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**(2013) 10 BOM CK 0204**

**In the Bombay High Court**

**Case No : Arbitration Petition No. 1153 of 2013**

M/s. Parekh Holdings

APPELLANT

Vs

Mohamed Yusuf Trust and Others

RESPONDENT

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**Date of Decision : 10-10-2013**

**Acts Referred:**

**Citation : (2014) 2 BomCR 188**

**Hon'ble Judges : Roshan Dalvi, J**

**Bench : Single Bench**

**Advocate :** S.U. Kamdar, Mr. Chirag Mody, Mr. Munaf Virjee and Mr. Rishikesh Soni instructed by DSK Legal, for the Appellant; Anuj Narula instructed by . J. Narula and Associates for Respondent Nos. 1 to 6, Mr. Chirag Shah, Mehul Shah instructed by . Mr. Parag Shah, for the Respondent

**Final Decision : Disposed Off**

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## **Judgement**

Roshan Dalvi, J.—The petitioner claims injunction u/s 9 of the Arbitration and Conciliation Act, 1996 against respondent No. 1 who is the trust and respondent Nos. 2 to 7 who are trustees of respondent No. 1 trust pending the arbitration invoked by the petitioner against selling, mortgaging, transferring, encumbering, alienating, disposing of or creating any third party rights or granting any development right or parting with possession of the property called Nawab House/ Nhava House, 65, Maharishi Karve Road, Mumbai-400 002. The parties have entered into a development agreement on 9th April, 2005 pursuant to the trustees of respondent No. 1 Trust having passed a resolution by majority in terms of the deed of trust under which they are appointed inter alia for executing such agreement.

2. A resolution has been passed in the meeting of the Trustees dated 9th September, 2004. There are six trustees of respondent No. 1 trust. Respondent Nos. 2 to 6 attended the meeting. The respondent No. 7 was absent despite notice. All the respondents who attended the meeting except respondent No. 6 agreed to execute the development agreement.

3. The development agreement dated 8th April, 2005 was in fact executed by respondent Nos. 2 to 5 who received the earnest of Rs. 5 lakhs thereunder. The agreement recited the possession of the owners, the suit filed against the illegal occupant of the disputed premises for eviction and the fact that the building was in a dilapidated and highly dangerous condition and on the verge of collapse. It appeared that the respondent No. 7 was not agreeable to settle with the petitioner to develop and accordingly it is recited that the petitioner represented to and assured the owners that it would be in a position to arrive at a settlement with respondent No. 7 as also another illegal occupant (with whom the dispute has since been settled) to commence the development.

4. Under clause 2 of the said development agreement respondent Nos. 2 to 6 being the owners declared that they had notified the petitioner as the developer that the petitioner is granted development rights under the said agreement subject to the order of this Court. If the order has not been obtained or if this Court refused or declined to pass the order, the agreement was to stand cancelled and terminated without any claim of the developers against the owners for the costs incurred by the developers of the development.

5. The agreement sets out the separate and specific rights of two of the trustees in clause 2(e).

6. Clause 2(b) specifies that 11 flats and 4 car parking spaces to be provided to the respondents.

7. Under clause 4(a) the petitioner was to settle with the illegal occupant (which has since been settled at Rs. 1.32 crores).

8. Under clause 4(b) the petitioner was to be responsible and liable to settle and compromise with respondent No. 7 who is stated to be in occupation of a tenanted premises.

9. Under clause 8(a)(i) Rs. 5 lakhs is paid as the earnest and Rs. 5 lakhs has to be paid within seven days of the grant of the order of this Court sanctioning the grant of development rights under the agreement.

10. Under clause 8(b) if the Court failed or refused sanction within 36 months the earnest amount would have to be refunded.

