

(2014) 09 BOM CK 0134

In the Bombay High Court

Case No : Appeal (Lodging) No. 464 of 2014 in Notice of Motion No. 996 of 2012 in Suit No. 2408 of 2006

Kalpataru Properties Pvt. Ltd.

APPELLANT

Vs

Majithia Nagar Co-operative Housing Society Ltd.

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Maharashtra Co-operative Societies Act, 1960 — Section 164

Citation : (2014) 09 BOM CK 0134

Hon'ble Judges : S.J. Vazifdar, J; Revati Mohite Dere, J

Bench : Division Bench

Advocate : Janak Dwarkadas, Sr. Counsel a/w J.P. Sen, Sr. Counsel, Sharan Jagtiani, Rahul Dwarkadas, Prachi Dhanani, Yuvraj Choksy and Suneet Tyagi, i/b Wadia Ghandy and Co, Advocate for the Appellant; Pravin Samdani, Sr. Counsel a/w Vikhil Dhoka, Ashwini Patil and Mukesh Gupta i/by Solicis Lex, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Revati Mohite Dere, J.—The present appeal is directed against the Order dated 30th June, 2014 passed by the learned Judge, by which the appellant's Notice of Motion No. 996/2012 for interim reliefs in its suit for specific performance came to be dismissed.

2. The short controversy arising in the present Appeal is whether there is a "concluded contract" between the appellant and the respondent No.1-Cooperative Housing Society.

3. We are entirely in agreement with the learned Judge that there is no concluded contract. We would summarise our findings as follows:

Admittedly, no agreement was executed between the appellant and respondent No.1. The tender conditions expressly provided that a concluded contract would come into existence only upon the execution of a formal agreement. There is

nothing in the other terms that suggest otherwise. The other terms establish that the execution of a formal agreement was an essential term of the bargain between the appellant and respondent No.1-Society. For instance, the terms entitled the Society to modify or alter or add any additional terms and conditions even "before signing the agreement ". To uphold the appellant's contention, would deprive respondent No.1 of the right to do so.

Further, all the letters addressed by the appellant and the appellant's conduct clearly establishes that the appellant itself knew and accepted that a contract could come into existence only upon the execution of a written agreement. For instance, the tender required the payment of Rs. 4 Crores as security deposit within fifteen days of the award of the contract. Accordingly, the appellant offered to pay the security deposit of Rs. 4 Crores only upon the execution of the documents stating that the contract would be complete "upon the execution of the "Development Agreement and related development documents ".

The balance of convenience is also in favour of respondent No.1, as an injunction in such a case would deprive its 300 members, the right to enjoy their property upon redevelopment during the pendency of the suit.

4. A few facts which are necessary to decide the said controversy, are as follows:

(A) Respondent No.1 is a Cooperative Society consisting of 284 residential flats admeasuring 350 sq. ft. each; 10 shops admeasuring 225 sq. ft. each; two commercial units admeasuring 320 sq. ft. each and one commercial unit i.e. occupied by a bank admeasuring 1848 sq. ft. Respondent No.1 also owns two adjoining plots together with respondent No. 2.

(B) As the respondent No. 1 decided to redevelop the property bearing CTS No. 444-A at Kandivli (West), Mumbai, tenders came to be invited by the respondent No.1 for the same. The tenders that were invited, apart from certain terms and conditions, stipulated a tender deposit of Rs. 25,00,000/- lakhs drawn in favour of respondent No.1-Society.

(C) On 30th October, 2004, the appellant submitted the tender form along with a tender deposit of Rs. 25,00,000/-. According to the tender document, the term "contract" and the term "tender" were defined to mean as under :

"(B) The "CONTRACT" shall mean the tender and acceptance thereof and formal agreement executed between the Developers and Society together with the documents referred to therein including these conditions and appendices and any special conditions and specification, design, drawings, price schedules, bills of quantities and schedules of rates. All these documents taken together shall be deemed to form one contract and shall be complementary to one another."

"(I) "TENDER" means an offer."

