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

COMMERCIAL APPEAL (L.) NO.67 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO.452 OF 2017
WITH
NOTICE OF MOTION (L.) NO.111 OF 2018

M/s. Srushti Raj Enterprise (India) Ltd. ...Appellant
Vs.
Tilak Safalya Co-operative Housing Societies Ltd. ...Respondent

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Mr.Prasad Dhakepalkar, Senior Advocate, with Mr.Anupam Surve, Ms.Rajni Divkar, Ms.Yasmeen Mohd. Sabir, Mr.Ravi Kotian i/b. Little & Co. for Appellant.
Mr.Zal Andhyarujina, with Mr.Niranjan Jagtap i/b. Niranjan Jagtap & Co. for Respondent.

CORAM : NARESH H. PATIL AND
G.S. KULKARNI, JJ.

Reserved on : 4th July, 2018

Pronounced on : 10th July 2018

Judgment (Per G.S. Kulkarni, J.):

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") challenges an order dated 2 February 2018 passed by the learned Single Judge whereby the petition filed by the appellant under Section 34 of the Act, challenging the award

dated 7 October 2017, passed by the learned sole arbitrator, stands rejected.

2. The dispute between the parties had arisen under the Development Agreement dated 9 May 2007 under which the respondent which is a co-operative housing society had awarded a contract for development and construction of a building for its members, to the appellant, on terms and conditions as set out in the said agreement. The agreement is known as the Development Agreement. It is not in dispute that in June 2007 about 24 members of the society had vacated their respective flats in the old building and further that the building was demolished by the appellant in the year 2010.

3. Under the development agreement, it was the obligation of the appellant/developer to obtain necessary permissions from the competent authorities for construction of the building which included obtaining IOD and commencement certificate within 9 months from the date of execution of the said agreement and further to complete the entire construction and obtain occupation and completion certificate within 24 months, with the grace period from the date of commencement certificate period as agreed in clause 8(iii). The appellant also agreed for payment of monthly rent of different slabs

which varied from Rs.7,500/- per month to Rs.15,000/- per month for different periods along with brokerage charges to each of the member. In clause No.43, the parties agreed that the agreement was made subject to 2.4 FSI, and if the additional FSI was to be obtained by the appellant/developer, the same will be shared in the ratio of 50% to society and remaining 50% to the appellant. In Clause 37 of the development agreement, the parties agreed to refer disputes which may arise between the parties, for arbitration.

4. It is not in dispute that the respondent did not commence any construction much less completing the construction within a period of 24 months as agreed in clause 8(iii) of the agreement. It is also not in dispute that a commencement certificate was also not obtained by the appellant at any point of time. The appellant's case is that there were issues on FSI and though the appellant was entitled to the FSI of 2.4, the same could not be utilized by it under the development permissions granted to the appellant by the MHADA and thus, the construction could not commence.

5. The case of the respondent is that the appellant had not paid the rent and compensation as agreed under the said agreement to the members of the society. There was substantial delay of more than 7

years and no progress was made in commencing the construction. The members of the respondent society for seven years were deprived of a permanent roof over their head and were suffering agonies of a temporary/transit accommodation. The respondent by its Advocate's notice dated 12 January 2014 thus had terminated the development agreement.

6. Disputes having arisen between the parties, the appellant invoked the arbitration clause under the agreement, by referring the disputes to arbitration. A statement of claim came to be filed by the appellant praying for specific performance of the said development agreement. This was contested by the respondent as also a counter claim was made claiming damages as well as payment of rent and compensation. The learned arbitrator rendered an award dated 7 October 2017 dismissing the claim of the appellant for specific performance and partly allowed the counter claim made by the respondent-society.

7. The arbitration award was assailed by the appellant by filing a petition under Section 34 of the Act which has been dismissed by the learned Single Judge by the impugned order and accordingly, this appeal.

8. In assailing the impugned order, Mr.Dhakephalkar, learned Senior Counsel for the appellant, has made two fold submissions. It is firstly contended that the appellant was entitled to utilize FSI of 2.4 to undertake the development and that the learned Arbitrator also had clearly observed that MHADA had offered the appellant FSI of 2.14 and not 2.4 FSI as per the development agreement and thus, the appellant was entitled for the reliefs of specific performance of the development agreement. It is contended that it was illegal for the respondent to terminate the agreement. The second contention is that in the absence of any termination clause in the development agreement and the parties having agreed to a specific mechanism as contained in clauses 8 and 36 of the agreement for rent and completion of work, the respondent could not have terminated the agreement. The learned Arbitrator ought to have held that the termination on this backdrop was illegal. The findings in that regard as made in the award were thus clearly illegal and ought not to have confirmed by the learned Single Judge.