11. There are various other covenants to be performed by the parties to the development agreement with which we are at present not concerned. The development agreement was executed by the aforesaid four trustees respondent Nos. 2 to 5. In this petition, however, all the trustees, the trustees who then agreed to develop the suit property as also the trustees who even all the time did not so agree have together claimed refusal and inability to develop on various grounds which must be considered separately thus:

(I). Development Agreement expired by efflux of time:

12. The respondents claim that the agreement has expired and the arbitration

invoked thereunder has become infructuous and have consequently resisted the petitioner's claim. This is essentially under clause 2 of the development agreement. Clause 2 runs thus:

2. The owners have notified the Development and the Developers have accepted and agreed that under the Deed of Trust the owners are required to file a petition and obtain appropriate order from the Hon''ble Bombay High Court sanctioning the grant of the development rights to the Developers. Accordingly the grant of the development rights herein to the Developers is subject to the Hon''ble Bombay High Court passing such an order, if by the expiry of thirty-six months from the date of execution of this agreement the order has not been obtained from the Hon''ble Bombay High Court or the Hon''ble Bombay High Court has refused or declined to pass an order sanctioning the grant of development rights, then (subject to the parties then being mutually agreeable to file an Appeal from such order), this agreement and grant of the development rights to the Developers shall forthwith stand cancelled and terminated and the Developers shall have no claim whatsoever against the owners, the tenants and/or in respect of the said property and/or in respect of any costs or expenses incurred by the Developers in respect of the said property and the development.

13. The trust is described as the owner in the agreement and the trustees are shown as the tenants. It is the obligation of the trust as the owner to file the petition to obtain the sanction of this Court. This would be the necessary statutory sanction u/s 36 of the Bombay Public Trusts Act, 1950. The trustees would have to apply for such sanction on behalf of the trust. The development rights would naturally be only subject to the order of this Court. The trustees on behalf of the trust have not applied for such sanction. The obligation is not performed. The trustees claim that the grant of development rights being subject to this Court's order and it not having been obtained, the agreement has become infructuous and un-enforceable. It is rightly argued on behalf of the petitioner that the acceptance of this argument would reflect that the party in breach would claim that upon its breach the agreement stands cancelled, but that he is not liable. That would be an absurd construction of law. It is argued that, if an application is made by the trustees on behalf of the trust and is not sanctioned by the High Court for whatever reason, the agreement would stand cancelled, but if the trustees themselves did not file the petition that they are required to file as set out in clause 2 of the agreement they cannot take advantage of their own failure and neglect. It is, therefore, argued that breach itself gives rise to the right to claim specific performance of that agreement.

14. It is argued on behalf of the respondents that clause 2 contemplates three situations in which the agreement would stand cancelled:

- (i) if the order has not been obtained
- (ii) if this Court has refused the order
- (iii) if this Court has declined the order

Hence it is argued that under both situations if the order/sanction is not obtained by the trustees or if the Court has refused or declined it the agreement cannot proceed. It is argued that this gives the right to the trustees not to apply and makes the agreement subject to that their act. A reading of clause 2 makes the agreement only subject to this Court's order. It does not make the agreement subject to the respondents' application. In fact the clause states that the respondents (owners-the trust) are required to "file the petition". Hence the only difference between point (i) and points (ii) & (iii) above is that point (i) is in passive voice and points (ii) & (iii) in the active voice with regard to the same aspect. Default on the part of the trustees to do what they were required to do viz. to file the petition, therefore, cannot be the reason for their claiming that the contract was at an end. If that interpretation has to be accepted in any contract having the reciprocal promises, the failure on the part of one party to perform his part of the promises would cause the contract to be cancelled rather than impose upon him the liability for such failure or breach.

15. The doctrine of frustration of contract has been clearly set out in Pollock and Mulla's Contract law 13th Edition Volume I at page 1124 thus:

#### DOCTRINE OF FRUSTRATION

Frustration signifies a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party and which renders performance of the contract by one or both parties physically and commercially impossible.

16. Taking from P.S. Atiyah an introduction to the law of contract, fifth edition page 231 it is further enunciated in Mulla's law of contract thus:

Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration.

17. It would have to be seen in the arbitration whether the trustees contributed to the impossibility. If the trustees made a bonafide application and the Court refused it, seeing that the sale was not in the interest of some of the trustees or some of the beneficiaries, the respondents as the trustees or the trust would not be in breach. If the trustees defaulted in making the application itself they may be responsible for such default.

