

(1999) 01 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No. 1472 of 1996

M/s. Narangs International Hotels Pvt. Ltd.

APPELLANT

Vs

Maharashtra Tourism Development Corporation Ltd.

RESPONDENT

Date of Decision : 30-01-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 73, 74, 75
Specific Relief Act, 1963 — Section 10, 14, 20

Citation : (1999) 2 BomCR 320

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Advocate : D.G. Jhangiani, for the Appellant; D.D. Madon and M.V. Jaykar, instructed by M/s. M.V. Jaykar and Co., for the Respondent

Judgement

N.J. Pandya, J.—It seems that a hotel in the name of Pilgrims Inn set up by the respondent Maharashtra Tourism Development Corporation Ltd. (hereinafter referred to as the M.T.D.C.) has run into litigation right from the date that the M.T.D.C. had decided to give it to a private party to run the same. The first such an attempt was made by issuing a public advertisement in the Times of India, Bombay, on or about 28th December, 1988 calling upon the interested parties to submit tenders. The petitioner had submitted its tender on 23rd January, 1989. Revised offer was submitted on 13th March, 1989. Based on the offers received, the Board of Directors of M.T.D.C., on 25th March, 1989, had taken a decision in favour of the present petitioner. This action was challenged by the unsuccessful bidders by way of Writ Petition No. 1419 of 1989 on 10th May, 1989, pursuant to which revised offers were called which ultimately resulted into a decision again in favour of the petitioner on 5th June, 1989. This was communicated by the M.T.D.C. by its letter dated 6th June, 1989 to the petitioner calling upon it to execute the necessary documents.

2. On 12th June, 1989, a meeting was held between the petitioner and M.T.D.C. officials to furnish a draft lease agreement which, later on, came to be agreed to

on or about 10th July, 1989. Before it could be executed, one of the unsuccessful bidders filed a Writ Petition No. 1703 of 1989 on 28th July, 1989. The petitioner in the said petition was none else but the one who had earlier filed Writ Petition No. 1419 of 1989. The name is M/s. Dalvi Builders Private Limited. That petition came to be disposed of by an order of dismissal on 7th September, 1995 at page 63. All throughout the period, by a reasoned order, the learned Single Judge, who dealt with the matter, had issued interim orders and, therefore, in spite of tender of the petitioner herein having been accepted as per the said communication dated 6th June, 1989 and the draft lease deed having been agreed by and between the parties, it could not be executed.

3. After the said decision of 7th September, 1995 in Writ Petition No. 1703 of 1989, the petitioner herein started pursuing the M.T.D.C. to execute documents and hand over possession of the said hotel. Personal meetings took place and correspondence was also exchanged. Finally, a legal notice came to be issued by the petitioner on 17th June, 1996 as per page 73. This was replied to by the M.T.D.C. by way of its letter dated 20th June, 1996 signed by its General Manager, Mr. Bhide, who also acts as Company Secretary. Letter is at page 78. It was communicated to the petitioner by the said letter that the matter is being placed before the Board of Directors.

4. As nothing was heard from M.T.D.C. on 5th July, 1996, the petitioner once again demanded execution of the draft lease deed and possession by a legal notice dated 5th July, 1996. As nothing was heard from the M.T.D.C., the present petition is filed.

5. A copy of the writ petition having been served upon respondent M.T.D.C., they chose to file an affidavit limited solely to the question of admission of the matter and took a plea of writ petition being not maintainable as it is a matter of contract and, therefore, the petitioner should go for getting specific performance of the contract under civil law. In paragraph 4 of the affidavit, it was disclosed that "in any case with the passage of 7 years, all circumstances have changed and the conditions not possible to adhere to the terms and conditions laid down in 1989." It is reiterated in paragraph 5 of the said affidavit dated 2nd August, 1996 that there is no binding contract between the parties whereby the petitioner can invoke performance of the contract at any point of time, especially since the terms were formulated on the basis of the circumstances existing in 1989 which are duly outdated after the lapse of 7 years.