Some of the relevant clauses of the tender document which will have a bearing on the decision of the present appeal are set out as under :

"Tender Deposit"

The Tenderers shall deposit the tender deposit by Pay Order in favour of the Society payable at Mumbai. If during the Tender validity period the Tenderer withdraws his Tender or the successful Tenderer fails to submit security deposit and bank guarantee as specified within 15 days after receiving notice of the award of the contract and fails to submit security deposit including bank guarantee, the Tender deposit shall be forfeited and Tenderer shall be disqualified. After award has been finalised the tender deposit will be returned to the respective unsuccessful Tenderers within the 15 days. The successful Tenderer's tender deposit will be retained as a security deposit. No interest will be paid on the tender deposit."

"Award of Contract"

Notification of the award will be made in writing to the successful Tenderers. The contract will be awarded to the best qualified and responsive Tenderers offering best overall evaluated tender in conformity with the specifications and technically feasible rates."

"Security Deposit"

Within 15 days of the Award of Contract to the Developers, the Developers shall give Interest Free Security Deposit of Rupees Four Crores to the Society for due fulfillment of the contract.

The mode of making this deposit shall be as under :-

(A) (i) Tender Deposit of Rupees Twenty Five Lakhs deposited with the Society will be adjusted in the said Security Deposit.

(ii) Balance amount of Rupees One Crore Seventy Five Lakhs to be submitted as Security Deposit.

(B) In addition to Security Deposit of Rupees Two Crores as mentioned above an unconditional irrevocable bank guarantee of Rs. Two Crores which shall remain in force until a period of two years after completion of the project.

"Refund of Security Deposit"

Security deposit shall be released after defect liability period is over on the submission of the certificate from the Consultant subject to the discretion of the Society."

"Additional Terms and Conditions"

Society reserves the right to amend or modify any of the terms, specifications and conditions of the contract and to add any additional terms and conditions before signing the agreement with the Developers and the same will be intimated to the Developers in advance.

The terms of payment are set out in special condition of contract. The Consultants and the Society shall not under any circumstances relax these terms of payment and will not consider any alternative payment terms. Tenderers should therefore in their own interest note this provision to avoid rejection of their Tenders.

5. The appellant submitted a bid. The bid was amended from time to time. Correspondence and three draft agreements came to be exchanged between the appellant and the respondent No.1. Meetings were also held. However, as the respondent No.1 failed to sign the agreement, the appellant issued a notice u/s 164 of the Maharashtra Co-operative Societies Act and filed the above suit for specific performance, and in the alternative, for damages. Prayer (a) is as under :-

"(a) that this Court be pleased to declare that the Agreement between the Plaintiff and the Defendant consisting of Tender Document/Form, Exhibit "E" hereto and the Addendum dated 19th January 2005 (i.e. Exhibit "S" hereto) read with the approved draft agreement (i.e. Exhibit "GG ") hereto jointly constitute a concluded contract which is valid, subsisting and binding upon the Defendants and the Defendants are bound and liable to specifically perform the same.

No ad-interim reliefs were granted in the suit. Sometime, in April 2012, the appellant's Chamber Summons seeking to amend the plaint for bringing on record subsequent developments and for impleading respondent Nos. 2, 3 and 4, came to be allowed. Respondent No.2 is a formal party. Respondent Nos. 3 and 4 were impleaded, as, respondent No.1 had received offers from them upon the termination of the negotiations with the appellant.

6. Mr. Dwarkadas, learned Senior Counsel appearing for the appellant contended that the appellant had duly submitted the tender form together with the tender deposit of Rs. 25,00,000/- and the offer was revised and upgraded as stated in the subsequent communications. He submitted that in fact, in the Special General Body Meeting held by the respondent No.1 on 23rd January, 2005, there was an unanimous resolution passed, accepting the offer given by the appellant and for awarding the contract to the appellant. He submitted that pursuant to a detailed presentation of the project made to the members of the respondent No.1-Society, the same came to be reduced by the respondent No.1-Society in the form of an addendum to the tender, which came to be placed before the members of the respondent No.1- Society and was unanimously accepted. He relied on the resolution dated 23rd January, 2005, which reads thus :

"Resolution Passed By The Special General Body Meeting Dated 23rd January 2004

"RESOLVED THAT the negotiated final offer/tender submitted for four towers of 18 stories each and placed before the Special General Body Meeting of the Society held on 23rd January 2005 be and the same is hereby unanimously accepted.