18. It is argued that obtaining the sanction of the Court was a contingency upon which the contract depended and consequently u/s 35 of the Indian Contract Act, 1872 the contract became void when at the time specified in clause 2 the sanction of this Court was not obtained. It may be mentioned that the sanction of the Court is the requirement of statute and hence not an uncertain event specified in the contract which would render it void u/s 35 of the Act.

19. In fact a petition came to be filed and affirmed by the respondents in May, 2006 but was not prosecuted.

20. The development agreement was until then unregistered. It came to be registered under the deed of confirmation dated 7th August, 2006, a day prior to the execution of the supplemental agreement. Such registration is by respondent No. 2 as a Chairman of the trust for himself, and also for respondent No. 3, 4 & 5.

21. The parties entered into a supplemental development agreement on 8th August, 2006. The respondents inter alia further agreed to amend the deed of trust to procure this Court's sanction. The entitlement of the parties mentioned in the agreement came to be altered in view of the alternate conditions of grant of FSI by the Municipality, but with which at present we are not concerned.

(II). Act of all trustees:

22. It is the grievance of the respondents that all the trustees have not sought to develop the disputed property in the execution of the trust as required u/s 48 of the Indian Trust Act, 1882 which enjoins the trustees not to act singly. However that provision is excepted where the instrument of trust otherwise so provides. The deed of settlement of the disputed property under the indenture dated 29th April, 1929 provides for trustees to act by a majority under clause 20 thereunder. Such act would be in relation to "every question" which would have to be decided by a majority. In case of casting of votes, the Chairman would have a casting vote. The question with regard to the development of the disputed property could also be decided by a majority of the trustees. The meeting of the trustees dated 9th September, 2004 shows the decision to execute the development agreement within 30 days of that date taken by a majority of trustees, there being six trustees of the trust, five of whom attended and four of whom voted in favour of such a question. The development agreement was also signed by four out of the six trustees on 8th April, 2005. The deed of confirmation was signed by three trustees including the Chairman on 7th August, 2006. This would make an equal number of trustees execute the deed of confirmation giving the Chairman the casting vote. Such casting vote of the Chairman would make it the decision of the majority. Consequently the act of all the trustees is not required. The respondent No. 7 who specially did not attend the meeting despite receipt of the notice of the meeting came to be bound by the decision of the majority of the trustees taken on 9th September, 2004, which resulted in the development agreement and the supplemental development agreement.

(III). Sale of property:

23. It is also argued that under clause 5 of the deed of settlement dated 29th April, 1929 the disputed property was settled to be used for the residence of the settler and his wife during their life time and thereafter by the successor of them followed by their descendants after the last of whom it was settled to be used for charitable purpose. Though such a settlement may be legal though in perpetuity u/s 4 of the Musalman Wakf Validating Act, 1913 read with u/s 1 of the Indian Trusts Act, 1882, the said clause is subject to clause 14 of the deed of settlement allowing the sale of any immovable property forming a part of the Wakf

properties, of course with the leave of this court since that was a statutory requirement. The disputed property is shown to be the property forming a part of the Wakf properties being shown at item No. 24 in the first and the second schedule to the Deed of Settlement dated 29th April, 1929.

24. It is argued that the descendants for whom the property has been settled for residential purpose are 16 in number out of whom 6 are the trustees. The agreement for development cannot be allowed to be executed if it was not in the interest of the beneficiaries who are the descendants of the settlor and his wife. It is precisely for that purpose that the trustees who agree to grant development rights must apply as they were enjoined for the sanction of this Court. It is only for this Court to determine whether or not the development agreement would be against the interest of the beneficiaries. It is not for the trustees who agreed to grant development rights and entered into such a development agreement or the trustee who absented himself to contend that the development agreement may not be in the interest of the descendants who are the beneficiaries under the settlement. In any event it is shown from another trust petition filed by the trustees themselves in respect of another property forming a part of wakf properties in this Court in 2006 that several of the beneficiaries have also agreed to sell some of the wakf properties.