6. It is also adverted into paragraph 4 of the said affidavit that during the pendency of the said earlier petition the M.T.D.C. has started running the said hotel on its own and had carried out improvements by investing a sum of Rs. 14,00,000/- in the said hotel and added 10 air-conditioned rooms, installed T.Vs. and other amenities. As a result, M.T.D.C. has started earning profits and finds it fairly profitable to run the hotel. This was not the position in the year 1989 as they were running it in a loss. That fact is also stated in paragraph 4 of the said affidavit.

7. The matter was admitted and rule was issued on 2nd August, 1996. Later on, in course of hearing of the matter on 26th November, 1996, the learned Single Judge, who dealt with the matter, passed an order to the effect that as the said letter of 20th June, 1996 disclosed the position of the matter being placed before the Board of Directors of M.T.D.C. and would communicate the decision of the Board to the petitioner. In that intervening period, looking to the said affidavit dated 2nd August, 1996 of Mr. Bhide, the petitioner had already addressed a letter dated 19th October, 1996 making certain offers with respect to the capital investment and other related matters with a view to meet with any such financial outlay which the respondent M.T.D.C. might have made, so that it can recoup the same. The Ld. Judge directed the Board to consider that letter also.

8. The Board did take a decision, a copy of which is produced at Exhibit "R" page 81-A. The Board met on 12th December, 1996 and resolved to revoke the contract and not to accept the offer of the petitioner to take up the Pilgrims Inn Hotel, Shirdi, on lease. It also decided not to accept the offer contained in the letter dated 19th October, 1996 submitted by the petitioner. The Board clearly expressed to the effect that the M.T.D.C. shall continue to run the hotel itself.

9. In view of this development, amendments were carried out in the petition and parties, naturally, therefore, filed reply, rejoinder and submitted documents and finally the matter has been heard today.

10. So far as the petitioner is concerned, it is making efforts to get relief under this petition on the ground of promissory estoppel, ground of revocation being mala fide and malicious and suffering from arbitrariness.

11. Basically, therefore, the submission can be two fold; (i) promissory estoppel and (ii) action of the respondent M.T.D.C. suffering from vice of malice and arbitrariness.

12. On behalf of the petitioner it is contended that an offer in the form of tender having been accepted by the said letter at page 55, all that was to be done was to enter into a contract which as per the record was to confirm by and large a proforma set up by the respondent M.T.D.C. No doubt, by negotiations, as a necessity as would be pointed out by either side, there could be variation in the wording and/or condition or addition or deletion. In this background submission, therefore, is that when the situation had reached that stage though admittedly the document is not signed, it could be kept in mind while considering the action of revocation.

13. For this purpose, the document contained amongst other things is relied upon which cast an obligation on the part of lessee non fulfillment of which may result into cancelling the lease. It is contained in Clause 20 on page 32. It was, therefore, pointed out that having been reached that stage, still M.T.D.C. wanted to back out of the contract, they had to bear in mind these circumstances shown in Clause 20 of the lease agreement and unless it is shown that any of the circumstances were not in existence, they cannot back out from the same.

14. In my opinion, it will not be necessary for considering the present dispute to keep this in mind the reason being that it being a part of lease transaction itself, it will be confined to the existence of lease once it is entered into and possession of the hotel is made over.

15. The parties are at stage where no lease deed is executed and possession of the hotel is not handed over. The action of deciding not to enter into lease deed after accepting the offer is, therefore, required to be considered either on the test of arbitrariness or malice as submitted or the basis of the promissory estoppel.

16. It is true when the petitioner submits that the change of circumstances are the only one adverted to the resolution. The resolution is of 12th December, 1996 but the affidavit in reply dated 2nd August, 1996 filed by Mr. Madhav Bhide clearly discloses that the respondent-M.T.D.C. no longer desires into the contract under the lease. Their communication was in the year 1989, when the exercise was carried out when the hotel was running at a loss. The turn over of the hotel was somewhere around Rs. 32 lacs. During intervening period and pendency of the said petition between 1989 to 1995, the hotel was being run by M.T.D.C. After improving the amenities and making investment of Rs. 14 lacs, the M.T.D.C. was able to raise its turn over to the tune of about Rs. 65 lacs. This portrayed a very rosy picture for the future of the venture.