IT IS FURTHER RESOLVED that the Chairman Shri Vipin H. Bhuta be and is hereby authorized to endorse the acceptance as owner on behalf of the Society and further the Chairman, the Secretary, the Joint Secretary and the Treasurer are hereby jointly and/or severally authorized to do and SQP 9/24 execute all acts, deeds, documents, writings, matters and things as may be required in the course of redevelopment of the properties of the Society.

IT IS FURTHER RESOLVED that in addition to the unanimous consent, the members shall also individually / separately sign and deliver to the Society a duly notarized letter of consent for the redevelopment of the properties of the Society as prescribed by the Legal Consultants, for facilitating the smooth, uninterrupted and unobstructed redevelopment."

Mr. Dwarkadas submitted that apart from the unanimous resolution passed by the members (225 members) on 23rd January, 2005, 212 members who were present at the meeting also signed separate communications accepting the resolution. Thereafter, the respondent No.1 by a communication dated 24th January, 2005 addressed to the appellant stated that the contract was awarded to the appellant "as per the terms and conditions levied in the Tender ". The acceptance was thus not final and absolute but "as per the terms and conditions of the tender ". We will shortly demonstrate the execution of a formal agreement was in this case an essential term of the bargain between the parties. This is virtually accepted, as even thereafter, there was an exchange of drafts, each of which contained proposals and counter proposals, but never an acceptance of the terms and conditions.

7. Mr. Dwarkadas submitted that the third revised draft was, in fact, approved and finalised between the parties i.e. between the appellant and the respondent No.1 and only the formal execution thereof, was to follow. He, therefore, submitted that the facts as disclosed would clearly reveal that there was a concluded contract between the parties. According to him, the execution of the agreement was not an essential term of the contract, more particularly, when all the essential terms of the contract were settled and finalised and which fact, was even formally recorded in the form of an addendum. According to him, the contract was awarded to the appellant by the respondent No.1-Society and the said fact is clearly borne out from the documents on record. He submitted therefore that there is a valid and binding agreement between the parties.

8. Per contra, Mr. Samdani, learned Senior Counsel for the respondent No.1-Society supported the impugned order and contended that no interference was warranted. He submitted that under no circumstances, in the facts of the present case, could it be said that the respondent No.1 had awarded the contract to the appellant or that there was a concluded contract between the appellant and respondent No.1. He submitted that the fact, that drafts were being exchanged between the parties which contained material changes, would clearly show that the contract was not awarded or entered into with the appellant. He submitted that the draft agreements exchanged between the parties contained terms other

than those contained even in the tender documents. He referred to certain paragraphs in the plaint, more particularly paragraph Nos. 27, 32 and 36 in support of his contention. According to Mr. Samdani, certain material changes were suggested in the draft agreement, which were post resolution and addendum. He submitted that the negotiations did not result in a concluded contract between the appellant and the respondent No.1. He submitted that considering the number of members of the society, it was necessary to consider the representations made by all, more particularly, as the members had lost faith, trust and confidence in the appellant. He contended that in the facts of the case, the balance of convenience lies in favour of the respondent No.1-Society.

9. At the outset, it may be noted that the Apex Court in the case of Kollipara Sriramulu Vs. T. Aswathanarayana and Others, has observed that -

"a mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement."

(emphasis supplied)

10. Keeping in mind the aforesaid legal principle, we proceed to consider and examine whether there was a "concluded contract" between the parties i.e. the appellant and the respondent No.1.

11. In the present case, the requirement of a formal contract being signed by the parties was a term of the bargain. This is clear from the terms of the tender and the conduct of the parties. The facts not only establish this but also establish that this is how even respondent No.1 understood the matter to be and also acted accordingly.

12. The term "contract" is defined to mean the tender and acceptance thereof "and a formal agreement executed between the Developers and the Society ". The definition of "Contract" further provides that these and other documents "form one contract and shall be complementary to one another." The plain language of the definition therefore clearly required a formal contract to be executed in order to bring about a contract between the parties.

