

(2015) 02 BOM CK 0042

In the Bombay High Court

Case No : Execution Application Nos. 99 and 241 of 2011 in Chamber Summons No. 299 of 2002 in Suit No. 2824 of 1985

Mahendra Builders Pvt. Ltd. and Others

APPELLANT

Vs

Padmabai and Others

RESPONDENT

Date of Decision : 27-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32, Order 21 Rule 32(1)

Citation : (2015) 3 ABR 339 : (2015) 3 BomCR 551

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Judgement

R.S. Dalvi, J.—The above suit was settled under consent terms dated 2nd December 2003. An order was passed in terms of the consent terms on 12th January 2004. The suit came to be disposed off in terms of the consent terms on 12th January, 2004. The consent terms are sought to be executed by plaintiff Nos. 3 and 4 and defendant Nos. 17 and 18 (plaintiff) against defendant No. 16 (defendant). The consent terms would require to be executed within 12 years of the order being passed in terms thereof. Hence the consent terms would have to be executed on or before 11th January 2016. The execution has been levied in 2011.

2. The plaintiff as well as the defendant took out various chamber summonses. The plaintiff's chamber summonses were for appointment of court receiver and redevelopment of the property. They have been dismissed. The defendant's chamber summons were for setting aside the warrant of attachment upon the suit property. The personal residential immovable property of defendant No. 16 has been attached. That attachment has been raised. The immovable property of the defendant which was the suit property consisting of a building and one garage therein has also been attached. The attachment thereon is not raised. Those chamber summonses have also been dismissed. The execution application remains. Consequently the attachment on the suit properties remains.

3. It may be mentioned that the attachment, if levied would continue until the sale of the property if the decree of the Court is executable by attachment and sale of the property so attached. It may also be mentioned that execution applications do not come up for consideration before any Court and only an application taken out in execution application would be considered by the Court.

4. The defendant filed an appeal against the order in the chamber summons. The order of the division bench of this Court in appeal dated 21st November, 2014 has observed that the contention of the defendant that the decree is not executable would be considered finally at the hearing of the execution application. The appeal Court has further observed that whether the rights of the parties are conditional upon fulfilling their obligations or not would also have to be decided in the execution application. The defendant has challenged the execution on the only ground that the decree is not executable as it is a decree only of declaration.

5. Under the consent terms, defendant No. 16, who took over rights of the other defendants was to redevelop the suit property. Defendant No. 16 was to give the plaintiff Nos. 3 and 4 and defendant Nos. 17 and 18 and one Kapurchand Hastimal Jogani HUF, who has not sought execution of the consent decree, five flats in the redeveloped property, three of which were to be of 1267 sq. ft carpet area and two of which were to be of 500 sq. ft carpet area as follows:

The contentions in this execution application are, therefore, in respect of four flats in the building to be redeveloped by defendant No. 16.

6. The time for redevelopment and handing over possession of the four flats is not specified in the consent terms. It would, therefore, have to be performed within a reasonable time. The reasonable time for redevelopment would require to account for vacating the tenants, obtaining various permissions of the planning authority, getting the plans sanctioned, putting up the construction and obtaining the requisite certificates for completion of construction and occupation of the building. This having not been done from 2004 until 2011 the above execution applications were taken out and the attachments were levied.

7. The contention of the defendant is that the decree is not executable and hence the execution application must be dismissed and the attachment levied upon the suit property must be raised. This was the precise contention in the Chamber Summons taken out by defendant No. 16 which has been dismissed. This contention is reheard upon the directions of the Division Bench of this Court.

8. Mr. Madon on behalf of the defendant drew the Court's attention to the relevant part of the consent terms.

Under clause 3 of the consent terms the parties agreed that defendant No. 16 had agreed to allot the premises as provided in clause 4 of the consent terms to the plaintiff Nos. 3 and 4 and defendant Nos. 17 and 18 and one Kapurchand H. Jogani HUF.

