration Act") in matters of redevelopment agreements entered into between a Developer, (the Petitioner in the present case) and a Cooperative Housing Society, (Respondent No. 1 "the Society" in the present case), the facts of the present case would make plain that it is infact anything but so. Infact, in

my view, as the facts of the present case would make clear, the present Petition is nothing but a sheer attempt to misuse of the provisions of Section 9 of the Arbitration Act.

2. The ‘*disputes*’ that are stated to have arisen are under a Redevelopment Agreement (“RDA”) and a Supplementary Agreement (“SA”), both dated 20th July 2022 entered into between the Petitioner i.e., the Developer, on the one hand and the Society which comprises of eleven members on the other hand. The RDA has also been individually signed/executed by each of the eleven members of the Society. Admittedly, Respondent No. 2 is neither a member of the Society nor has Respondent No. 2 signed the RDA. Infact, the Petition itself describes Respondent No. 2 as “*Occupant on Respondent No. 1’s property*”.

3. Before adverting to the rival contentions, it is essential to set out the following facts, viz.

- i. The Petition concerns a plot of land measuring about 461.52 sq. meters, bearing CTS No. 1163, Final Plot No. 282, T.P.S. II (1st variation final) of Village: Vile Parle (East), Dist. Mumbai Suburban (“the said land”), and a structure/building comprising of ‘A’ and ‘B’ Wings (“the said structure/building”) standing on the said land.

- ii. On 13th January 1986, M/s. Gulshan Construction, through a Deed of Assignment, was granted development rights in respect of the said land by its owner, stated to be one Pyaremal Sagormal. Subsequently, M/s. Gulshan Construction built the said structure/building. The A-Wing initially comprised of a ground floor and three upper floors, and B-Wing comprising a ground floor and two upper floors. Later, a fourth floor was added to the A-Wing.
- iii. M/s. Gulshan Construction then sold all the flats in the A-Wing to individual purchasers, i.e., the eleven members of the Society. The B-Wing, which has one flat per floor, was initially kept unsold and reserved by a partner of M/s. Gulshan Construction for his personal use. However, in 1993, the partner of M/s. Gulshan Construction sold all three flats in B-Wing to Respondent No. 2. In the year 2006 the individual flat purchasers of A-Wing registered and formed the Society on 22nd August 2006. It is not in dispute that (a) Respondent No. 2 is not a member of the Society, (b) the B-Wing has been independently assessed for property tax since 2001, which had at all times been paid by Respondent No. 2, (c) B-Wing has independent water and electricity connections for which separate bills are raised on and are paid by

Respondent No. 2 (d) there is a compound wall between A-wing and B-wing and separate entrances to both the wings and (e) the open space around each wing was separately demarcated.

- iv. In 2018, the Society, during a Special General Body Meeting (SGM) held on 8th September 2018, resolved to undergo redevelopment. However, the Petition asserts that due to the non-cooperation of Respondent No. 2, the redevelopment did not proceed. The Society thereafter in the year 2019 applied for a unilateral deemed conveyance in respect of the said land and structure/building. Respondent No. 2 contested the application for deemed conveyance. The Competent Authority, however, by an order dated 7th September 2020, allowed the application for deemed conveyance. This order was challenged by Respondent No. 2 by filing Writ Petition (St) No. 1253 of 2021 which Petition is presently pending.
- v. On 3rd November 2020, the Petitioner submitted an offer to the Society for the redevelopment of the said land and said structure/building. Respondent No. 2 refused to consent to the redevelopment, claiming exclusive possession of B-Wing and a greater entitlement than what was being offered to the members of the Society. The Society however proceeded to execute and subsequently register the RDA and SA. As I

have already noted above, (a) the RDA and SA were executed between Petitioner and the Society only (b) each member of the Society also signed/executed the RDA and SA and (c) Respondent No. 2 has admittedly not signed either the RDA and/or the SA and is also admittedly not a member of the Society.

