
(2013) 09 BOM CK 0203

In the Bombay High Court

Case No : Appeal (Lodging) No. 82 of 2013 in Notice of Motion No. 2055 of 2012 in Suit No. 1963 of 2012 and Notice of Motion (Lodging) No. 326 of 2013 in Appeal (Lodging) No. 82 of 2013

Shantilal J. Shah and Others.

APPELLANT

Vs

Jitendra Sanghavi and Others

RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Citation : (2014) 3 ABR 384 : (2013) 6 ALLMR 212 : (2014) 1 MhLj 193

Hon'ble Judges : M.S. Sonak, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Ravi Kadam, Mr. Chetan Kapadia, Mr. Tejash Shah and Mr. Ashish Rao instructed by M and M Legal Ventures, for the Appellant; A.V. Anturkar and Mr. Tanaji Matugade instructed by S.B. Deshmukh for Respondent Nos. 1 to 3, Mr. I.M. Chagla, Mr. Gaurav Mehta, Darshan Mehta and Mr. Naresh Chheda instructed by Dhruve Liladhar and Co., for the Respondent

Final Decision : Disposed Off

Judgement

D.Y. Chandrachud, J.—The Appeal arises from an order of a learned Single Judge declining relief in a Motion which was taken out by the Appellants in a suit for specific performance. The Plaintiffs are in Appeal.

Respondents 1 to 3 are the owners of a property known as Padmavati Sadan at Matunga, Mumbai. An agreement was entered into between the Appellants and Respondents 1 to 3 for development of the property on 25 September 2007. The agreement records that the building is a cessed building in the occupation of tenants/occupants and is in a dilapidated condition requiring heavy repairs and/or reconstruction or redevelopment. By the agreement, the owners conferred upon the Appellants full development rights. The total consideration for the agreement was Rs. 1.38 Crores in addition to which, as stipulated in Clause 2(b) and Clause 2(c) of the agreement, the owners were entitled to ownership rights in a carpet area ad-measuring 2000 sq. ft. of residential accommodation and of

800 sq. ft. for commercial use in the building which was to be constructed by the Appellants. Under Clause 6, the Appellants were to negotiate with the tenants/occupants by offering them permanent alternate accommodation on ownership basis or by a surrender of tenancy rights. The Appellants were to be entitled to effect a transfer of tenancy rights from the tenants/occupants.

Clause 11 of the Agreement provided as follows:

11. The Developers shall immediately commence the development work at their own costs and risk on the said property and make best endeavour to obtain Commencement Certificate within 6 months from the date of obtaining vacant and peaceful possession of the entire property, which may be extendable mutually and complete the same within a period of 30 months from the date of obtaining Commencement Certificate from the MCGM time being the essence of the contract. The Developers shall endeavor to obtain Occupation Certificate from the MCGM within a period of 30 months from the date of obtaining Commencement Certificate. The Developers shall indemnify and keep indemnified the Owners in respect of breach of any of the terms and conditions of the sanctioned plans while commencing, continuing and completing the construction work on the said property and/or any terms of this Agreement"

Clause 20 provided as follows:

20. It is specifically agreed between the Parties hereto that, if for any reason the building plan could not be sanctioned and/or approved by the MCGM, then, in that event, this Agreement shall not come to an end or terminated. The Owners shall be entitled to retain the entire amount paid under this Agreement to them by the Developers as also the possession of the premises in their possession/occupation if not handed over to the Developers and the Development rights granted under these presents shall vest with the Developers herein forever.

Under Clause 22, an Irrevocable General Power of Attorney was to be executed by Respondents 1 to 3 in favour of the Appellants.

Clause 2 (e) stipulated that the consideration of Rs. 1.38 Crores was not to be refunded by the owners to the developers even if the developers do not complete or develop the property for any reason whatsoever.

2. In pursuance of the agreement, an amount of Rs. 1.38 Crores was paid by the Appellants. An irrevocable power of attorney was executed by the owners in favour of the Appellants.

3. Admittedly, the Appellants neither entered into any settlement with the tenants or occupants, nor did they commence construction upon the property. As a matter of fact, it is also not in dispute that the Appellants did not submit any building plans to the Municipal Corporation for sanction. In a letter dated 17 December 2010 addressed to the Income Tax Officer, the Appellants referred to the fact that there was "an extremely slow progress" or "no progress" in the implementation of the Development Agreement for the following reasons:

Since this Development Agreement was entered into three years ago, after which there has been an extremely slow or no progress mainly due to the global melt down in 2008 and also non-clarity from the government on the Redevelopment of the Cess Category Buildings followed by the negotiation with the tenants & ambiguity on the grounds of extra area being offered by way of increase in the Floor Space Index (FSI)

Therefore no development work has physically started.

4. Respondents 1 to 3 terminated the Development Agreement by a letter dated 4 October 2011. The ground for termination was that since the execution of the agreement, no steps had been taken by the Appellants for the performance of the obligations which were cast upon them of developing the property. The letter of termination also stated that the consideration of Rs. 1.38 Crores under the Agreement was made non-refundable and in addition they reserved the right to recover loss and damages for the delay on the part of the Appellants.

5. Since the Agreement between the parties contained an arbitration agreement, the Appellants instituted proceedings u/s 9 of the Arbitration and Conciliation Act 1996. By an ad-interim order dated 1 December 2011, a learned Single Judge declined the prayer for ad-interim relief but directed the owners to deposit an amount of Rs. 1.38 Crores prior to entering into any development agreement with a third party. The ad-interim order of the Hon"ble Mr. Justice S.J. Vazifdar reads as under:

It is true that an amount of Rs. 1,38,00,000/- was paid by the petitioners to the respondents. That however is not the only consideration. The petitioners were also entitled free of cost, to a part of the construction as stipulated in clause 2.