17. In other words, what is indicated is that the decision taken earlier of handing over the hotel to an agency to run the same on lease basis was loss and lack of experience, but because of the said intervening period of 7 years when the M.T.D.C. itself run the hotel, it could make the venture profitable and, therefore, a departure from the policy of leasing out a hotel and retaining it by itself.

18. It is this action which is under challenge and that is required to be tested. The M.T.D.C. is no doubt a corporation being formed to primarily look after the interest of tourists to promote tourism in the State of Maharashtra. As a part of it, it may have its own hotels and would certainly be authorised either to run itself or to hand it over to a private agency. In the instant case, in 1989, it had decided to hand it over to a private agency. But for the intervention of the said litigation, it would have been so handed over and there would have been no controversy between the parties. The changed circumstances that are sought to be relied on by M.T.D.C., therefore, are to be found in the said period of 7 years and its nothing else but the fact that the M.T.D.C. had run the hotel itself and had succeeded in making profit.

18A. If a Government Company formed for a substantial objective like promotion of tourism as in the instant case is found, happens to earn profit in the process, there is nothing wrong in it. They are supposed to be a viable corporation themselves. The problem that arises is that about 7 years back, it had decided to lease out this venture to a private party and because of the litigation, it had decided to reverse its decision. From the point of view of the M.T.D.C., therefore,

all that it has done is to retain the hotel itself and not to lease out. Though it had agreed to do so 7 years back.

19. Action is described to be arbitrary and unreasonable because according to the petitioner, the aforesaid decision on the background of profitability would indicate only one thing that if it is a loss making proposition, the private party should take the hotel on lease, run the same and assure the M.T.D.C. of profit irrespective of the fact that whether private party makes profit or not. If one turns to the Minutes dated 25th March, 1989 page 35, minimum return has to be guaranteed coupled with certain percentage of the total turn over. The lease proposition was, therefore, ideally suited to the Corporation so far as the hotel is concerned as it would get a fixed income from the lessee without having to bother on day-to-day basis to run the same. This would necessarily be the position whether the lessee earns profit or not. No doubt ,if he does not earn profit, there are provisions indicating that the commission may be reduced to with which one may refer to the lease. There is a basic minimum return guaranteed to the M.T.D.C.

20. Earlier resolution as rightly pointed out by the learned Advocate for the petitioner and the minutes under consideration at page 35 are noted very elaborately and systematically. Likewise, Exhibit I page 48 also makes very elaborate calculation. After examining as many as four offers on the second occasions, on merits when it was found that the present petitioner has offered a better bid, the M.T.D.C. accepted it One of the relevant considerations for the purpose was that the petitioner is already in hotel business and has good experience to run a hotel which they were doing in the city in the name of Ambassador Hotel. The petitioner is also having a hotel at Aurangabad and Madras.

21. This is one of the factors that had gone into for consideration of the policy decision of leasing out a hotel. One is profit and the other is an experience of the hoteliers to take over the hotel and assure a minimum income. On this twin factor, the offers were tested and offer of the petitioner was accepted. On the judicial scrutiny also, it reveals that the petitioner challenged the decision in the form of minutes followed by the letter of acceptance which has been defeated when Writ Petition No. 1703 of 1989 came to be dismissed.

22. The circumstance, therefore prevailing at the time when the offer was accepted, it was in two fold. One is that the M.T.D.C. did not have experience in hotel business and the other one is that they were running it at a loss. In this background if the said resolution is read coupled with an affidavit, the circumstances are that the M.T.D.C. has run the hotel almost 7 years and he started earning profit.

