

(1994) 11 DEL CK 0039

In the Delhi High Court

Case No : Interim Application No's. 127 and 967 of 1993 and Suit No. 288 of 1993

Aruna Bahree and Others

APPELLANT

Vs

R.K. Apartments Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 17-11-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1994) 4 AD 985 : (1995) 57 DLT 257 : (1994) 31 DRJ 450

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : L.B. Rai, S.K. Khanna, Arun Jaitley, M.R. Chawla and N.K. Kaul, for the Appellant;

Judgement

Vijender Jain, J.

(1) This is an application filed by the plaintiff under Order 39 Rules 1 and 2 read with Section 151 CPC (IA No.967/93) for restraining defendant Nos. 1 and 2 from taking forcible possession of the suit land and interfering with use and enjoyment of the suit land by the plaintiffs and the defendant Nos. 3 to 5. This Court on 27.1.1993 restrained the defendants from interfering with the possession and the use and enjoyment of the land in suit by the plaintiffs. On the same date the Court appointed Local Commissioner to go to the site and report as to who is in actual possession of the site. Pursuant to the order of this Court, Local Commissioner had filed the report. For the purposes of adjudicating this application, it is not necessary to go into the report of the Local Commissioner.

(2) The main controversy between the parties is in relation to an Agreement purported to have been executed between the plaintiffs and defendants 1 and 2, plaintiff Nos.1 and 7 as also plaintiff No.5 (jointly entered into Joint Venture Agreement dated 1.3.1985 with defendants 1 and 2). Two similar Agreements were also executed, one by plaintiff No.2 and the other jointly by plaintiff Nos.3 and 6 and defendant No.5 on 11.3.1985. The relevant clauses of the Agreement

dated 1/11.3.1985 which require adjudication by this Court are as follows :-

"CLAUSE-3:- Since the owners are otherwise preoccupied in their own respective affairs, and are unable to bestow their full time attention to pursue the pending writ petition for notifying the land and for the removal of encroachments subsisting on the said plot as well as for overcoming the Urban Land Ceiling, the Builders take upon themselves the obligation to pursue the Court cases and allied "matters for obtaining the clearance from the acquisition proceedings and also to clear the land from Urban Land Ceiling at the Builders own cost. Similarly, the builders also undertake to get the land cleared of all encroachments and keep watch/ward staff at their own (Builder"s) cost to enable the Builders to expeditiously embark upon the preparation of building plans and designs for the proposed project. The owners on their part agree to furnish to Builders all the papers and documents and render necessary assistance in connection with the acquisition proceedings and the writ-petition filed by them and also to refer the Builders to the (owner"s) lawyers associated with the writ proceedings and Urban Ceiling Proceedings. Clause-4 :- The Builders assure the owners that the task of getting the clearance of the subject plot from acquisition proceedings and Urban Land Ceiling as well as from the encroachments subsisting on the land in the form of Jhuggi Jhopri settlements shall be carried out with all the promptitude to ensure that the Builders are able to arrange to have suitable designs, models and/or plans prepared for the proposed project and for this purpose they may engage and employ the services of a recognised Architect at their (Builders) own expenses. The Builders for and on behalf of the owners shall apply to the concerned authorities for requisite permissions, sanctions, and approvals to construct on the said land in accordance with the approved building plans. The Builders will make or agree to make such variations in the design or plans as may be considered necessary by the owners in consultation with G.P.A. on behalf of the owners regarding owners" informed of the progress through their G.P.A regarding such permissions/sanctions and approvals regularly from time to time or whenever asked for by the owners. Clause-7:- The Builders hereby agree to deposit the following amounts free of interest with the General Power of Attorney, of the owners as security for the due performance of their obligations under this Agreement in the manner and to the extent as mentioned herein-below :- a) Rs.25,000.00 at the-time of execution of this Agreement and delivery of the possession of the land for the purpose of this Agreement. b) Rs.75,000.00 at the time when the land is freed from acquisitions ,notifications and clearance under the Urban Land and Ceiling Act is obtained. Clause-8 :- The owners shall be deemed to have handed over the possession of the said plot to the Builders today for the purpose of this Agreement. The owners will retain their ownership of the entire land while the Builders will utilise this land for the execution of the aforesaid Agreement. Clause-20 :-That in case, in spite of. the best efforts on the part of the builders, the plot of land in question is not denotified from the Land Acquisition Act and the clearance is not obtained under Urban Land and Ceiling Act and all impediments to construction not removed within a period of 5 years

from the date of this Agreement, this Agreement would become null and void and the Builders would be entitled to get back only their security deposit and no other expenses incurred by Builders will be reimbursed by the owners."