- vi. The Society, thereafter through letters dated 29th September 2022, 4th February 2023, and 14th March 2023, informed Respondent No. 2 about the execution and registration of the RDA and SA and called upon Respondent No. 2 to consent to the redevelopment. Respondent No. 2 however did not consent. The Petitioner thereafter obtained an Intimation of Disapproval (IOD) on 1st August 2023, as also the approval of the MCGM to the plans for redevelopment.
- vii. On 22nd August 2023, the Society informed Respondent No. 2 about the IOD and also called upon Respondent No. 2 to execute and register the Permanent Alternate Accommodation Agreement (PAAA) and handover possession of the three flats. In response, Respondent No. 2, by a letter dated 31st August 2023, expressed surprise at the redevelopment and denied receiving any prior communication. Respondent No. 2 vide a letter dated 12th September 2023 stated that he was not a member of the

Society and that B-Wing and the land beneath it did not form part of the Society's property.

viii. On 14th October 2023, the Petitioner addressed a letter to Respondent No. 2, stating that Respondent No. 2 had never applied for membership of the Society and had opposed the grant of the deemed conveyance by suppressing the purchase agreements. The letter emphasized the urgency of redevelopment and informed Respondent No. 2 that they were entitled to the same benefits as members of the Society. Despite this, Respondent No. 2 did not respond or comply. It is thus that the present Petition came to be filed.

4. Mr. Shah, learned counsel for the Petitioner, submitted that with the grant of deemed conveyance in favour of the Society, there could be no dispute that the Society was the rightful owner of both the said land as also both the 'A' and 'B' Wings. He thus submitted that there was no legal barrier preventing the Society from redeveloping the property provided that the redevelopment had been approved by the majority of the member of the society and was otherwise in accordance with the law. He pointed out that in the present case, all members of the Society had not only approved the redevelopment, but they had also individually executed the RDA and SA.

5. Mr. Shah then submitted that although Respondent No. 2 had challenged the deemed conveyance by filing a Writ Petition, no steps had been taken by Respondent No. 2 to expedite the hearing of the Petition. Nor had any interim order been passed to stay the order of 7th September 2020, by which the Competent Authority had granted a deemed conveyance in favour of the Society. Mr. Shah also submitted that although Respondent No. 2 claimed ownership of three flats in the 'B' Wing, along with rights to the land beneath those flats, no legal steps had been taken by Respondent No. 2 in furtherance thereof.

6. Mr. Shah submitted that it made no difference that Respondent No. 2 was not a member of the Society, since it was well settled that in a Petition filed under Section 9 of the Arbitration & Conciliation Act, 1996, reliefs could be granted against third parties. He submitted that under Section 9, the Court could pass orders to protect the subject matter of the arbitration agreement, which, in this case, was the redevelopment of the Society's property. He placed reliance upon the judgment in of this Court in the case of *Choice Developers vs. Pantnagar Pearl CHS Ltd. & Ors.*¹ and pointed out that this Court had in that case, exercising jurisdiction under Section 9 of the Arbitration Act directed a

1 2022 SCC OnLine Bom 786

non-member of a cooperative housing society to vacate their respective flats in society therein.

7. Mr. Shah also placed reliance on the Division Bench judgment in *Girish Mulchand Mehta & Anr. vs. Mahesh S. Mehta & Anr*² and *M/s Dem Homes LLP vs. Taruvel C.H.S.L. & Ors*³, to submit that minority members or occupants of a cooperative housing society could not obstruct redevelopment that had been approved by the majority, based on any independent right or dispute they may have with the society. He pointed out that Respondent No. 2 had not challenged any of the resolutions passed by the Society nor had Respondent No. 2 challenged the RDA and SA. Therefore, Mr. Shah submitted that Respondent No. 2 could not, under the guise of asserting independent rights, delay the redevelopment, which was prejudicing the majority of the society members.