23. The petitioner, therefore submitted that this is nothing but an attempt on the part of the M.T.D.C. how to turn around and say no to the petitioner, who has fought all along with them almost for 7 years and reasonably expecting to get

the lease deed executed in its favour at the end of litigation and if finally not getting it, the question of promissory estoppel would arise.

24. In support of the claim, the respondent M.T.D.C. submitted that so far as the promissory estoppel is concerned, the petitioner has not shown anything, by way of material placed on record, that an action was taken pursuant to the alleged promise. Nothing is shown on record that the petitioner has suffered damages or losses and is likely to suffer the same if the lease is not granted.

25. Branching out from it, as an independent submission, it was urged on behalf of the respondents that looking to the nature of controversy between the parties, the suit is the only remedy and they opposed the admission of writ petition on the ground that the suit being the only remedy, the writ petition would not lie. It has categorically been stated on behalf of the M.T.D.C. that the submission of filing of a suit is not made on the point of alternative remedy but the submission is clear to the effect that the suit could be the only remedy under the circumstances. In support of the submission, the learned Advocate appearing on behalf of the respondents cited section 10 of the Specific Reliefs Act, 1963 and has relied on the same provisions which are to the effect except as otherwise provided, the specific performance of any contract is in the discretion of the Court and it may be so exercised when there exists not for the actual damage because by non performance of the act agreed to be done. In the instant case, apart from the fact that there is standard for ascertaining the actual damages, there is nothing to indicate whatsoever the damages suffered. In any case, this aspect can be gone into from effectively and properly only in a suit where material can be tested by cross examining the witnesses. No doubt, the learned Counsel is aware of the first explanation below that section where the breach of a contract to transfer immovable property is involved. However, he submits that this being rebuttable presumption, that will have to be left to a Civil Court where alone on proper examination of this presumption, the same can be dealt with on legal evidence.

26. The Ld. Advocate for the M.T.D.C. also refers to section 14(1)(a)(o) where there is a bar on specific performance. The first one refers to the compensation in terms of money is an adequate relief and the second one refers to a contract which in its nature is determinable. It being a lease transaction, according to the Counsel, a contract is determinable. Necessarily, therefore, the damages can be ascertained on his submission. Section 20 sub-sections (1) and (3) are also relied on. Again there is a discretion in grant of decree of specific performance as merely because it is lawful to do so, the Court is not bound to give it as per the said sub-section (1). Sub-section (3) also says that the discretion to decree specific performance has properly to be exercised and, in any case, the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. The submission is that apart from it being a contract capable of specific performance, there is nothing to indicate that the petitioner has done substantial acts or suffered losses.

27. The learned Counsel is very much aware of the fact that this being the matter under writ jurisdiction, the provisions of the Specific Reliefs Act, as such may not apply but what he is saying is that if under the law of Specific Reliefs when the Court may not grant a decree for specific performance and the respondents succeed in the petition to point out that there is a possibility of denial of decree of specific performance, there could not be issue of any writ directing the respondents to enter into the contract. In short, according to the respondents, no mandamus could be issued in the aforesaid back ground.

28. Having taken down the fact at the rival submissions. I will now turn to a decision cited at the bar. On behalf of the petitioner, citations are relied upon. They are (i) Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , (ii) Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , (iii) Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , (iv) Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., , (v) Delhi Cloth and General Mills Ltd. Vs. Union of India (UOI), . The first three authorities are with regard to the question as to how fairness/good arbitrariness and how the action of a public body-an authority which can be considered to be State under Article 12 of the Constitution of India has to be tested.

29. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , a reliance was placed on paragraphs 12 and 13 at pages 1036 and 1037. It says that every action of the State or its instrumentality of the State in exercise of its executive power must be informed by reason. This necessarily follows that it has to be fair in a public interest. In para 13 of the said report, it has been held that existence of power of judicial review however depends upon the nature (of) and the right involved in the facts and circumstances of a particular case. It also refers to the fact that there can be "malice in law" which is a part of critical apparatus of a particular action in administrative law. Indeed, therefore, "malice in law" is part of dimension of the rule of relevance and reasons as well as the rule of fair play in action.

30. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , reliance was placed on paragraphs 16, 17, 18 and more particularly on paragraph 20 starting from pages 1038 to 1039. It emphasizes that the fairness must be there to the parties concerned, paragraph 18 refers to the fact of the case where by conduct of the parties for almost 18 years and stretching upto the period of 18 years, the contractual relations and abrupt stoppage of supply of lubricants to firm the petitioner was held to be bad. Clearly, therefore, it was a case of right emanating to the contract and, in that background, the fairness between the parties is referred to in para 20.

31. In Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , reliance was placed on paragraph 18 at page 549 and also paragraphs 20 to 25 and 27. It refers to the action of public body or its officers and makes it subject to Article 14 as also in furtherance of public good. Paragraphs 30 and 31 refer to public purpose and paragraph 36 lays down the test of reasonableness. Factually,

it involved the wholesale termination of appointment of Government Pleaders en bloc. This action would amount to right emanating a contract.

32. In Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , reliance was placed on paragraphs 7 and 8 at page 1604. It reiterates that in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet.

33. If one turns to the facts of the case, though the petitioners have claimed that they have a vested right, what emerges by their letter is merely an acceptance of tender, Advertisement inviting tenders was an invitation to the offer and the tender having been accepted, no doubt, there was an agreement between the parties that the offer of the petitioners to enter into lease transaction is accepted. This is an executory contract which is yet to fructify into a final transaction of lease deed coupled with handing over of the possession of the said hotel premises. Thus, from the point of view of a right which could be in favour of the petitioner, it appears that there is a right to get a document of lease and to obtain possession thereunder of the lease premises. If this is required to be tested on the aforesaid ground of fairness and arbitrariness into the circumstances which are brought about right from the date of the acceptance of the offer till the conclusion of the second writ petition in the year 1995, the stand of the respondents that the circumstances have changed, in my opinion, has to be accepted.

34. It may be reiterated here that when M.T.D.C. entered into a contract, it evaluated tenders while admitting the fact that the profit is not the motive but it wants to be assured of a fixed income especially when it was not possible for it to run the hotel on its own. Because of the pendency of the litigation, when this was thrust upon the M.T.D.C. , it in the process had come at a stage where apparently it gained confidence and started earning profits and, of course, as pointed out, also poured Rs. 14 lakhs for carrying out various improvements in the said hotel as also engaged 50 employees or more and thereby undertook liabilities as well if they decide to continue the operation of the hotel at their own. In the, aforesaid background, in my opinion, even on the test of fairness, it will stand. There is, therefore, no arbitrariness. It is by this very judgment, in my opinion the action will have to be upheld.

35. It may be noted here that when the affidavit in reply disclosed the factum of an additional investment, by the said letter dated 19th October, 1996 containing an offer to recoup the amount after working out book value of capital investment, so far as the M.T.D.C. is concerned, no doubt, the petitioner has acted bona fide in this regard. Therefore, an offer as referred to above, has not been accepted in the said resolution of December, 1996. When the resolution refers to the order of the Court and also to the said offer dated 19th October, 1996, pendency of the litigation and all attendant circumstances thereto must be before the Board and, if the decision is taken, in my opinion, it will be a policy

decision. This Court has to exercise its powers under writ jurisdiction and, therefore, will not sit in appeal to decide the same on the test of fairness, arbitrariness and informed decision. That having been done, the finding being in favour of the M.T.D.C., I hold that the petition fails on that count.

36. Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., is on the point of promissory estoppel. Reliance on paragraphs 6, 7, 8, and 9 at pages 850 to 852 was placed. Paragraph 11 of the Report clearly says that the action taken by the respondents on instrumentality of the State should be on principle which meets the test of reasonableness. Delhi Cloth and General Mills Ltd. Vs. Union of India (UOI), lays down that for applicability of the promissory estoppel, no detriment is necessary. What is necessary is that the party pleading estoppel should have acted on promise. Paragraph 24 of the judgment clarifies the concept of detriment. By virtue of these two decisions what emerges is that so far as the concept of detriment is concerned, it is not in form of loss or damage. If the party pleading estoppel has acted on promise, as culled out, the estoppel is available in its way.

