

RUTURAJ V. BANKAR

ADVOCATE, HIGH COURT BOMBAY

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BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH
C.P. NO. 265(MB)/2017

Fibra Shipping Agency & Ors.
Versus

... Petitioners

Dreams the Malls Company Ltd. & Ors.

... Respondents

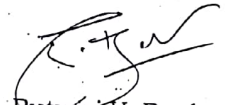
To,
The Registrar,
NCLT,
Mumbai.

Sir,

Pursuant to the order dated 23rd April 2018 and the extension granted on 8th June 2018. Be pleased to take on record the accompanying court commissioner's report along with compilation of documents in the above matter.

Dated this 24th day of July, 2018

Thanking you,


Ruturaj V. Bankar
Advocate
Commissioner

CC: 1. Mr. J S Kini
(Advocate for Petitioners)
2. Mr. Anil Wani
(Advocate for Respondents)

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COURT COMMISSIONER'S REPORT

1. By an email dated 4th May 2018, the Advocate for the Petitioners herein informed the undersigned about the Order dated 23rd April, 2018 and forwarded a copy of the same. By the Order dated 23rd April 2018, this Hon'ble Tribunal was pleased to appoint the undersigned as Commissioner to physically visit and inspect Dreams the Malls located at L-25, LBS Marg, Bhandup (West), Mumbai 400 078 (*the said property*) and ascertain the following:
 - (i) Whether the common facilities, which the Respondent No.1 have mentioned in the Articles of Association/Memorandum of Association, have been provided or not;
 - (ii) Whether payments have been made by Respondent No. 1 to the various departments / authorities;
 - (iii) Whether the Petitioners have been regularly paying to Respondent No. 1 the amounts mentioned in the Articles of Association.

A copy of the said Order dated 23rd April 2018 passed by this Hon'ble Tribunal is hereto annexed and marked as Annexure "I".

2. Pursuant to the email dated 4th May, 2018 received from the Advocate for the Petitioners, the undersigned addressed an email dated 9th May, 2018 to both the parties informing them that the inspection of the said property would be conducted on 11th May, 2018. Accordingly, on 11th May 2018, the Commissioner inspected the said property and also held a meeting with the representatives of the Petitioners and the Respondents. During the inspection, the undersigned was accompanied by the representatives of the Petitioners and the Respondents along with photographers and a videographer. The Advocates for the parties were also present. The details and particulars of the observations made by the undersigned during the said inspection are provided in "Annexure-II" hereto. Also, during the inspection and meetings held at the said property on 11th May 2018, the undersigned sought for various documents from the parties. Directions

were also given to the parties to submit necessary challans, receipts, payment slips etc. along with statement showing details of various payments made by the parties.

3. Pursuant to the aforesaid directions, the Petitioners furnished certain documents on 16th May, 2008 and the Respondents submitted their documents on 18th May, 2018. Thereafter, a meeting was held on 28th May, 2018 at the office of the undersigned. However, after the said meeting, it was realised that the documents submitted by the parties were incomplete. Therefore, during the said meeting held on 28th May 2018, once again directions were given to the parties to submit all relevant supporting documents along with their respective statement of payments.
4. Pursuant to the aforesaid directions, the Respondents submitted their further documents along with a Statement on 4th June, 2018 and the Petitioners submitted their further documents along with statement on 6th June, 2018. In light of the aforesaid, the undersigned was compelled to make an Application before this Hon'ble Tribunal on 8th June, 2018 seeking extension of time for submitting the Report. Accordingly, the matter was adjourned to 17th July, 2018. In the meantime, the Respondents on 5th July, 2018 submitted further documents.
5. The Petitioners have submitted the following documents:
 - (i) Invoices issued by Respondent No. 1 towards the Common Area Maintenance Charges ("CAM charges");
 - (ii) Challans/Receipts issued by the Brihan Mumbai Mahanagarpalika against payment of property tax;
 - (iii) The extract showing the property tax paid by the Petitioners to the Mumbai Municipal Corporation;
 - (iv) Journal Vouchers issued by Respondent No. 1 to the Petitioners in respect of CAM charges and property tax;
 - (v) Receipts issued by Respondent No. 1 to the Petitioners acknowledging payment of property tax;
 - (vi) Ledger obtained from Mumbai Municipal Corporation regarding payment of property tax;
 - (vii) Statement showing the property tax due and payable to Mumbai Municipal Corporation by the Petitioners;
 - (viii) Statement showing the maintenance amount payable by the Petitioners as on 31st March, 2015 to Respondent No. 1;
 - (ix) Statement showing the payments towards property tax directly made by the Petitioners to Mumbai Municipal Corporation for which, Respondent No. 1 has given Credit Notes;