13. The other terms of the contract do not suggest anything contrary to the plain language of this clause. The other terms of the tender, in fact, establish clearly

that the plain language is to be given effect to.

14. For instance, in the "Additional Terms And Conditions", the Society reserved to itself the right to amend or modify the terms of the contract as also to add any additional terms and conditions "before signing the agreement ". This provision clearly establishes that the execution of a formal contract was not a mere formality but a term of the bargain between the parties. To hold otherwise, would be to deprive the Society of a very important right expressly conferred upon it by the contract viz. the right to modify the contract "before signing the agreement".

15. The term of the tender document relating to "Security Deposit" provides that the successful tenderer was to submit a security deposit of Rs. 4 Crores for due fulfillment of the contract as specified in the tender document "within 15 days of the Award of Contract ". As we noted earlier, the definition of a Contract includes a "formal agreement executed between the Developers and the Society ". Thus, unless there was a formal executed agreement between the parties, there could be no contract and if there was no contract, there could be no question of an "Award of Contract ". It is thus obvious, that the security deposit not only follows a concluded contract, but is in furtherance of it. It is of vital importance to note, that this is precisely how even the appellant and the Society understood the matter, as is evident from their conduct reflected in the following correspondence.

16. It is pertinent to note, that post the resolution dated 23rd January, 2005 and the letter dated 24th January, 2005, several letters and three draft agreements came to be exchanged between the parties. The first draft agreement was exchanged sometime in April, 2005, the second and third draft agreements in May, 2005. There were certain material changes incorporated in the draft agreements. The plaint is bereft of details as to when and to whom the third draft agreement was given. The parties having proposed changes itself, establishes that a concluded agreement was not arrived at. The matter, however, does not end there.

17. The letters exchanged between the parties reveal that even the parties did not consider there to be a concluded contract between themselves. The letters further establish that the parties themselves knew and had acknowledged that a concluded contract would come into existence only upon the execution of a written agreement.

18. In a letter dated 10th May, 2005 addressed to the advocates for the respondent No.1, the appellant's advocate stated as follows :-

".....

As regards the payment of the security deposit by your client, we would like to draw your attention to the definition of "Contract" contained in the Tender Documents issued by your client, which definition specifies that "the contract shall mean the tender and acceptance thereof and the formal agreement executed between the Developers and the Society together with the documents

referred to therein... " In light of the definition, it would appear that the award of the contract by your client would be complete upon the execution of the Development Agreement and related development documents in favour of our client, and our client would have to make payment of the Security Deposit at such time. Needless to say that our client is ready and willing and shall make payment of the Security Deposit simultaneously with the execution of such documents."

(emphasis supplied)

The aforesaid admission virtually concludes the fact, that the appellant had accepted that as per the terms of the tender, there would be no concluded contract between the parties till the "execution of the Development Agreement and related development documents" and acted accordingly. The appellant itself considered the execution of the development agreement to be a term of the bargain. The appellant, therefore, stated that it would make payment of the security deposit simultaneously with the execution of such documents. Mr. Dwarkadas' submission is contrary not only to the terms of the tender but also to the appellant's understanding thereof. The appellants were thus well aware, that the award of the contract would come into existence only upon the execution of the development agreement and related development documents. The stand now taken is an afterthought.

19. The stand of the Society has been consistent throughout. By a letter dated 10th June, 2005, the Society confirmed that although appellant had paid Rs. 25,00,000/-, the Society will give effect to the said amount as security deposit, only when balance amount of Rs. 1.75 crores and bank guarantee of Rs. 2 crores are deposited with the Society, and that, till that time, the said amount of Rs. 25,00,000/- will remain as tender deposit only.

20. The appellant's stand even thereafter was the same as is evident from its letter dated 16th June, 2005 in which it reiterated that the balance security deposit would be paid "forthwith upon the execution of Development Agreement and the related development documents ". In fact, by the said letter, the appellant requested a final meeting to be arranged to settle and finalise the drafts. This is important in view of the fact that the said third draft is dated 30th May, 2005, which, Mr. Dwarkadas contended was the concluded contract. The appellant itself never understood it to be a concluded contract, for, otherwise, by its letter dated 16th June, 2005, it would not have requested a final meeting to settle and finalise the draft. The meeting would have been necessary then only to execute the agreement after having it typed out as per the third draft.

