

Sharayu Khot.

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

CONTEMPT PETITION (L) NO.4934 OF 2022

IN

INTERIM APPLICATION (L) NO.19494 OF 2021

IN

COMMERCIAL SUIT NO.190 OF 2021

New Rising Sun Co-operative Housing
Society Limited

...Petitioner/org.
Plaintiff

Versus

K. Bhatia Realtors & Ors.

...Respondent No. 1/
Org.Defendant No. 1

And

Omega Enterprises & Ors.

...Contemnor No. 1/
Org.Defendant No. 2

Mr. Karan Dua i/b. Bhandary and Bhandary for Petitioner/Plaintiff.

Mr. Kunal Bhanage i/b. Akshay Pawar for Defendant Nos.2 to 8.

CORAM : R.I. CHAGLA J

DATE : 20 January 2023

ORDER :

1. By this Contempt Petition the Petitioner has claimed that the Respondent Nos. 2 to 8 have committed willful breach of the

order of this Court dated 22nd November 2021. Further interim relief has been sought to direct the Respondent Nos. 2 to 8/Contemnors to forthwith pay all amounts with arrears and future dues payable to the Petitioner society with interest at the rate of 24% per annum from the date of contempt of the said order till the date the payments are made.

2. The Petitioner society comprises of 13 members including the Plaintiff. The society is seized and possessed of and entitled to plot of land described in paragraph 1.1 of the Petition. The Petitioner along with its members are personally aggrieved with the acts of the Respondents which they claim are illegal and unlawful and the present Suit had been filed against the Respondents.

3. Respondent No. 1 is engaged in the business of real estate developments and construction and undertakes real estate development projects in and around Mumbai.

4. The Petitioner is constrained to file the Contempt Petition against the Respondent Nos. 2 to 8/Contemnors because of the willful, deliberate and continuous breach and contempt of the

order passed by this Court.

5. By order dated 22nd November 2021 passed by this Court, the Respondent Nos. 2 to 8/Contemnors were directed to commence payments of future rent payable to the Petitioner by depositing eight months postdated cheques towards rent of each of the members of the Petitioner society. This Court had ordered that the Respondent Nos. 2 to 8 would also clear the outstanding arrears of rent until the date of the order in eight equal monthly installments which was to be paid to the Petitioner Society from the date of the order.

6. Respondent Nos. 2 to 8 are also directed to complete the construction of the rehab premises in the new redevelopment building within eight months from the date of the order which was in terms of the Respondent No. 2's own undertaking given before this Court.

7. The Petitioner has claimed that the Respondent Nos. 2 to 8/Contemnors have committed contempt of order dated 22nd November 2021 passed in terms of the prior order dated 29th

October 2021. The order dated 29th October 2021 had recorded that the statement of the learned Counsel for the Respondent No. 2-Developer that the construction would be completed within eight months. Further the Respondent No. 2-Developer had agreed to pay the entire amount of arrears of transit rent in installments within a 12 month period. The Plaintiff society had asked for the payment to be made within eight months and which this Court had considered to be not an unreasonable request in order for both the application for the occupation certificate and payment for arrears and ongoing transit rent to be completed on the same Schedule. The statements made on behalf of the learned Counsel for the Defendants/Respondents were accepted as undertakings to this Court. This Court had accepted the request of the Petitioner Society and at best the Respondents would have an allowance of not more than four weeks beyond eight months to pay any remaining balance.

8. The order of which the Petitioner claims that the Respondent Nos. 2 to 8/Contemnors are in contempt of is the order dated 22nd November 2021. The said order noted that as aggregate amount of Rs. 2,50,20,000/- was the outstanding transit rent from 1st July 2019 till 31st August 2021 and further, interest at the rate of

12% per annum on the said amount to be equally divided between the members of the Petitioner society as per development agreement read with the first and second supplemental agreement, the said agreement and permanent alternate accommodation/individual agreements. This was directed to be paid within a period of 9 months from the date of the said order. It was noted that there were assurances on the part of the Respondent No. 2 by way of communication to the Petitioner society that the members of the Petitioner society would be paid rent at the earliest. The communication/emails have been referred to in paragraph 3 of the said order dated 22nd November 2021.