- (x) Notices received from Mumbai Municipal Corporation demanding payment of property tax;
- (xi) Letter dated 1st September, 2015 received by Respondent No.1 from the Electricity Board, informing them about disconnection of supply of electricity to the said property from 1st July, 2015 for non-payment of an amount of Rs.72,37,990/- along with letter dated 2nd February, 2017 issued by the Electricity Board confirming that there is an outstanding arrear of Rs.1,65,66,882/- towards electricity bills;
- (xii) Extract of the amounts payable to the Water Department, Mumbai Municipal Corporation obtained from the website of MCGM;
- (xiii) Agreements executed between the Petitioners and Respondent No. 1 along with receipts showing that the Petitioners at the time of entering into the agreement paid six months' advance CAM charges along with Rs.15,000/- towards electricity.
- (xiv) Minutes of Meeting dated 23rd January 2015 held between the Petitioners and Respondent No.1.

6. The Respondents have submitted the following documents:

- (i) Copy of electricity bill generated by MSEDCL for the month of June, 2016 and the statement of outstanding;
- (ii) Copies of the bills dated 22nd June, 2017 paid towards security service rendered by the agencies;
- (iii) Copy of the letter dated 1st February, 2016 from Dreams the Mall to M/s. Total Cleaning Solutions (Facility management) along with the bills which are paid by the Dreams the Mall;
- (iv) Copy of Form – B issued by Government approved Consultant and Contractor;
- (v) Copy of the letter dated 26th April, 2018 issued by Dreams the Mall Company Ltd. to the Office of the Deputy Fire Officer along with Form J and Invoice;
- (vi) Copy of the letter dated 22nd March, 2018 from PMC Bank to High Speed Elevator;
- (vii) Copy of the Agreement with OTIS Maintenance;
- (viii) Daily MIS Report (01.04.2015 to 31.03.2016) showing income and expenditure towards CAM;
- (ix) CAM outstanding List (bill raised upto March, 2015);
- (x) CAM outstanding towards HDIL Entertainment Pvt. Ltd. amounting to Rs.1,20,02,350/-;
- (xi) CAM outstanding towards Dreams the Malls Company Pvt. Ltd. amounting to Rs.3,96,33,477/-;

- (xii) Total CAM outstanding till March, 2015 amounting to Rs.5,16,34,827/- payable by shops owned by Respondent No. 1 and the other shop owners, which includes the Petitioners.
- (xiii) Daily MIS Report (01.04.2014 to 31.03.2015) showing income and expenditure paid, wherein income is Rs.9,18,76,734/- and expenditure is Rs.9,16,71,698/-.
- (xiv) Daily MIS Report (2013-2014) showing income and expenditure paid towards the Mall, wherein income is Rs.6,33,32,417/- and expenditure is Rs.6,17,65,130/-.