37. In this regard, submissions were made on behalf of the petitioner firstly relying on the said promise viz. the letter of acceptance that they fought litigation all throughout, and secondly, the petitioner wanted the Hotel Pilgrims Inn at Shirdi, which was available to it in the form of the hotel of M.T.D.C. Because of the M.T.D.C.'s promise, the petitioner did not try for a similar venture in that area as at the end of litigation, the petitioner had a legitimate expectation of getting a contract which was agreed to be given to them. This was no doubt the contract of lease.

38. Over and above, the said offer of recouping the investment, so far as 50 employees are concerned, during the pendency of the petition and before it was heard, an offer has been made by the petitioner that to the extent necessary of the said employees, the petitioner would absorb in number required by them and to that extent, they will mitigate the liability of M.T.D.C. in that regard. So far as the fighting out a case is concerned, no doubt, both, the petitioner and M.T.D.C., were supporting the action in form of acceptance of tender in favour of the petitioner which was under challenge on behalf of the unsuccessful bidder. The M.T.D.C. was trying to justify its action as it had to, once for all get established so that in future, if there be any infirmity in this regard, they can on the basis of the judicial pronouncement, take the same into consideration in future. The petitioner was no doubt joining it and pursuant to the action, they fought in tandem for the reasons that it's offer was accepted. In my opinion, this cannot be said to be "acted on" because this was not emanating out of acceptance of offer but only unexpected development in form of a challenge raised by unsuccessful bidders. There is no alternative but to defend the same.

39. Now remains the question of not finding out another opportunity or starting a new venture of establishing of a hotel in the pilgrim town of Shirdi. If this action on the promise is evaluated on the factual background, the aforesaid two cases,

relying on the contract of granting loan to 4-Star Hotel, a venture was entered into by an agreement in performance of its statutory duty to advance the loan for construction of hotel and accordingly the construction of a hotel was started. There was a positive action in that regard. In second decision, the petition was based on the other ground viz. policy of concessional freight rate for transporting Neptha which policy was revived. In this background, while clarifying the concept of detriment, nothing by way of action has culled out and so far as the decision of the railway revised rate is concerned, it was upheld by the Hon''ble Supreme Court.

40. During the pendency of the petition when the petitioner has not done anything and have fought litigation, it is true that the petitioners can be said to be waiting for the final outcome of it. After the litigation ended between September, 1995 and June, 1996, and in the month of July, 1996, when the petitioners had filed writ petition after a period of almost 9 to 10 months, it could not be said that the petitioner has not taken any action. Even during the said period of litigation, this action, in my opinion will not help the petitioner in pleading the case of promissory estoppel because except for waiting, apparently they have done nothing. There is nothing on record to show that whether any other opportunity was available with them to allow to go relying upon the assurances or promises or that it was feasible for them in the meantime to start a venture of this nature but because of this promise, they did not do so. This aforesaid decision also therefore does not help the petitioner.

41. On behalf of the respondent, it was strongly urged that the petitioner ought to have filed a suit and that was the. only remedy available to them. Coupled with this, may be taken as submissions based on the statutory provisions of Specific Reliefs Act. I do not accept either of these contentions because the jurisdiction of this Court under Article 226 of the Constitution is definitely right and the stand of the State authority or its instrumentality, is to be tested. For consideration of the stand, at best filing a fresh suit is an alternative remedy, writ cannot be a remedy. So far as the petition is concerned, it fails.

42. After the order was dictated. Mr. Jhangiani, the learned Advocate for the petitioner has requested that the interim order directing the respondents not to transfer or hand over the hotel for running to any other party and keeping the hotel running with them be continued for 12 weeks. It is continued for a period of 12 weeks as requested.