(3) Mr. Ravinder Sethi, learned counsel for the plaintiffs, has argued that in view of Clause-20 of the Agreement, the period of operation of agreement was 5 years from the date of the Agreement in which necessary denotification from the Land Acquisition Act and clearance from Urban Land and Ceiling Act was to be obtained if not obtained and all impediments to construction if not removed the Agreement would become null and void and the defendants were only entitled to get back their security deposits and no other expenses incurred by builders. Mr. Sethi has argued that after the execution of the Agreement on 1/11.3.1985 the Agreements were valid till February, 1990 and thereafter the defendants have no right over the said land under the said Agreements. Learned counsel for the plaintiff has argued that as per Clause-4 of the Agreement it was an obligation under the Agreement to be performed by the defendants to get the clearance of the said plot from acquisition proceedings and proceedings of Urban Land and Ceiling Act as well as from encroachments subsisting on the land in the form of Jhuggi Jhopries so as to enable the defendants to have suitable designs and plans prepared for construction at the site. Learned counsel for plaintiff has also contended that as per Clause-7 of the Agreement the defendants were to submit free of interest with the general power of attorney of the owners as security for due performance of their obligation under this Agreement. A sum of Rs.25,000.00 at the time of execution of Agreement and delivery of the possession of the land, Rs.75,000.00 at the time when the land is free from acquisition, notification and clearance under the Urban Land and Ceiling Act was obtained. Learned counsel for the plaintiff has further argued that a sum of Rs.75,000.00 which was to be deposited as security has not been deposited by the defendants. Therefore, the defendants have no right to claim any right in the land in question after a lapse of 5 years stipulated under Clause-20 of the Agreement.

(4) On the other hand, Mr. Arun Jaitley, learned counsel for defendants, has vehemently argued that the Agreement was for the purposes of construction and what was required in terms of the Agreement has been carried out by the defendants with promptitude. Mr. Jaitley has argued that the cluster of Jhuggi Jhopries has been got cleared by making payment to the encroachers. He has contended that excess vacant land has been determined u/s 9 of the Urban Land and Ceiling Act and there is no need for getting permission under Sections 20 and 21 of the Urban Land and Ceiling Act for the purposes of construction and no further clearance is required for carrying out the construction activities. Mr. Jaitley has also argued that after the expiry of term of the Agreement on 20.6.1991 a general power of attorney was given in favor of the defendants by one of the co-owners of the suit land which was later revoked on 31.7.1993. Mr. Jaitley has vehemently argued that time was not essence of the Agreement as Clause-5 provides that in the event of construction being stopped, delayed, the

builders shall pay damages to the owners @ Rs.10,000.00 per month.

(5) On the basis of Clause-5, Mr. Jaitley has argued that once in an agreement, a penalty is provided the time ceases to be the essence of the agreement. In his support he has cited the case Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, and Indira Kaur and Ors Vs. Sheo Lal Kapoor, . Mr. Jaitley on the basis of Clause-5 has further submitted that at best the plaintiffs are entitled to charge Rs.10,000.00 per month for delay in construction.

(6) After giving my careful consideration to the submissions of the respective counsel for both the parties, the whole controversy veers round on the construction of Clause-20 of the Agreement. The language of Clause-20 is clear, it states that if in spite of best efforts on the part of the builders the plot of land in question is not denotified from the Land Acquisition Act and the clearance is not obtained under Urban Land and Ceiling Act and thereafter the words all impediments to construction not removed within a period of five years from the date of Agreement, the Agreement would become null and void". The words and all impediments to construction is in addition to the requisite denotification of land from acquisition proceedings and clearance from the Urban Land and Ceiling Act, nothing is placed on record to demonstrate prima facie as to whether even today the defendants are in a position to commence construction on the basis of excess vacant land declared by the competent authorities u/s 9 of the Urban Land and Ceiling Act. That may be the reason that within the period of five years, no security in terms of Clause 7(b) of Rs.75,000.00 has been deposited by the defendants with the plaintiff. The Agreement has to be read as a whole for harmonious construction of the document. The intention of the parties are manifest in Clause-20 that time for exploring all possibilities was five years and if construction could not start within that period, the Agreement becomes null and void.

(7) In view of unequivocal intention of the parties as reflected in Clause-20 of the Agreement, this Court will not substitute its own interpretation. Therefore, I hold that time was essence of the Agreement. I have to take a prima facie view of the matter and nothing said will be an expression of opinion on the merits of the case, I also find no force with the arguments of the learned counsel for the defendants that Clause-5 relates to penalty and, Therefore, it makes essence of time redundant. From a plain reading of Clause-5 it is obvious that this Clause is intended to come into play after the construction of super-structure after obtaining the sanction of the building plans has been obtained. Clause-20 deals with the contract as a whole if the obligation under Clause-20 has not been fulfilled by the defendants, I need not go to Clause-5. Therefore, the authorities cited by Mr. Jaitley is of no help to defendants. For the reasons stated above, I confirm the injunction granted earlier on 27.1.1993 and dismiss the application of the defendants 1 and 2 under Order 39 Rule 4 read with Section 151 CPC (IA No-2127/93) for vacation of injunction.

(8) Both the IAs stand disposed of.