9. In paragraph 5 of the said order dated 22nd November 2021, this Court had recorded that the Respondent No. 2 was to apply for part occupation certificate for the Petitioner society members component upto 9th floor within eight months as per the order dated 29th October 2021. There was an assurance of Respondent No. 2 that the occupation certificate would be applied for during that period. Regarding ongoing transit rent, Respondent No. 2 had agreed to pay the entire amount in installments within eight months with an allowance for additional four weeks for payment of

any remaining balance arrears of transit rent. The matter had come up earlier on 15th November 2021 when this Court was apprised of the fact that the Consent Terms had not yet been entered into between the Petitioner society and the Respondent No. 2 as to the payments of outstanding transit rent. It was recorded that the concern of the Petitioner society was not only as to the outstanding transit rent, but as to whether the future transit rent will be paid by the Respondent No. 2. The contention of the Petitioner society was that the Respondent No. 2 had resiled from its assurances by failing to enter into the Consent Terms to resolve the issues of the petitioner society.

10. In spite of the directions of this Court in the order dated 29th October 2021 wherein eight months had been granted to pay the entire arrears of transit rent, Respondent No. 2 had on 22nd November 2021 stated that they had no instructions to enter into the Consent Terms. It was their contention that payment of entire arrears amount of transit rent will be made after applying for part Occupation Certificate for the Petitioner society members component upto the 9th floor within the stipulated time. This Court by the said order dated 22nd November 2021 had considered that though the

formal Consent Terms were to be entered into and which had not been by the Respondent No. 2, this Court cannot permit Respondent No. 2 to resile from the assurance that it would clear the arrears of transit rent and shall pay the present outstanding transit rent.

11. Thus, this Court had by the said order dated 22nd November 2021 directed Respondent No. 2 to pay the entire outstanding transit rent to the members of the Petitioner society towards their temporary alternate accommodation for the period from 1st July 2019 till the date of the said order, which amount will be equally divided between the members of the Petitioner society as per the Development Agreement read with the first and second supplemental agreement, the said agreement and permanent alternate accommodation/individual agreements within a period of 9 months from the date of the said order. The Respondent No. 2 was further directed to deposit postdated cheques as per clause 13 of the assignment agreement with the Petitioner-society for a period of 9 months or till such time that Respondent No.2 completes construction of the said property and hands over possession of the respective premises to the Petitioner-society with occupation certificate.

12. The Respondent Nos. 2 to 8/Contemnors have thereafter not complied with the said order dated 22nd November 2021. An Affidavit dated 18th October 2022 has been filed by Respondent Nos. 2 to 8/Contemnors wherein they have tendered unconditional apology for their inability to comply with the orders and directions as containing in the said order dated 22nd November 2021. They have stated that the lapse in compliance of the said order was for reasons beyond the immediate control of these Respondents. They have state that their inability to comply with the said order was solely due to lack of funds resulting from slowdown in the real estate sector and due to the Covid-19 lock-down. They have given assurance that to ensure that in order for the rehabilitation component of the said project to be successfully completed within the stipulated time, they have roped in a financial investor who would ensure that the necessary funds are made available for the completion of the project. They have further stated in paragraph 6 of the said Affidavit that they will be in a position to apply for part occupation certificate from the ground to the 7th floor on or before 31st March 2023 and handover possession of the rehab component upon being granted part occupation certificate for the same. They have relied upon a Report prepared by their Architect, M/s. Spacera

Architects setting out the status of the completion of work as on the present date which is annexed as Annexure A to the said Affidavit. They have also stated in paragraph 7 that the Respondent No. 1-firm has already entered into settlement with two members of the Petitioner society, i.e. Mr. Jitender Singh Talwar and Mr. Vishnu Wadhwani whereby the said members have agreed to receive an amount of Rs. 6,50,000/- towards full and final settlement of their claim towards the arrears of transit rent from June 2019 till December 2022. They have also claimed in paragraph 8 that they are negotiating with the other members of the Petitioner society in order to arrive at an amicable settlement towards their claims, with an undertaking that the possession of the flats would be ready by 31st March 2023.

