
(2012) 10 BOM CK 0017
In the Bombay High Court
Case No : Arbitration Petition No. 560 of 2012

Navin Makhija and Others

APPELLANT

Vs

Tulsi Bhimjiyani and Another

RESPONDENT

Date of Decision : 16-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 42, 9
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Specific Relief Act, 1963 — Section 22

Citation : (2013) 4 BomCR 791 : (2013) 1 MhLj 173

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : S.U. Kamdar, assisted with Mr. Chirag Balsara, Mr. P.K. Shroff, Mr. D.V. Deokar, Mr. V.P. Shroff, Ms. Jaylaxmi Gaud, Ms. Rashmi Jha, instructed by P.K. Shroff and Co, for the Appellant; Nitin Thakkar, A/w. Ms. Snehal Shah, Ritesh Jain, Ms. Anita J. Tatani, instructed by . M/s. Purnanand and Co., for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this petition, the petitioners seek interim measures u/s 9 of the Arbitration and Conciliation Act, 1996. Admittedly, the Arbitral Tribunal has been already constituted in the above matter. The petitioners have made statement before the Arbitral Tribunal that this application would be withdrawn. The petitioners have taken out Chamber Summons in this proceedings (1215 of 2012) for seeking certain amendments. The Learned Counsel appearing for the petitioners submit that relief's in the Chamber Summons are granted and the petitioners are permitted to withdraw this petition.

2. The Learned Senior Counsel appearing for the respondents, however, strongly oppose this petition on the ground that this court has no territorial jurisdiction to entertain, try and dispose of this petition and consequently this court has no jurisdiction to entertain the Chamber Summons filed by the petitioners. In view of the preliminary objection raised by the respondents this court shall first decide

whether this court has jurisdiction to entertain, try and dispose of the present petition. Some of the relevant facts touching this issue are as under:-

3. By an agreement dated 21st February, 2002 executed between one Mr. Fardeen Nadir Shah Mulla and four others and the Respondent No. 2, the respondents became entitled to a property situated at Village Majiwade, Thane admeasuring about 97,891.24 sq. mtrs.

4. On 3rd October, 2010, agreement in the form of Term Sheet was executed at Mumbai between the Petitioners and the respondents recording the agreement for joint development of the property and to form the LLP and to have development agreement in favour of LLP to be executed on or before 31st December, 2010 on the terms and conditions contained in the said agreement.

5. It is the case of the petitioners that on 22nd September, 2010, the petitioners paid a sum of Rs. 5,04,00,000/- to the 2nd respondent.

6. On 3rd October, 2010, the petitioners paid a sum of Rs. 10,00,00,000/- to the 2nd Respondent. On 3rd November, 2010, the petitioners paid further amount of Rs. 1,01,00,000/- to the respondents and on 16th November, 2010 a sum of Rs. 20,00,00,000/-.

7. By notice dated 27th April, 2012, the petitioners invoked arbitration clause and nominated Shri Justice F.I. Rebello (retired) as a arbitrator. The arbitral tribunal was constituted. The proceedings before the arbitral tribunal are pending.

8. The Learned Senior Counsel appearing for the respondents made following submissions:-

(a) This court has no territorial jurisdiction to entertain this petition.

(b) The proceedings filed by the petitioners is for land which is situated outside Mumbai and thus this court has no territorial jurisdiction to entertain this petition.

(c) The petitioners have filed title dispute in respect of the suit property.

(d) In view of Section 42 of the Arbitration and Conciliation Act, 1996, if this application is entertained in this court which does not have jurisdiction, all subsequent applications arising out of that agreement shall also have to be filed in this court which also would be without jurisdiction.

9. The Learned Senior Counsel for the respondents placed reliance on the judgment of Supreme Court in case of Adcon Electronics Pvt. Ltd. vs. Daulat and another 2001 (4) MLJ 469. Reliance is placed on paragraphs 9, 11, 12, 13, 15, 16, 17 and 18. The Learned Senior Counsel invited my attention to prayers (d), (g), (k) and (l) of the statement of claim in support of the plea that the claim before the arbitral tribunal made by the petitioners was for land for possession and also for adjudication of title in respect of the suit land. Relevant paragraphs are setout as under:-

9. Thus, it is clear that under clause 12 of the Letters Patent, the High Court in

exercise of its ordinary original jurisdiction will have power to receive, try and determine: (1) suits for land or other immovable property if such property is situated within the local limits of original jurisdiction of the High Court; or (2) all other cases (a) if the cause of action has arisen wholly within the local limits of the ordinary original jurisdiction of the High Court; (b) if prior leave of the Court has been obtained and the cause of action has arisen in part within the local limits of the ordinary original jurisdiction of the High Court; or (c) if the defendant dwells or carries on business or personally works for gain within such limits.

11. The question then arises as to what is meant by "suit for land". This expression has been interpreted by different High Courts as well as the Federal Court.