9. Under clause 4 of the consent terms it was agreed, declared and confirmed that under an agreement dated 7th November, 2003 defendant No. 16 had agreed to allot premises admeasuring a specified area (as set out above) upon the terms and conditions mentioned in the agreement dated 7th November, 2003.

10. Under clause 5 of the consent terms subject to what was stated in clauses 3 and 4 it was agreed, declared and confirmed that defendant No. 16 was the sole and absolute owner of the suit property and in possession thereof.

11. Under clause 6 of the consent terms subject to what was stated in clauses 3, 4 and 5 it was agreed, declared and confirmed that the plaintiffs and defendant Nos. 17 and 18 would have no right, title or interest in the suit property.

12. Consequently under clauses 3 and 4 of the consent terms the parties have recited what they had agreed. What was agreed was that defendant No. 16 had agreed to allot the premises described in the consent terms to plaintiff Nos. 3, 4 and defendant Nos. 17 and 18 and Kapurchand H. Jogani HUF. However the parties not only agreed, but also agreed, declared and confirmed in clause 4 that defendant No. 16 had agreed to allot the premises of the specified area as per the agreement dated 7th November, 2003 to the aforesaid parties. Defendant No. 16 has, therefore, agreed to allot the specified premises to specified parties.

13. The consent terms are not happily worded. The consent terms show the agreement between the parties to recite what defendant No. 16 agreed to allot. The agreement to allot is the declaration of the intention of the parties. The consent terms shows the declaration and the intention of defendant No. 16 to allot the specified five premises to five specified persons and/or HUF. Indeed the consent terms have not specified that defendant No. 16 "shall allot" any premises to any party.

14. It is, therefore, contended on behalf of defendant No. 16 that the consent terms are not executable as the consent terms only show agreement to allot and not the obligation to allot.

15. Nevertheless the agreement to allot is clear. It is, therefore, contended that the consent terms would, therefore, give a cause of action to the beneficiaries of the allotment viz., plaintiff Nos. 3, 4 and defendant Nos. 17 and 18 and Kapurchand H. Jogani and HUF. The consent terms being an agreement can certainly be enforced by a civil action in a civil Court. However, since there is no obligation to allot it is contended on behalf of the defendant that the allotment is not specifically enforceable and consequently the consent terms cannot be taken to be a decree for specific performance and cannot be executable as such.

16. It is argued on behalf of the plaintiff that the consent terms are executable as a decree for specific performance and also as a decree for injunction under Order 21 Rule 32(1) of the CPC by attachment of the property of the party against whom the decree for specific performance of the contract is passed or the party against whom an injunction is granted.

17. It would have to be seen how the consent terms and the order passed in terms of the consent terms would constitute a decree for specific performance of a contract. The contract, under the consent terms is the agreement to allot the premises specified therein. It further shows the declaration that defendant No. 16 has agreed to allot, (but does not show the obligation to allot). It also shows the confirmation that defendant No. 16 has agreed to allot, (but does not show the confirmation to allot the premises specified therein). It is contended on behalf of the defendant that specific performance of the agreement to allot can only be enforced by confirmation of defendant No. 16 that he would allot the said premises.

18. It is also contended on behalf of the defendant that there is no specific premises to allot and that any allotment can be made only upon the plaintiff allowing the defendant to construct the premises. Mr. Madon on behalf of defendant No. 16 who is present in Court, stated and confirmed that defendant No. 16 shall allot the premises specified in the consent terms, (which includes the premises to be allotted to the above HUF also) but only if the premises is constructed. Since the premises has not been able to be constructed, he stated that defendant No. 16 cannot allot any specified premises and the premises not being in existence, the Court also cannot execute the allotment of any such premises.