9. On the other hand, Mr. Andhyarujina, learned Counsel for the respondent would support the impugned award as also the impugned order passed by the learned Single Judge. It is submitted that the learned Single Judge has appropriately exercised the jurisdiction

under Section 34 of the Act, as no ground available under the said provision was made out for the award to be set aside. It is submitted that the contentions as urged on behalf of the appellant are completely in the realm of facts which are not perverse. It is submitted that there cannot be any re-appreciation of evidence in the proceedings under Section 34 of the Act. As regards the contentions as urged on behalf of the appellant, it is submitted that the evidence on record was clear that though the FSI at 2.4 was available to be utilized, it was the appellant who did not utilize the said FSI for commercial considerations best known to the appellant. The appellant on his own volition submitted plans utilizing FSI of 2.14 although FSI of 2.4 was available. In this regard, our attention is drawn to the various documents which includes the sanction letter issued by MHADA and the relevant sanctioned plans showing the calculation of FSI as annexed to the paper book. It is submitted that there is no material on record to support the contention as urged on behalf of the appellant for not utilizing of FSI of 2.4. It is submitted that in fact, the appellant wanted to have more commercial benefit and extra FSI of 2.5 for which the appellant kept on delaying the commencement of work awaiting the suitable time and benefits to be reaped at its own sweet time, however to the gross prejudice of the respondents. Even to have this benefit, the appellant was neither incurring any expenditure nor had taken any timely steps to utilize such

FSI by submitting any plans. It is next submitted that contention of the appellant that there was no provision for termination of the development agreement, is patently misconceived. It is submitted that the law in that regard is well settled. It is not an acceptable proposition that under law, the contract cannot be terminated. The learned Single Judge has rightly referred to a decision in case of **Chaurangi Builders and Developers Pvt. Ltd. vs. Maharashtra Airport Authority Company Ltd.** in Arbitration Petition (L.) No.1999 of 2013 dated 29 November 2013 in which the Court has held that, even if there is no provision of termination in the contract, if the breaches are committed, contract can still be terminated, which was the view taken by the learned arbitrator as well. It is next submitted that the facts in the present case are gross in as much as though the development agreement was entered into in the year 2007 and the parties had agreed that the entire construction would be completed by 24 months however, the construction was not commenced by the appellant. It is submitted that the building being demolished in the year 2010, for almost 8 years, the members of the respondent-society only on account of the conduct of the appellant, are yet to see the permanent accommodation entitled to them. It is thus submitted that the issues raised being completely factual, no interference is called for, in this appeal.

10. We have heard the learned Counsel for the parties. We have also perused the record and the impugned order.

11. A perusal of the development agreement clearly indicates that FSI of 2.4 was available to the appellant to be utilized by the appellant in submitting the plans in undertaking the development. The facts clearly indicate that it was the appellant who did not submit plans to avail the entire FSI of 2.4 which could be utilized as per the terms and conditions of the development agreement and the respondent-society could not have been blamed by the appellant, for which the appellant was solely responsible. There is nothing on record to indicate that it was the respondent-society which prohibited the appellant from utilizing the FSI of 2.4. A perusal of the record in fact would indicate that it was not the immediate intention of the appellant to undertake development for utilizing the FSI of 2.4 as the plan which was submitted by the appellant was for FSI of 1329.18 sq. meters which comes to about 2.14. In fact, at one point of time, the plans, which were submitted, were barely to accommodate the members of the society which was utilized FSI of only 1.2 which is clear from the letter dated 24 December 2009 addressed by MHADA (Exhibit – 21, page 212, volume VI). The learned arbitrator has recorded a finding of fact that though the Intimation of Disapproval (IOD) was issued on 30 July 2010, the

appellant never obtained a commencement certificate so as to begin with the work. It is clear that the appellant itself never submitted plans for utilizing FSI of 2.4, but however, availed FSI of 2.14 and in that context, the learned arbitrator merely making observation in paragraph 40 of the award that what was granted by MHADA to the appellant on his own application was an FSI of 2.14 which was close to the FSI of 2.4, would not give any credence to the contention of the appellant that the appellant could not undertake the development at the FSI of 2.4 and that the respondent insisted for utilizing FSI of 2.14. The interpretation of paragraph 40 of the award on behalf of the appellant, which is wholly erroneous.

12. As regards the second contention that the development agreement made no provision for termination of development agreement and therefore, the termination of the agreement by the respondent was illegal, also cannot be accepted. Law in that regard is well settled. Even if there is no provision in the agreement for termination of the agreement, nonetheless under law if there is breach of the terms and conditions of the contract, the parties are entitled to terminate the contract. The learned arbitrator has clearly recorded a finding based on evidence that the termination of the development agreement was proper and further that there was no ground made out

for granting specific performance as sought by the appellant. The learned Single Judge has rightly adverted to the decision in case of **Chaurangi Builders and Developers Pvt. Ltd.** (supra) in rejecting the said contention of the appellant.

13. In the light of the above discussion, we find no merit in the appeal. The appeal is thoroughly misconceived. It is accordingly dismissed with costs of Rs.50,000/- to be paid to the respondent within two weeks from today.

[G.S. KULKARNI, J.] **[NARESH H. PATIL, J.]**

14. After pronouncement of the Judgment, the learned counsel appearing for the appellant prays for continuation of ad-interim order for a period of six weeks. The learned counsel for the respondent opposed the said prayer. In the fact, prayer for continuation of ad-interim order stands rejected.

[G.S. KULKARNI, J.] **[NARESH H. PATIL, J.]**