21. The appellant addressed a further letter dated 8th August, 2005, wherein, it once again requested the Society to fix a meeting, where the formality of settling the Development Agreement could be completed and to fix a date for execution thereof, as soon as possible thereafter. The appellant, therefore, itself contemplated a further meeting to settle the terms of the agreement and to fix a

further date for the execution of the agreement that may have been finalised at such meeting.

22. Thus, even after the resolution dated 23rd January, 2005, the parties were further negotiating certain terms and conditions in the draft development agreement. In fact, certain terms, other than those contained in the tender documents were incorporated in the draft development agreement. It is thus evident that negotiations were not limited to the bid document. A perusal of the correspondence also shows that the respondent No.1 has been consistent throughout, inasmuch as, it did not consider the contract as having entered into with the appellant. What clinches the issue is the fact, that the appellants have also confirmed the said position, taken by the respondent No.1 vide its said letters. The unanimous resolution passed on 23rd January, 2005, communicated to the appellant vide letter dated 24th January, 2005, by itself, is not sufficient to hold that there was a concluded contract between the parties, wherein the respondent No.1 accepted the appellant's tender, would further indicate that the contract was yet to be concluded between the parties. The statement in the said letter that "Execution of appropriate development agreement shall follow" prima facie indicates that the parties had agreed to bind themselves only on execution of an appropriate development agreement. As is evident, till the end, neither the terms were settled nor was the contract concluded, and hence no reliance could even be placed on the third draft agreement. What is crucial and clinches the issue, is that in the correspondence subsequent to the resolution dated 23rd January, 2005, the appellants have accepted the fact, that the contract would come into existence only on execution of the development agreement.

The doubt, if any, is set at rest by the "Additional Terms and Conditions" set out above, by which, the respondent No. 1 had reserved "the right to amend or modify any of the terms, specifications and conditions of the contract and to add any additional terms and conditions before signing the agreement with the Developers" by intimating the same to the Developers in advance ".

(emphasis supplied)

Though, there were negotiations, exchange of drafts and correspondence all stopped short of a concluded contract. Thus, in the facts, the contract would come into existence only on execution of an agreement.

23. There was, therefore, between the parties only an agreement to enter into an agreement which is not enforceable in law.

24. An inference that the requirement of the execution of a formal agreement is a term of bargain is stronger, when one of the parties is an entity such as a Society comprising of several members, whose consent, at least by majority, is essential. The Society would understandably reserve a right to amend or modify the terms, right up to the stage of executing the formal agreement for a variety of reasons. There may be several suggestions and demands from the members which the Managing Committee may wish to consider, even if they otherwise

have the power to enter into a concluded contract. Thus, where the plain language suggests the requirement of the execution of a formal agreement to be a term of the contract, an inference to the contrary cannot easily be drawn, when one of the parties is an entity, such as respondent No.1. The importance of a signed agreement is often greater when many members are involved, all of whom have a stake in the redevelopment of the premises. The respondent No.1 was entitled to consider all the representations made by its members and to negotiate further in view of the clause "Additional terms and Conditions" in the tender document. We reiterate that a view to the contrary would be to deny respondent No.1 an express right under the "Additional Terms and Conditions".

25. The balance of convenience is also in favour of the respondent No.1-Society which comprises of 284 residential flats admeasuring 350 sq. ft. each; 10 shops admeasuring 225 sq. ft. each; two commercial units admeasuring 320 sq. ft. each and one commercial unit i.e. a bank admeasuring 1848 sq. ft. If an injunction is granted, almost 300 members would be deprived the benefit of enjoying their property during the pendency of the suit. On the other hand, the appellant always has a right to claim damages. The members of respondent No.1-Society ought not to be denied the right to a better living and better facilities.

26. Considering the aforesaid, in conclusion, we are of the opinion that the appellant has not made out a prima facie case for granting any interim relief. No interference whatsoever is called for in the impugned order.

27. The appeal being sans merit, is dismissed. There shall be no order as to costs.

28. The statement recorded in the order dated 7th May, 2012 is continued upto and including 15th October, 2014.