19. Mr. Pooniwala on behalf of the plaintiff drew the Court's attention to the judgment in the case of Harihar Pandey Vs. Mangala Prasad Singh and Others, which holds that the decree on a compromise is executable and is not a mere agreement which merely declares rights of the parties. In that case the dismissal of the objection of the judgment debtor, whereby removal of certain construction raised by him in violation of the decree, was challenged. The obstruction was in a passage. An interim injunction restraining construction activity in the passage was granted. Under a consent decree an alternative passage was provided. 10 years after the decree was passed the plaintiff applied for enforcing the decree by attachment of the construction, removal of certain bamboo clumps and detention of the defendant in civil prison. The judgment debtor contended that the compromise was merely an agreement which declared the respective rights of the parties and was hence not capable of execution. It was contended that injunction was not specifically granted. However because the suit was for injunction which was decreed the Allahabad High Court held that there was a self induced injunction. It was observed in paragraph 9 of the judgment that where the parties agreed for a future mode of conduct either by doing something or by restraining to do something and obtain a decree in those terms it would be a self induced injunction against oneself. The Court observed that the real intent of the parties has to be looked into and if the mandate in the compromise was intended to be enforced as an injunction the decree must be held to be one for injunction. For that purpose the petition cannot be interpreted strictly and an allowance must always made for infirmity of expression in the compromise petition (consent terms). It was observed that in that case the defendant undertook to

give an alternative passage and to make it usable. They agreed to desist from obstructing it in any manner. The Court held that it was not a mere declaratory decree, but that the decree in fact granted an injunction by agreement and was hence executable.

20. This Court would accept the noble interpretation - we call it the interpretation to advance justice and not to frustrate it, to prevent mischief - of such consent terms as set out in the aforesaid judgment.

21. An analogy with an "implied promise to pay" the sum stated in a receipt or a deposit may be made with an agreement to allot a premises. It has been oft held since 1895 in the Privy Council case of Kalka Singh Vs. Paras Ram, (1895) ILR 22 Cal. 434 ENDLAWFINDER that an admission of a debt implies a promise to pay it. Similarly in the case of Maniram Vs. Seth Rupchand, also it was held that an unconditional acknowledgment of liability implied a promise of pay because that is the natural inference, if nothing is said to the contrary. "It is what every honest man would mean to do". This has been followed and aptly quoted in the case of Chunilal Ratanchand Gujrati Vs. Laxman Govind Dube, in which case a suit on an acknowledgment of debt in a Khata was held to imply an unconditional promise to pay. In that case a clear admission of an open and current account having been seen, it was held that "whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other".

22. Thus seen, it is clear that upon the agreement, declaration and confirmation of such agreement to allot the specified flats to the plaintiff, an obligation to so allot is implied and implicit in the agreement itself.

23. In this case also the intention of the parties could never have been merely of declaration. The suit itself was to be disposed off. The plaintiffs would no longer agitate their claim. It would be of little use to the plaintiff to only know what defendant No. 16 agreed to do. Indeed defendant No. 16 had agreed to allot the premises under the agreement dated 7th November, 2003 itself. What use would it be to reiterate that agreement ? How can the lis between the parties come to an end by such mere reiteration ?

24. The suit came to be disposed off under the order dated 12th January, 2004 in terms of the consent terms. The lis between the parties would end when the plaintiff would obtain something from the compromise or from the adjudication by the Court. An order came to be passed in terms of the consent terms thus putting the imprimatur of the Court upon the agreement between the parties by way of the consent terms so that the Court itself noted that the lis ended. Would the Court be merely satisfied with the defendant merely agreeing to allot a specified premises to the plaintiff without any time frame? Can the defendant, therefore, throw up his hands and state to Court that he has agreed to do something which cannot be enforced or executed ? It would be an absurd interpretation of a consent terms which disposes off a suit and orders the parties to do what is mentioned therein.

25. The question that remains is how can the allotment which was agreed by defendant No. 16 to be made be enforced ? The property is not in existence. It is not constructed. It cannot be accepted or concluded that defendant No. 16 who is a businessman and who has sought to develop the property would purposely not develop the property because he would want to escape from his liability to allot five flats in the developed property. Hence so soon as the defendant would construct the first five premises (four of which are sought to be executed and enforced aggregating to 4034 sq. ft. of carpet area) the plaintiff Nos. 3, 4 and defendant Nos. 17 and 18 and also Kapurchand H. Jogani and HUF would be entitled to have them allotted to them. Consequently, as justifiably argued by Mr. Madon, the consent terms would become executable when the construction is put up upon redevelopment of the suit property.