7. In addition to the above, the Respondents have also submitted documents being agreements, correspondence, purchase orders etc. with regard the Chiller Plants, Escalators, Elevators etc. executed by Respondent No. 1 with third parties. The Respondents have also submitted receipts/challans/extract of the property tax paid by them from time to time.
8. From a perusal of the aforesaid documents and after holding various meetings with the parties, it appears as follows:
9. The said property was developed and constructed by Housing Development and Infrastructure Limited ['HDIL'], Respondent No. 8 herein in the year 2005 and the allotment letters were issued to interested shop owners. The said property consist of basement, lower ground floor, upper ground floor, first floor, second floor, third floor and a terrace. The shops / commercial galas owned by the Petitioners herein are located on the lower ground floor, upper ground floor and the 1st floor. The second floor and third floor is owned by the developer. The second floor consists of food court, a multiplex theatre, banquet hall and gaming zone. The third floor is let out to PMC bank and Sunrise Hospital. Moreover, the PMC Bank is operating from the third floor but Sunrise Hospital is closed down.
10. It appears that in or around September, 2009, the Developer obtained Occupation Certificate for the said property from the Mumbai Municipal Corporation. It also appears that between the years 2009 and 2010, Sale Agreements were executed with the shop owners for purchase of the various shops. From a perusal of the Agreements, it appears, that six months advance CAM charges and an amount of Rs. 15,000/- towards electricity charges was paid by the shop owners to the Developer at the time of signing the Agreements.
11. In or around the same time period i.e. 2009-2010, a subsidiary company of Respondent No. 8, viz., HDIL Entertainment Pvt. Ltd. (Respondent No. 7 herein) was assigned the task of maintaining the said property. Thereafter, on 10th May 2013, Respondent No. 1 Company was incorporated and took over the

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maintenance of the said property. Respondent No. 7 and Respondent No. 1 charged an amount of Rs.31 per sq. feet carpet area equivalent to Rs.18.5 per sq. feet built-up area towards property tax and CAM charges from the shop owners;

12. The Respondent No. 1 was incorporated with the following main objective:

"(A) THE MAIN OBJECTS OF THE COMPANY TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE:

1. To carry on affairs of "The Dreams Mall" and to look after the maintenance of the main entrance, façade, passages, shops, stair-cases, elevators, terraces, gutters, sewage, supply of water, common areas, utilities, electricity including distribution of power to shop owners and to apply and obtain approvals from municipality or authorities, installation and maintenance of generators for alternative power supply and air-conditioners used in, under or upon the building by shop-owners in common or general public and maintenance of building security and to look after general administration of the Dreams Mall in terms of sale agreement entered into amongst the developers- Housing Development and Infrastructure Limited and the shop owners who have bought shops in the Dreams The Mall located at L-25, LBS Marg, Bhandup (West), Mumbai- 400078 and maintain accounts thereof either by itself or through any agency appointed for the same.

13. Amongst the 138 Petitioners, they own 156 Shops/Gallas and as stated above, these 156 Shops/Gallas are located on the lower ground, upper ground and first floors of the said property.

14. It is stated by the Petitioners that sometime in or around the year 2013 onwards, Respondent No. 1 stopped maintaining the said property and the Petitioners, from the notices of the Municipal Corporation, also learnt that no property tax has been paid in respect of the said property. The Petitioners further informed the Court Commissioner that though property tax was collected (together with maintenance charges under CAM invoices) the same was not paid to the Municipal Corporation. As a result thereof, it appears that from the year 2014 onwards, the Mumbai Municipal Corporation issued various notices demanding payment of property tax to Respondent No. 1. It is further stated by the Petitioners that sometime in or around 2015-2016, Respondent No. 1 completely abandoned the said property as it closed down its office situated in the said property (the fact that the office of Respondent No.1 is closed was also observed during the site inspection held on 11th May 2018).