12. In *His Highness Shrimant Maharaj Yashvantrav Holkar of Indore vs. Dada Bhai Cursetji Ashburner* 1890 (14) ILR Bom. 353 a Division Bench of the Bombay High Court held that a suit for specific performance would not fall within the meaning of that expression. There the suit was filed for specific performance of an agreement to mortgage certain immovable property. The agreement was made in Bombay between the parties on January 8, 1883. The Divisional Court held, "it had jurisdiction" and granted decree. On appeal a Division Bench referred to an earlier judgment of that court in *Yenkoba Balset Kasar Vs. Rambhaji* 9 Bombay H.C. Rep. 13 which laid down that suit for land was a suit which asked for delivery of land to the plaintiff. The High Court also referred to the view of the Calcutta High Court in *The Delhi and London Bank Vs. Wordie* I.L.R., 1 Cal 249 263 construing that expression to mean, "substantially for land"--that is for the purpose of acquiring title to, or control over, land". It also noticed the view of a learned single Judge of the Calcutta High Court in *Sreenath Roy Vs. Cally Doss Ghose* ILR (5) Cal 82 holding that the court had no jurisdiction to make a decree in a suit for specific performance. The Division Bench of the Bombay High Court held that the suit was within the jurisdiction whether regarded as a suit for specific performance or to enforce equitable mortgage by deposit of title deeds as a court of equity in England could entertain it.

13. In *M/s. Moolji Jaitha and Co. Vs. The Khandesh Spinning and Weaving Mills Co. Ltd.* AIR 1950 (37) FC 83, there is divergence of opinion among the learned Judges of five-Judge Bench of the Federal Court in regard to the import of the expression "suit for land". Chief Justice Kania opined, "Taking the suit as a whole, one has to consider whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly". Justice Fazl Ali observed, "If I had really felt that I was called upon to decide it, I would have agreed with the line of cases in which it has been held that, broadly speaking, the expression "suit for land" covers the following three classes of suits: (1) suits for the determination of title to land; (2) suits for possession of

land; and (3) other suits in which the relief's claimed, if granted, would directly affect title to or possession of land. Justice Patanjali Sastri took the view, "The words in question, besides obviously covering claims for recovery of possession or control of land, are apt to connote also suit which primarily and substantially seek an adjudication upon title to immovable property or a determination of any right or interest therein". Justice Mahajan observed, "If an attempt is made to find a comprehensive definition of the phrase, it will eventually be discovered that it has created further complications. I therefore content myself by saying that where the nature of the suit is such that in substance it involves a controversy about land or immovable property and the Court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immovable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in the real sense of the term, then such a suit cannot fall within the four corners of this expression". He added, "In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a "suit for land"; but if the suit is simpliciter for specific performance, i.e., for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that the decree in it would operate on the land". In that view he expressed his agreement with the decision of the Full Bench of the Madras High Court in P.M.A. Velliappa Chettiar and Another Vs. Saha Govinda Doss and Others, . Justice Mukherjea perceived, "It seems to me fairly clear that the expression suit for land occurring in clause 12, Letters Patent, means a suit which is instituted with the object of establishing claims regarding title to the property or possession of it. Whether or not possession is claimed, if title to any immovable property is to be directly affected by the result of the decision, the suit would be a suit for land."

15. From the above discussion it follows that a "suit for land" is a suit in which the relief claimed relates to title to or delivery of possession of land or immovable property. Whether a suit is a "suit for land" or not has to be determined on the averments in the plaint with reference to the relief's claimed therein; where the relief relates to adjudication of title to land or immovable property or delivery of possession of the land or immovable property, it will be a "suit for land". We are in respectful agreement with the view expressed by Mahajan. J. in M/s. Moolji Jaitha's case (supra).

16. In a suit for specific performance of contract for sale of immovable property containing stipulation that on execution of the sale deed the possession of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is part of the decree of specific performance of contract. But in this connection it is necessary to refer to Section 22 of the Specific Relief Act, 1963 which runs:

22. Power to grant relief for possession, partition, refund of earnest money, etc. -

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

17. It may be seen that sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further relief's mentioned in clauses (a) and (b) thereof. Clause (a) contains relief's of possession and partition and separate possession of the property, in addition to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed. Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for.

18. In the instant case the suit is for specific performance of agreement for sale of the suit property wherein relief of delivery of the suit property has not been specifically claimed as such it cannot be treated as a "suit for land".