26. Once the expression "agreed to allot" is read as an "obligation to allot" the obligation would become executable and enforceable, but only when the premises to be allotted has itself come into existence.

27. It is trite that once an execution application is filed and an attachment is levied it would remain in force until the execution proceeds to the next stage of sale of the property. A decree for specific performance and injunction which is executable by attachment under Order 21 Rule 32 may not only end in sale of the property, but may end in the transfer of the property in favour of the plaintiff or may be enforceable as per the facts of each case. Consequently there would be a legal dilemma of the status of the property; the attachment would continue until the premises are allotted. The premises would be allotted only after they are constructed. The construction cannot be put up if the property is under attachment. Consequently the attachment would lead to nothing. The attachment cannot remain in force endlessly. The attachment is only an aid to the ultimate execution, be it by sale or by execution of a document or otherwise. The attachment must enure for the benefit of the decree holder, but is not expected to punish the judgment debtor. It is not required to debilitate the business of the judgment debtor; in fact that would be counterproductive even for the decree holder. Consequently as per the order of the Division Bench of this Court the issue whether the decree is executable or not is to be decided taking into account the practical realities.

28. The decree in terms of the consent terms dated 2nd December, 2003 under the order of this Court dated 12th January, 2004 is executable. It can and shall be executed only upon the redevelopment of the suit property by defendant No. 16 and by construction of the premises in the redeveloped building. It shall be executed by allotment of the premises constructed to the extent of 1267 sq. ft carpet area in clauses 4(a), 4(b) and 500 sq. ft. carpet area, 4 (d) and 4(e) of the consent terms and further 1267 sq. ft carpet area under clause 4(c) of the consent terms to the above HUF totalling to 4034 sq. ft. carpet area. Needless to mention that if defendant No. 16 constructs premises of a different area and not of area of 1267 sq.ft or 500 sq.ft also plaintiff Nos. 3 and 4 and defendant Nos.

17 and 18 shall be entitled to whatever premises that is constructed, but to the extent of 3534 sq. ft. carpet area being 1267sq. ft and 500 sq. ft as per clauses 4(a), 4(b), 4(d) and 4(e) of the consent terms and, of course the above HUF would be entitled to 1267 sq. ft. carpet area thus constructed.

29. It is further clarified that only upon such allotment being made in terms of the agreement, declaration and confirmation of defendant No. 16 in clause 4 of the consent terms will defendant No. 16 be the sole and absolute owner of the entire property so developed and constructed.

30. The right title and interest of plaintiff Nos. 3 and 4 and defendant Nos. 17 and 18 shall not be at an end until then.

31. In view of the fact that the premises would have to be constructed to be allotted as per the statement made by Mr. Madon on behalf of defendant No. 16 who is present in Court, defendant No. 16 must be allowed to construct and redevelop the suit property. Hence the attachment made on the property would be required to be stayed to allow for such construction and redevelopment.

32. Hence the following order:

1. The attachment levied upon the suit property is stayed.
2. Defendant No. 16 shall be entitled to redevelop and construct the suit property.
3. So soon as the property to the extent of two premises admeasuring 1267 sq. ft and two premises admeasuring 500 sq. ft. and totalling 3534 sq. ft carpet area are constructed, the attachment thereon shall come into force without any further order of the Court. There shall, however, be no attachment in respect of any further constructions to be put up by defendant No. 16 thereafter.
4. The plaintiff Nos. 3 and 4 and defendant Nos. 17 and 18 shall be entitled to further execute the decree if defendant No. 16 fails to handover the premises agreed, declared and confirmed to be allotted under clause 4 of the consent terms, upon its construction / redevelopment.
5. Order accordingly.