15. Therefore, the Petitioners have stated that:
- (i) The electricity to the said mall / property was disconnected in or around July, 2015 and in this regard, the Petitioners have furnished a letter of the Electricity Board. A copy of the said letter from the Electricity Board is enclosed hereto as Annexure-"III". The Petitioners have also furnished a letter dated 2nd February 2017 of the Electricity Board which confirms that an amount of confirming Rs.1,65,66,882/- is in arrears in respect of the common areas of the said property. A copy of the said letter from the Electricity Board's letter dated 2nd February 2017 is enclosed hereto as Annexure-"IV".
 - (ii) There are arrears of water charges amounting to Rs.79,76,281/-. Copies of the extracts showing arrears in water charges obtained from the Municipal Corporation is enclosed hereto as Annexure-"V";
 - (iii) Initially, the Petitioners were receiving monthly bills towards CAM charges and this practice continued till March, 2015. The Petitioners have further stated that after March 2015, they have not received any monthly bills towards CAM charges. However, the Petitioners state that they received a bill towards CAM charges for the entire financial year April, 2015 to March, 2016 in the month of March, 2016. The Petitioners have not made any payments against the said CAM bill raised in March 2016. Therefore, the Petitioners have not made any payments towards CAM charges after March 2015.
 - (iv) Subsequent to the electricity being disconnected in the said property, they have arranged for electricity for their respective units/galas/shops for which, they have been directly paying to the Electricity Board.
 - (v) There is huge outstanding of property taxes payable to the Mumbai Municipal Corporation and in fact, the Petitioners started receiving property tax bills individually from the Mumbai Municipal Corporation for the first time in the year 2013 for the period 2010 onwards and they have been paying property taxes directly to the Mumbai Municipal Corporation directly towards property tax. The Petitioners have produced receipts of payment of property tax and same is produced before this Hon'ble Tribunal by way of a separate compilation of documents.
16. As stated in detail in Annexure -1 hereto (i.e., the site inspection report), the statements of the Petitioners with regard to arrears in electricity bills and water bills is collaborated by the fact that there is no electricity connection and water supply in the common areas of the said property. Presently, the water is procured from private tankers.
17. The Petitioners have also produced a Minutes of the Meeting dated 23rd January 2015 held between the representatives of the Petitioners and Respondent No.1. Under serial no. 1 of the said Minutes of Meeting it is recorded as under:

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"Both PSM & DMM have agreed that the shop owners with Property Tax amount less than CAM dues will pay the Property Tax, submit the receipt to DMM, DMM will adjust the paid property tax amount against their CAM dues."

Also, under serial no. 4 of the said Minutes of Meeting, it is recorded that Respondent No. 1 will provide the Books of Accounts to the representatives of the Petitioners for the last four years as early as possible. A copy of the Minutes of the Meeting dated 23rd January 2015 is enclosed hereto as Annexure "VI". In furtherance of Minutes of the Meeting dated 23rd January 2015, the Respondent No.1 also addressed a letter dated 23rd February 2015 stating that HDIL (i.e., the Developer) shall make payment of property tax for and on behalf of those shop owners who have timely made payment of CAM charges upto the date of incorporation of the society or upto two months from the date of the said letter (whichever is earlier). A copy of the said letter dated 23rd February 2015 by HDIL is enclosed hereto as Annexure "VII".