25. It is settled law that any document has to be read as a whole. The aforesaid clause 5 of the settlement deed granting the right of residence to the descendants of the settlor is, therefore, subject to clause 14 of the settlement allowing the trustees to sell that property amongst others as one of the wakf properties with the leave of this Court.

(IV). Barred by Limitation:

26. It is also argued that the action under the development agreement is barred by the law of limitation, the agreement having been entered into as far back as in 2005 and requiring the permission to have been obtained within 36 months thereof i.e. by 7th April, 2008 and the arbitration having been invoked in 2010. It is argued that the arbitration is invoked for specific performance of the development agreement dated 8th April, 2005 read with the supplemental agreement dated 8th August, 2006. Under Article 54 of Schedule-I of the Limitation Act, 1963 the limitation period is 3 years from the date fixed for the performance of the contract or the date when the performance is refused. The date fixed for obtaining the sanction of this Court being 36 months from the date of the development agreement was 7th April, 2008, it is from that date that the limitation period would begin to run. It would end when the arbitration is invoked. Even otherwise since 36 months" time is given to the trustees to obtain the sanction of this Court, they would commit a breach only if they did not obtain the sanction within that time. Hence only at the end of such period i.e. 7th April, 2008 that the breach would be complete and the petitioner would receive notice thereof. Hence even in that event the period of limitation would begin to run only on and from 7th April, 2008. The period would run until the arbitration is

invoked. The arbitration has been invoked in 2010. The petitioner's claim cannot be stated to be barred by the law of limitation.

(V). Dilapidated Structure:

27. It is argued that the development agreement proceeds under footing that the discretionary property is a dilapidated structure. The petitioner maintains that fact. The petitioner has shown various notices issued by the MMC u/s 354 of the MMC Act to carry out repairs and/or to demolish the structure as it was shown to be in a dangerous condition. Of course, the development agreement is not dependent or conditional upon the structure being dilapidated. The development agreement would have to be performed and could be enforced even if the structure was not so.

28. The respondents have disputed that the structure is dilapidated. The criminal prosecution in the Magistrate's Court is being defended. The respondents have produced photographs of the structure. Indeed the structure seen as a whole cannot be taken to be dilapidated. Parts of it may require repairs. In fact the structure is admittedly a grade-II Heritage structure and may deserve to be protected as per law in that behalf against complete demolition. That aspect may be considered by this Court whilst granting the sanction for the execution of the agreement for development rights which would consider the demolition of the Heritage structure in accordance with law in that behalf. Counsel on behalf of the petitioner has also conceded that demolition of the structure pursuant to the enforcement of the covenants under the agreement for development rights would abide such law. That aspect would have to be decided in the arbitration which is invoked and may be so agitated. However that also does not ipso facto make the development agreement void or unenforceable.

(VI). Arbitrability:

29. It is argued that the dispute between the parties for which specific performance is claimed by the petitioner is not arbitrable as it is an action in rem, it being against all the descendants of the settlor who are not parties to the development agreement. Similarly it is argued on behalf of respondent No. 7 that he not being a party to the agreement cannot be bound by any order in arbitration or otherwise under the agreement. The contention is wholly fallacious. The beneficiaries as also respondent No. 7 would be bound by the acts of the majority of the trustees under settlement deed dated 29th April, 1929. This would be subject to the supervision of the Court in granting or refusing sanction or leave to develop the property, demolishing the structure and to ultimately transfer the title. Subject to that the action for specific performance is an action in personam and is arbitrable as a discretionary relief to be granted as held in the case of Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, and is consequently not excluded under paragraph 36 of the judgment in the case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, . Similarly the contention that no award could be passed against the

beneficiaries or respondent No. 7 as the trustee upon the analogy laid down in the case of Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, is misconceived. In that case two companies, the board of directors of both of whom resolved to contract though one of the companies only signed the agreement. The Court held that there cannot be an award against the party who had not signed the contract. The minority trustees who may not sign the contract upon the majority of trustees signing the contract would be bound by the decision of the majority. There would not be another party who is not a party to the contract. Similarly the reliance upon the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, is equally misconceived as the judgment in the case of Sukanya holds that the party to a suit who is not a party to the arbitration agreement cannot be referred to arbitration. In this case the respondent No. 7 or the beneficiaries individually cannot be referred to arbitration. The arbitration would only be between the two parties; one of the parties is the developer, the other is the trustees who signed the contract representing the trust. The arbitration between them can commence as per the agreement in that behalf.