8. Mr. Shah then from the Additional Affidavit in Reply filed by Respondent No. 2, pointed out that the agreements for sale, upon which Respondent No. 2 had placed reliance were infact unregistered, and in any event did not create rights in respect of the said land. He pointed out that these agreements made reference to one structure comprising two wings, A-Wing

2 2010 (2) Mh IJ 657

3 Order of this court dated 1st July 2024 in Commercial Arbitration Petition (L) No. 13474 of 2024

and B-Wing, and recorded that Respondent No. 2 had inspected the documents under the Maharashtra Ownership Flats Act (MOFA). The agreements also provided that the purchasers in the B-Wing would be admitted as members of one cooperative housing society and that Respondent No. 2 could not demand partition of the property as the building was indivisible. Moreover, it was expressly stated that Respondent No. 2 would have no claim except for each flat. Mr. Shah, therefore, submitted that once the Society was formed and conveyance was registered in its favour under Section 11 of MOFA, there was no question of Respondent No. 2 asserting a title adverse to that of the Society.

9. Finally, Mr. Shah submitted that Respondent No. 2 was not being deprived of any right or entitlement as a result of the redevelopment. In fact, Respondent No. 2 was being treated equally with the eleven members of the Society and was being allotted an additional area of 22% over and above the existing space occupied by Respondent No. 2. He pointed out that the RDA, when crystallizing the entitlements of the members of the Society, did not use the term 'occupant', the SA later amended Clause 5(c) of the RDA to incorporate the term 'occupant' to ensure that Respondent No. 2 would receive equal benefits under the redevelopment plan.

10. Mr. Khandeparkar, Learned Counsel appearing on behalf of the Society, at the outset, adopted the submissions made by Mr. Shah on behalf of the Petitioner. He further submitted that the Writ Petition filed by Respondent No. 2 had become infructuous due to the fact that pursuant to the order dated 7th September 2020 the Society had executed a unilateral Deed of Assignment and Transfer dated 8th April 2021. He thus submitted that therefore there could be no dispute that the Society was the owner of the land and both 'A' and 'B' Wing of the said structure/building standing thereon. Mr. Khandeparkar then from the Deed of Assignment and Transfer, pointed out that (i) recital (q) explicitly clarified that the Society held the leasehold rights in respect of the land and structures/building (ii) the covenant at internal page No. 11 specifically conveyed the land and structures standing thereon to the Society (iii) the property schedule confirmed that all rights in the land and structures had devolved upon the Society and (iv) the list of members included the name of Respondent No. 2.

11. Basis the above, Mr. Khandeparkar submitted that with the execution of Deed of Assignment and Transfer, the rights of the developer or any assignee of the developer, including Respondent No. 2 in the said land and/or the said structures/building, had been fully subsumed in favour of the Society. He then pointed out that Respondent No. 2 had only challenged the

order dated 7th September 2020 passed by the Competent Authority but had admittedly not challenged the Deed of Assignment and Transfer itself. Therefore, he submitted that the Writ Petition filed by Respondent No. 2 had now become infructuous.

12. Mr. Khandeparkar also placed reliance on the proviso to Section 55(2) of the Transfer of Property Act, to submit that any independent claim and/or right of that Respondent No. 2 might have, whether through the erstwhile developer or under the purchase agreements as a flat purchaser, ceased to exist upon the execution of the Unilateral Deemed Conveyance. He submitted that Respondent No. 2, regardless of whether their claim was derived through the erstwhile developer or as a flat purchaser, no longer had an independent right to oppose the redevelopment after the deemed conveyance was executed in favour of the Society.

13. Mr. Khandeparkar then also submitted that the fact that Wing 'A' and Wing 'B' were part of a single conjoined structure was also beyond the pale of dispute. In support of his contention, he placed reliance upon (i) the approved sanction plan of the Society (ii) the architect's certificate dated 18th July 2024 (iii) recitals (E) and (K) of the Redevelopment Agreement (RDA), and (iv) the full occupation certificate dated 7th January 2004. He submitted that all

this unequivocally established that Wings 'A' and 'B' were part of a single, conjoined structure.