13. It is relevant to note what has been stated by these Respondents in paragraph 9 of the said Affidavit. These Respondents have stated that they are ready and willing to deposit a sum of Rs. 5,00,000/- for each member of the Petitioner society within a period of one week from the date of the Affidavit and the Respondents are ready to pay second installments of Rs. 8,00,000/- to each member of the Petitioner society as full and final settlement towards their claim

of arrears of transit rent to the 12 members of the Petitioner society. These Respondents have stated in paragraph 10 that they will continue to ensure that the order dated 22nd November 2021 is complied with. However, in view of adverse market conditions, they are in a position to only pay amounts as aforementioned and ensure that the construction of the project is completed as envisaged at the earliest.

14. The said Affidavit had been permitted to be filed in the additional time sought for by the learned Counsel for the Respondent No. 2 by the order dated 11th October 2022. It was made clear that the schedule of payment of outstanding rent as well as future rent shall be set out in the Affidavit filed by the Defendant No. 2. It was observed that there appears to be a clear breach of the order dated 22nd November 2021. However, prior to issuance of notice of contempt against these Respondents, the Respondent No. 2 was given last opportunity to satisfy this Court that they will comply with the said order both in terms of payment of entire outstanding rent as well as the future rent apart from completion of the subject building.

15. By further order dated 19th October 2021, this Court had taken up the said Affidavit for consideration. This Court had observed the contents of the said Affidavit as well as noted the submissions of the learned Counsel for the Petitioner that the amount had been outstanding since July 2019 and which comes to an amount of Rs. 4.95 Crores till the date of the said order. The learned Counsel for the Petitioner had also submitted that the offer of Rs. 5,00,000/- for each member of the Petitioner society is a mere pretence at settlement when compared to the outstanding rent payable to the members of the Petitioner society. The photographs of the rehab component was tendered to this Court which show that the rehab component is far from complete as made out by these Respondents and the learned Counsel has disputed the findings in the Report dated 15th October 2022 of M/s. Spacera Architects appointed by the Respondents. Further, he submitted that the existing partners of the Respondent No. 1-Firm was being replaced by new partners and consent of the Petitioner society has not been obtained prior to the change in the Constitution of the Respondent Nos. 1 and 2-Firm. There was no statement made in the Affidavit on behalf of Respondent Nos.2 to 8 as to future payment of transit rent as well as payment of balance arrears and as to when they would be paid as

directed by the orders dated 22nd November 2021 and 11th October 2022 passed by this Court. The learned Counsel for the Petitioner accordingly, submitted that there was clear contempt committed of the orders of this Court and that appropriate notice be issued for contempt to the Contemnors.

16. This Court by the said order dated 19th October 2022 had considered that the Respondent Nos. 2 to 8/Contemnors have been given ample opportunities to satisfy the Court that they will complied with the orders dated 22nd November 2021 and 11th October 2022 both in terms of payment of entire outstanding rent as well as future rent apart from completion of the subject building. It was observed that by the last Affidavit filed by the Respondent Nos.2 to 8/Contemnors, they had failed to satisfy this Court as to the compliance of the said orders. However, in order to test the *bona fides* of these Respondents an opportunity was given to them to make payment of the sum of Rs. 5,00,000/- to each member of the Petitioner-Society which they have themselves had stated that they are ready and willing to pay and which payment was to be made within a period of one week from the date of the said order. Further, these Respondents were also directed to pay the transit rent to each

member of the Petitioner society for the months of October and November, 2022 on or before 18th November 2022. It was expressly made clear that any failure to make these payments shall result in notice of contempt being issued to the Respondents under the Contempt of Courts Act.

17. The Respondent Nos. 2 to 8/Contemnors were directed to file further affidavit disclosing the constitution of the Respondent No. 2-partnership firm including as to whether there had been changes in the partners of the partnership firm and if so which of the existing partners have been substituted. These Respondents were also directed to disclose as had been directed in the said orders of this Court, the manner in which they were paid the outstanding transit rent to the members of the Petitioner society as well as future rent and duration of making such payments. They were also to disclose the current status of the rehab component including photographs of internal work having been carried out with regard to the rehab component in the said Affidavit which was to be filed by the Respondents on or before 18th November 2022.