(VII). Tenancy:

30. It is also contended that the respondent No. 7 is the tenant and the rights of tenants cannot be arbitrated as excepted in the case of Booz Allen (supra). The development agreement shows the trust as the owner and the trustees, who reside in the disputed property, as the tenants. It is not only respondent No. 7 who is shown as the tenant. Even respondent No. 4 is shown as a tenant of two flats and servants' quarters in Annexure-C to the development agreement. The reference to such status does not impinge upon the arbitration proceedings as there is no dispute raised between the trustees as tenants and the trust as the landlord.

(VIII). Area:

31. It is also contended that the respondent No. 2 who was to be given a carpet area of 4555 sq. ft. as shown in Annexure-C to the development agreement is to be given only carpet area of 2000 sq. ft. in the new construction under the supplemental agreement. The area to be provided to the trustees as the tenants of the trust or otherwise was to be in terms of the FSI that the property was capable of at the time of the agreement. It is stated that the FSI of the property was two in 2005 when the development agreement was entered into. Pursuant to the Development Control Regulations 1992 (D.C. Rules) the property later had 1.33 FSI. Consequently the net area to be given by way of consideration in kind under the development agreement came to be amended under the supplemental agreement. Hence each of the trustees/tenants would be entitled to a proportionate area in the new construction under the development agreement. That also is a matter which would be considered in arbitration, but should not concern this application. It is only set out as it is agitated on behalf of the respondents.



(IX). Amendment of the Trust Deed:

32. It is argued that it was resolved by the trust on 22nd February, 2007 to ratify the circular/resolution of the trust dated 8th February, 2007 to amend clause 5 of the deed of trust so as to obtain the views and consent of all the trustees and beneficiaries for the development subject to the sanction of this Court. Whatever be the resolution of the meeting the trust, the deed of trust has not been amended.

33. Consequently clause 5 read with clause 14 of the deed of trust would prevail.

34. The petitioner contends that it has performed its part of the contract in getting the illegal occupant vacated for which it has spent Rs. 1.32 crores and has been put in joint possession of the disputed property in a suit filed by the trust against the said occupant upon settlement with the occupant. Of course, that itself would not entitle the petitioner to claim specific performance, if otherwise the agreement has expired efflux of time or is otherwise void and unenforceable.

35. The agreement admittedly executed between the parties is prima facie seen to be valid and in force. The execution of the agreement as also the supplemental agreement and the confirmation deed are seen to be within the authority of the trustees acting by majority sought under the aforesaid deed of settlement binding them in respect of the reciprocal promises and the covenants contained therein. The action is not seen to be barred by the law of limitation. The arbitration would decide the rights, liabilities, duties and obligations of the parties under the agreement executed by them. The arbitration may also consider the contention of the respondents with regard to the Heritage status of the structure. Pending the arbitration, therefore, the disputed property is required to be protected against further alienation, though the defence of the respondents themselves would rule out any alienation which they would be capable of. Nevertheless since the respondents have contended that despite those facts they desire an order of injunction on merits, the merits of the matter have been considered. The petitioner has seen to have been made out prima facie case for grant of the reliefs prayed for.

36. There shall be relief in terms of prayer (a) of the petition pending the arbitration proceedings.

37. The respondents shall not sell, alienate, encumber, transfer or create any third party rights or part with possession in respect of the disputed property Nawab House at Maharishi Karve Road, Mumbai-400 002. The petition is disposed off accordingly.