14. He also pointed out that merely because Wing 'B' was being assessed independently by the Municipal Corporation, or because Respondent No. 2 had been paying property taxes, this would not by itself confer ownership of Wing 'B' upon Respondent No. 2. He also submitted that Respondent No. 2, being in exclusive occupation of Wing 'B', was required to pay the municipal taxes either directly or through the Society. Paying municipal taxes, he contended, did not establish ownership of Wing 'B' in favour of Respondent No. 2.

15. Mr. Khandeparkar emphasized that the aim of the present Petition was to facilitate the redevelopment of both Wings, which was the subject matter of the RDA. He pointed out that Respondent No. 2 was treated on par with the members of the Society in the RDA and SA. He also placed reliance on the judgment of this Court in *Choice Developers* (supra) to submit that the Court had the authority to pass orders to evict non-cooperating, non-members/occupants of the Society. He submitted that even if a third party was not accepted as a member of the Society or was not a signatory to the arbitration agreement, the Court still had the jurisdiction to pass orders

directing such third parties to vacate the premises in question, which were subject to redevelopment.

16. Mr. Khandeparkar submitted that Respondent No. 2, having full knowledge of the RDA and the resolutions passed by the Society, and not having challenged them, could not now oppose the redevelopment. He reiterated that Respondent No. 2 had opposed the application for deemed conveyance before the Competent Authority using identical defences as in the present Petition, all of which had been negated. He further pointed out that the Writ Petition filed by Respondent No. 2 challenged the deemed conveyance order and not the resolution dated 28th February 2021, which appointed the Petitioner as developer, or the RDA executed by the Society after the deemed conveyance order. He thus submitted that since Respondent No. 2 had not challenged the Indenture of Conveyance, they could not now make an adverse claim against the Society. Basis this Mr. Khandeparkar submitted that this Petition may be allowed.

17. Mr. Purohit, Learned Senior Counsel appearing on behalf of Respondent No. 2, at the very outset challenged the maintainability of this Petition. He submitted that there was no Arbitration Agreement between the Petitioner and Respondent No. 2. He pointed out that the RDA and SA were both

between only the Petitioner and the Society. He also pointed out that the RDA bore the signatures of all the eleven members of the Society and the Petitioner had not signed the same nor the SA. Mr. Purohit then pointed out that the RDA itself stated that the 'A' Wing was occupied by the members of the Society and the 'B' Wing was occupied by 'Occupant'. He thus pointed out that there was no association or contractual obligation linking Respondent No. 2 with the Society, nor was Respondent No. 2 claiming any rights through or under any party to the Arbitration Agreement.

18. Mr. Purohit further submitted that Respondent No. 2 was not a member of the Society, nor was Respondent No. 2 called upon to sign the RDA or participate in its execution Mr. Purohit then placed reliance upon an order of this Court in the case of *Nissa Hoosain Nensey vs. Pali Hill Neptune CHSL & Ors.* to submit that this Court had, in similar facts, held that where redevelopment agreements were also executed by individual members such agreements would not however bind non signatory members of the Society. He pointed out from the facts in the case of *Nissa Hoosain* (supra) that while the Society and certain members had infact executed the redevelopment agreement, certain other members who had not executed the redevelopment agreement were sought to be included by mentioning their names in redevelopment agreement as "existing members". He pointed out that this Court had then

specifically held that it cannot be said that there was a contract between non signatory member and the developer, by merely adding definition of 'existing members' and purporting them to be included in such a contract without signatures and names, while other members are named and signed the same contract. He then pointed out that in the facts of the present case, not only was Respondent No. 2 not a member of the Society but also that the SA described Respondent No. 2 as *Occupant on Respondent No. 1's property*. It was thus he submitted that there was no question of Respondent No. 2 being bound by the RDA or the SA.