10. The learned counsel also placed reliance upon the judgment of Calcutta High Court in case of Raj Kumar Singhania Vs. Benoy Kumar Mazumdar and Others, of the said judgment reads thus:-

23. Having considered the rival contentions urged, this Court is of the view that there is more substance in the contention of Mr. P.K. Das, namely a claim for possession now sought to be introduced by way of an amendment should not be allowed. To my mind it is not a mere case of amendment which if allowed would divest the jurisdiction of the Court but a case where the facts evidence that the property being situate outside jurisdiction no relief of possession could initially have been claimed in the original proceedings as the matter would be admittedly beyond jurisdiction of the Court if such a prayer or claim incorporated. It is significant that with knowledge of this aspect of the matter relief under clause 12 of the Letters Patent and Order 2, Rule 2 was obtained by the plaintiff and

specifically stated that the plaintiff reserved his right to take appropriate action to claim possession of the suit premises. The present application for amendment is not one such appropriate action contemplated. As such, it cannot be said that there was any inadvertence or negligence or any such factors required to be considered when considering whether the plea for amendment should be allowed. It cannot also be said that there is any defective pleadings on record which is required to be cured as viewed in *Ganesh Trading Co. Vs. Moji Ram*, . The second aspect of the matter, of great significance is that Section 22 of the Specific Relief Act which is an enabling provision does not seek to interfere with the jurisdiction of a Court and the section itself enacts that "in an appropriate case" a claim for possession and ancillary relief's can be sought by way of amendment in order to avoid multiplicity of proceedings. In the instant case, the decree for possession could not have been asked for in the original plaint as the Court would be incompetent too entertain and try a suit for land and the legislature in enacting Section 22 did not override Clause 12 of the Letters Patent. As such, the expression "in an appropriate case" must necessarily mean and refer to a case where the plaintiff was competent to make a claim for possession and/or seek other ancillary relief's, to avoid multiplicity of proceedings. It was not the intention of the legislature to give jurisdiction to a Court which had none, and it would be travesty of justice to allow a prayer for possession to be brought into the pleadings in this circuitous manner, when admittedly the original Court lacked jurisdiction to do so, and the plaintiff well knew his limitations and, therefore, sought appropriate relief under clause 12 of the Letters Patent as also Order 2 Rule 2 so that appropriate action could be taken by him, if necessary, in further proceedings. In this view of the matter, any prayer for possession and any amendment relating thereto cannot be allowed and is refused. The Division Bench decision cited in is distinguishable and each case must be guided by its own facts. In any event in that case, the court was not required to construe section 22 of the Specific Relief Act. So far as the prayer for incorporating the prayer for decree directing the defendant No. 1 to make payment of Rs. 34,500/- and consequential relief's hereunder, the same arises out of the agreement which is the subject-matter of the suit and not being a new case and being a matter which is in issue between the parties namely, as to whether the agreement sought to be enforced is required to be specifically enforced, the same would be sustainable and such amendments are thus allowed. Mr. Mitra has expressly indicated to the Court that so far as amendments sought for in paragraphs of Annexure X(e3) to (e5) are concerned, he was not pressing for the same and as such the same are not required to be considered.

11. The Learned Senior Counsel Mr. S.U. Kamdar, appearing for the petitioners on the other hand submits as under:-

(a) The relief's claimed in the arbitral proceedings are for seeking specific performance of the agreement entered into between the parties. There is no dispute in respect of the title of the suit property. There is no prayer for

possession in respect of the land. The petitioners have claimed specific performance of the agreement which is admittedly executed at Mumbai. Petitioners have obtained leave under Clause 12 of the Letters Patent. This court, therefore, has territorial jurisdiction to entertain, try and dispose of this petition.

(b) From the averments made in the statement of claim filed by the petitioners before the arbitral tribunal, it is clear that the claim is for specific performance of the agreement and is not for land or for adjudication of the title.

12. In my view, whether suit is a suit for land or not has to be determined on the basis of the averments in the statement of claim filed before the arbitral tribunal. The Learned Senior Counsel Mr. S.U. Kamdar invited my attention to paragraphs 2.7 to 2.16 and paragraphs (3) to (10), paragraphs (34) to (45) and prayers (a), (b), (c), (d), (e), (f), (h) and (i) of the statement of claim. From the perusal of the averments and the prayers in the statement of claim filed before the arbitral tribunal, it is clear that the petitioners seek specific performance of the agreement entered into between the parties and the suit is not for land. In view of the fact that the suit agreement is entered into at Mumbai and the dispute has arisen in respect of the such agreement for which specific performance is sought before the arbitral tribunal, in my view, this court has jurisdiction to entertain, try and dispose of the present petition. This court has already granted leave under Clause 12 of the Letters Patent to the petitioners in view of the fact that the property is situated outside Mumbai.

13. There is thus no merit in the submissions made by the Learned Senior Counsel appearing for the respondents that this court has no territorial jurisdiction to entertain this petition and thus shall not be allowed to be withdrawn.

14. By a separate order passed by this Court the Chamber Summons has been allowed. Mr. Kamdar seeks liberty to withdraw petition. Petition is allowed to be withdrawn. Petition is dismissed as withdrawn. There shall be no order as to costs.