18. The Affidavit on behalf of the Respondent Nos. 2

to 8 dated 19th November 2022 has been tendered in this Court. In the said Affidavit, it is stated that the members of the Petitioner society were called upon to receive individual cheques for the amount of Rs. 5,00,000/-. Intimation had been given vide e-mail dated 22nd October 2022. However, the individual members expressed their unwillingness to come and meet the Respondents for the purpose of receiving their respective cheques and the same ought to be forwarded to the Chairman or Secretary of the Petitioner society. Thereafter, the necessary cheques were issued to the members of the Petitioner society on 9th November 2022 by Registered post and were received on 10th November 2022. Copies of the individual cheques have been annexed at Exh.G to the said Affidavit.

19. In paragraph 7 of the said Affidavit dated 19th November 2022, the Respondent Nos. 2 to 8 have expressed their inability to comply with the timelines directed by this Court vide order dated 19th October 2022 and which they contend is attributable to the members of the Petitioner society. They have once again reiterated that the delay for payment of the outstanding rent amounts were for reasons beyond their control and for this Court to

condone the same. They have further stated in paragraph 8 of the said Affidavit that as far as payment of transit rent of Rs. 90,000/- per month from the months of October 2022 and November 2022, time of four weeks may be granted to comply with the same and make payments. It is noted that the amount of Rs. 90,000/- per month have been disputed by the Petitioner society.

20. Thereafter, in the said Affidavit, averments have been made as to the change in constitution of the Respondent No. 2-Firm. Under the sub-heading of payment of outstanding transit rent and future rent, the Respondent Nos. 2 to 8 have stated that they have been unable to comply with their financial obligations. The Respondents are currently only able to pay the amount of Rs. 13,00,000/- to each of the members of the Petitioner society after adjusting the amounts already paid to them towards past and future transit rent till March 2023. Once again an excuse have been made for non compliance of the said orders i.e. severe financial constraints resulting from the unfavourable market conditions resulting from the Covid 19 pandemic and overall recession in the real estate sector. The Respondents claim to have suffered losses and are no longer in a position to sustain further financial losses which they claim would be

aggravated by payment of total transit rent arrears as demanded. Thus, making it impossible for the redevelopment project to be completed in the time frame envisaged.

21. These Respondents have in the said Affidavit further claimed that the work towards redevelopment has been substantially completed and that the Respondent No. 2 would be in a position to apply for part Occupation Certificate from the ground till the 7th floor on or before 31st March 2022 and handover possession of the rehab component as soon as application for the part Occupation Certificate is made. They have relied upon the report of the Architect of the Respondent No. 2 setting out the current status of the construction as well as photographs of the internal and external work in progress.

22. I have considered the statement made by the Respondent Nos. 2 to 8/Contemnors on oath. In my view, there is a clear breach of the order dated 22nd November 2021 and no attempt has been made by the Respondent Nos. 2 to 8/Contemnors to satisfy this Court that the said order dated 22nd November 2021 will be complied with. The outstanding temporary rent continuous to remain

unsatisfied inspite of ample opportunities given by this Court. The outstanding arrears of rent was to be paid within nine months from the order dated 22nd November 2021 and the postdated cheques were to be deposited for the period of nine months. These Respondents in the said Affidavit dated 19th November 2022 have admitted that they will not be in a position to comply with the said order dated 22nd November 2021 by clearing the total arrears of transit rent, as they will not be able to sustain further financial losses resulting therefrom making it impossible to complete the redevelopment project in the time frame envisaged. There is thus, an admitted breach and failure in compliance of the operative part of the said order dated 22nd November 2021. Further the construction of the rehab competent was upto the 9th floor and to be completed within eight months from the order dated 29th October 2021, as further directed in the said order dated 22nd November 2021 and which the Respondent No. 2 has committed a breach of. In fact what is now stated by the Respondent Nos. 2 to 8/Contemnors is that the rehab component upto the 7th floor would be completed prior to 31st March 2022. Thus, there is non compliance of the said order dated 22nd November 2021.

23. In view thereof, Contempt Petition is admitted and contempt notice is issued to Respondent Nos. 2 to 8/Contemnors under the Contempt of Courts Act, 1971.

24. Respondent Nos. 2 to 8/Contemnors shall file their Affidavit in Reply to the Contempt Notice within a period of four weeks from the date of this order.

25. The Contempt Petition shall be placed for hearing on 28th February 2022.

[R.I. CHAGLA J.]