19. Mr. Purohit then from the Agreement dated 22nd July, 1993, entered into between Respondent No. 2 and M/s. Gulshan Constructions, pointed out that the same specifically granted Respondent No. 2 exclusive possession of certain common areas, the terrace, and the land surrounding B-Wing. He pointed out that the Society had for the last thirty years always acknowledged and acted upon this basis i.e., that 'B' Wing was independent. He also pointed out that for the last thirty years, 'B' Wing was independently assessed for property tax as also separate bills in the name of Respondent No. 2 were issued in respect of Respondent No.2. In support of his contention, he placed reliance upon electricity and water charges bills which were at all times paid by Respondent No. 2.

20. Mr. Purohit also placed reliance upon a circular dated 30th July 2004 issued by the Government of Maharashtra and pointed out that same set out the requirements of registration of the Co-operative Housing Society which *inter alia* were that a society should have separate entrance, electricity meter, water tank & water meter and tax assessment. He pointed out that in the present case, that Respondent No. 2 clearly conformed to all of the requirements as enumerated in the said circular and therefore was clearly independent of the Society.

21. Mr. Purohit additionally pointed out that Respondent No. 2 had challenged the order granting the Deemed Conveyance which challenge was pending before this Court. He submitted that even if the Deemed Conveyance and Unilateral Deed of Assignment were valid, they pertained only to the land beneath B-Wing, while Respondent No. 2 continued to be the owner of the structure of 'B' Wing itself. Therefore, the Petitioner, would have no legal right to in any manner disposes Respondent No. 2 from 'B' Wing.

22. Mr. Purohit then submitted that the Judgements of this Court in *Girish Mulchand Mehta* (supra) and *M/s. Dem Holmes* (supra) would not be applicable in this case, since in both those cases the dispute was between the non-cooperative members of the Society and not non member occupant/s. He

pointed out that it was well settled that the will of the majority would bind even such non cooperative members and therefore such non cooperative member's wish was the issue in hand in both these cases. Insofar as the Judgement of this Court in the case of *M/s. Choice Developers* (supra), he pointed out that the same was also distinguishable on facts, since the opposition to the redevelopment in that case was by a person though not a member of the Society in question but who was claiming membership of the Society. Hence in the said judgment, the order of eviction followed only after the issue of membership was resolved.

23. Basis the above, Mr. Purohit submitted that this Petition was not maintainable and ought to be dismissed.

24. I had at the outset noted that though the reliefs sought for in the present petition were seemingly the usual reliefs in Petition filed under Section 9 of the Arbitration Act, arising out of a of redevelopment agreement, the Petition infact is an attempt to completely misuse the provisions of Section 9 of the Arbitration Act. I say so for the following reasons, viz.

A. *First*, it is well settled that before granting relief under Section 9 of the Arbitration Act, the Court must be satisfied about the existence of an arbitration agreement. In the present case, *admittedly* there is no

arbitration agreement between the Petitioner and Respondent No. 2. Also, *admittedly*, the RDA which contains the arbitration clause (i) is entered into only between the Petitioner and the Society; (ii) is signed by each member of the Society; (iii) Respondent No. 2 is not a member of the Society; (iv) Respondent No. 2 had never applied for membership of the Society and (v) Respondent No. 2 had never signed the RDA. Therefore, not only is there no arbitration agreement between the Petitioner and Respondent No. 2 but also, Respondent No. 2 could never be said to be bound by the RDA/Arbitration Agreement through the Society.