18. The Respondent No.1 has furnished various documents, which are mentioned herein above. The Respondent No.1 has also furnished an extract showing the payment of property tax made by the Respondent No.1 and from a perusal of the same, it appears that:
- (i) As on the 2015, there was a total outstanding amount of Rs.21,21,70,178/- towards property tax in respect of the shops in the said property. The said statement / extract shows that out of the said amount of Rs.21,21,70,178/-, an amount of Rs.5,17,52,352/- was paid by the shop owners and an amount of Rs.1,82,00,571/- was paid by the Respondent No.1. Thus, out of the total liability of Rs.21,21,70,178/-, an amount of Rs.6,99,52,923/- was paid to the Mumbai Municipal Corporation and there is an outstanding of an amount of Rs. 14,22,17,255 payable towards property tax for the period upto year 2015. A copy of said statement / extract is enclosed hereto as Annexure-"VIII".
 - (ii) In addition to this, the Respondent No.1 has also produced an extract / statement showing the outstanding CAM charges payable by the Petitioners and/or various shop owners. A copy of said extracts is enclosed hereto as Annexure-"IX". As per this statement / extract, Respondent No. 1 claims that an amount of Rs.5,16,34,827/- is outstanding and payable towards CAM charges calculated upto March, 2015 from the Petitioners and/or shop owners. Moreover, from the said statement / extract it is seen that out of the total amount of Rs. 5,16,34,827/-, an amount of Rs. 1,02,36,242.67 is payable towards CAM charges by BMS shops (which are owned by the Developer) and the balance amount of Rs. 4,13,98,584.68 is payable by other shop owners, including the Petitioners.
 - (iii) Similarly, the Respondents have also produced a statement / extract showing the outstanding CAM charges payable by the Petitioners and/or all the shop

owners as on June, 2017 amounting to Rs.7,90,50,153/-; A copy of said extracts is enclosed hereto as Annexure-"X".

19. Though Respondent No. 1 has furnished statements/extracts showing the outstanding CAM charges amounting to Rs. 7,90,50,153/- for the period calculated upto June 2017, they have not furnished invoices raised by them demanding payment of CAM charges after the period March, 2016. Also, the Petitioners have produced challans/receipts showing payments made by them directly to the Mumbai Municipal Corporation towards property taxes in respect of their individual shops/galas. The Petitioners have also submitted a letter to show that as on March 2018, there is a total outstanding of Rs.15,92,75,270/- towards property taxes payable to the Mumbai Municipal Corporation. A copy of said letter showing outstanding property tax as on March 2018 is enclosed hereto as Annexure-"XI". The Respondent no. 1 has also provided receipts showing payment of property tax from time to time to the extent mentioned above. The receipts of property tax provided by the Respondent No. 1 are provided by way of a separate Compilation of Documents.

CONCLUSIONS

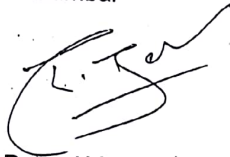
20. From the aforesaid documents and from the details mentioned in Annexure-II hereto (i.e., the site inspection report), the following conclusions can be drawn:
- (i) The common facilities mentioned in the Articles of Association are non-functional / non-operational and in fact, the said property is not being maintained and basic amenities such as electricity, water, escalators, elevators, air-conditioners etc. are lacking. Thus, the undersigned concludes that Respondent No. 1 has failed to provide common facilities mentioned in the Articles of Association;
 - (ii) Respondent No. 1 has not paid property tax amounting to Rs.15,92,75,270/- which is due and payable as on March, 2018. Respondent No. 1 has also not paid the electricity charges for the common areas amounting to Rs.1,65,66,882/- calculated as on 2nd February, 2017. Respondent No. 1 has also not paid an amount of Rs.79,76,281/- payable towards water charges. Thus, the undersigned concludes that there are arrears in payment of property tax, electricity charges and water charges by the Respondents to the respective departments/authorities and as a result thereof electricity and water supplies to the said property has been disconnected;
 - (iii) Out of the 138 Petitioners, 91 Petitioners have paid CAM charges upto March, 2015. In case of 49 Petitioners, the CAM charges payable are less than the property tax payable by the Respondents and therefore, they claim that instead of paying the CAM charges, they have directly paid the property tax arrears to the Mumbai Municipal Corporation. In case of remaining 15

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Petitioners, their CAM charges are more than the property tax payable by the Respondents.

- (iv) Further, the Petitioners have not paid any amounts towards CAM charges to the Respondent No.1 after March 2015 but they have made payments towards property taxes directly to the Mumbai Municipal Corporation.

Dated this 17th day of July 2018

At Mumbai



Raturaj V. Bankar,
Advocate
Court Commissioner