B. *Second*, it is well settled that when a Petition is filed under Section 9 of the Arbitration Act, (pre award) there must be manifest intention on the part of the party applying for reliefs under Section 9 to take recourse to arbitral proceedings. In the present case, clearly no such arbitration proceedings are intended and/or even contemplated, since there is no dispute between the Petitioner and any member of the Society. It is also well settled that a party who has no intention to ultimately refer the disputes to arbitration and seek final relief cannot be permitted to seek interim relief, since interim reliefs are only in aid of the final relief. In the facts of the present case, given that there is

no dispute between the Petitioner and the Society and/or any member of the Society, clearly no arbitration is infact intended and hence there is no question of arbitration being invoked by the Petitioner.

C. *Third*, the Petitioner's entire case to support the grant of interim relief against Respondent No. 2 is predicated upon the judgements of this Court in the case of *Girish Mulchand Mehta* (supra), *Choice Developers* (supra), and *Dem Homes* (supra). However, in my view, the said judgements would be of no assistance to the Petitioner as the same are *ex facie* distinguishable on facts. In all the aforesaid cases the individuals against whom reliefs were sought for were either members of the Societies in question and/or had sought membership of the Society which had entered into the development agreement basis which the Petition under Section 9 had been filed. It was thus that the identity of the members had merged with that of the Society, and it is thus that they were held to be bound by the will of the majority members of the Society.

D. *Fourth*, in the present case, the record bears out that (i) Respondent No. 2 is an occupant on Society's property; (ii) the Society has itself recognised Wing – B as a "*Bungalow*"; (iii) 'B' Wing is admittedly

separately assessed for property tax and has an independent water and electricity connections, and (iv) all taxes and charges in respect B-Wing have at all times been paid/discharged only by Respondent No. 2. Thus, the record as also the conduct of the Parties makes clear that the Society has at all times treated 'B' Wing as separate and distinct from the Society.

E. *Fifth*, and crucially in the aforesaid circumstances, since there is no arbitration agreement between the Society and Respondent No. 2, had the Society sought to either evict and/or take any legal steps/action against Respondent No. 2 it would only be by way of an appropriate legal proceeding and not by way of a Petition under Section 9 of the Arbitration Act. Therefore, there is no question of the Petitioner, who is a developer and has absolutely no privity with Respondent No. 2 from using the machinery of Section 9 of the Arbitration Act to obtain reliefs against Respondent No. 2, which reliefs even the Society could not have obtained under Section 9.

F. *Sixth*, also, merely because the Society has obtained a deemed conveyance in its favour would also not *ipso facto* entitle to evict and/or bind Respondent No. 2 to the RDA. The same would also not

conclusively determine questions of title that Respondent No. 2 might raise. It is infact well settled that an order granting deemed conveyance does not conclusively determine issues of title. In the present case, it is not in dispute that Respondent No. 2 has challenged the order, by which the deemed conveyance was granted in favour of Respondent No. 2, well before the present Petition was even filed. Admittedly, the Petition is still pending. *Thus*, by no stretch of imagination can the facts of the present case be equated with the facts of the judgements of this Court in the case of ***Girish Mulchand Mehta*** (supra), ***Choice Developers*** (supra) and ***Dem Homes*** (supra).

25. Therefore, what emerges from the above is that the Petitioner who is a developer and has absolutely no privity of contract and/or locus against Respondent No. 2 has sought to, by way of a purely private agreement entered into between the Society and its members, ride rough shod over Respondent No. 2. It is this which is in my view a complete and utter misuse of the provisions of Section 9 of the Arbitration Act. I have no hesitation in holding that the Petitioner has indeed made a frivolous claim and has instituted a vexatious proceeding wasting the time of the Court. Thus, this being a Commercial Arbitration Petition, the provisions of the Commercial Courts Act would require the imposition of costs.

26. Hence, the following order, viz.

- i. Petition is dismissed.
- ii. Petitioner to pay Respondent No. 2 cost of Rs. 5,00,000/- within a period of four weeks from the date of this order.
- iii. In the event the costs are not paid, Respondent No. 2 shall be entitled to recover the same as arrears of land revenue.

(ARIF S. DOCTOR, J.)