3. During the last four years, the petitioners have shown virtually no interest in the agreement. They state that they appointed an architect and negotiated with the tenants. There is nothing to indicate that any agreements have been entered into with the tenants. There has been absolute silence and inaction on their part.

4. The petitioners" reliance upon clause 20 is without any force. Clause 20 correctly construed would apply only if the approved plans had been submitted and could not be sanctioned and/or approved by the M.C.G.M. for reasons other than the petitioners" default. Any other construction would render this agreement extremely onerous to the respondents. It would in effect freeze their rights in respect of the property in perpetuity.

5. There is nothing on record which suggests that the respondents committed any default under the agreement. The petitioners never made a grievance about the respondents not having complied with their obligations therein. In these circumstances, it would be unfair to permit the petitioners to enforce the agreement after a period of four years of complete silence and inaction.

The petitioners" conduct indicates that they abandoned their interest in the agreement. It in any event virtually establishes that they were not ready and

willing at all material times to comply with their obligations. The mere fact that an amount of Rs. 1,38,00,000/- has not yet been refunded, makes no difference.

6. It is difficult to hold at this stage that the petitioners are not entitled to forfeit the said amount unless they do so under clause 20. For instance, clause 2(e) entitles them to do so even otherwise. Whether clause 2(e) constitutes a penalty or not is another matter. The ends of justice would be met by securing the petitioners' claim, if any, for refund of the amount of Rs. 1,38,00,000/-.

6. An appeal was filed before the Division Bench against the ad-interim order, which was disposed of on 16 April 2012. Before the Division Bench a statement was made to the effect that the owners had assigned their rights to the Fourth Respondent. It is not in dispute that on 22 December 2011 Respondents 1 to 3 entered into a Deed of Assignment of Lease-cum-Development Agreement for a consideration of Rs. 1.38 Crores with the Fourth Respondent. On 30 July 2012 the Petition u/s 9 of Arbitration and Conciliation Act, 1996 was withdrawn with liberty to file a suit and with the observation that the suit would be heard and disposed of on merits, without being influenced by any of the observations contained in the orders passed in the proceedings.

7. Thereupon a suit for specific performance was filed in which a Motion for interim relief was taken out. By the impugned order dated 19 November 2012 the learned Single Judge held that while the development agreement between the owners and the Appellants is capable of being specifically enforced, on facts, no case was made out for the grant of injunctive relief. The Learned Single Judge held that no steps were taken by the Appellants for negotiating or settling with the tenants. The Single Judge took notice of the admission contained in the Appellants' letter addressed to the Income Tax Authority in regard to the fact that there was an extremely slow progress or no progress allegedly due to the global melt down and also for the absence of clarity from the Government. The Single Judge held that the contention in the reply to the notice of termination that the owners had not cooperated was belied by the circumstance that in the four years since the execution of the agreement, not a single complaint was addressed to the owners to that effect. In sum and substance, the Court declined to grant interim relief finding that no prima-facie case has been made out since the Appellants have failed to comply with their obligations under the agreement for a period of more than four years by failing to negotiate with the tenants or even to submit building plans to the Municipal Corporation.

8. The judgment of the learned Single Judge has been questioned in this appeal, the submissions of learned senior counsel being that:

(i) Under the agreement between the Appellants and the owners, an absolute right to develop the property has been conferred upon the Appellants forever;

(ii) Clause 20 of the agreement stipulates that even if the building plans are not sanctioned or approved by the Municipal Corporation, the agreement was not to end or be terminated and the only right of the owners would be to retain

possession of the premises in their occupation, if not already handed over;

(iii) Hence, there was an equitable assignment of the interest of the owners to the Appellants; and

(iv) In terms of Section 202 of the Contract Act, 1872, the Irrevocable General Power of Attorney was coupled with an interest in the property for consideration and was hence not capable of termination.

9. In considering the submissions which have been urged on behalf of the Appellants, it must be noted at the outset that the agreement dated 25 September 2007 states in its recitals that building is cessed; and is in a dilapidated condition, requiring heavy repair, reconstruction or redevelopment. The agreement also stipulates that the owners had decided to demolish the building and erect a new building by consuming the F.S.I. under the redevelopment scheme as permitted by the Municipal Corporation. In this background, Clause 2 stipulates a consideration of Rs. 1.38 Crores in addition to which the owners were to be entitled to a carpet area of 2000 sq. ft. of residential accommodation and 800 sq. ft. of commercial accommodation on ownership but free of cost. The provision of constructed area to the owners was, therefore, an intrinsic part of the consideration payable under the agreement. Under Clause 6, the developer was vested with the authority to negotiate with the tenants/occupants by offering them permanent alternate accommodation or by obtaining a surrender of tenancy rights. Clause 11 required the developer to make his best endeavours to obtain a Commencement Certificate within six months from the date of obtaining vacant and peaceful possession and to complete the construction within 30 months from the date of obtaining the Commencement Certificate, time being the essence of the contract. Admittedly, the Appellants did not enter into any settlement with the tenants. Out of 19 tenements, 13 are occupied by the tenants while six are in the occupation of the owners. The Appellants failed to submit sanctioned plans to the Municipal Corporation. No construction was carried out.

10. Now in this background, a prima-facie view at the ad-interim stage was expressed in the petition u/s 9 of the Arbitration and Conciliation Act, 1996, by the learned Single Judge that (i) the consideration payable of Rs. 1.38 Crores was in addition to the provision to the owners of a built-up area free of cost; (ii) during the period of four years the Appellants virtually showed no interest in the agreement, nor did they enter into any agreement with the tenants; (iii) Clause 20 of the agreement would apply only if approved plans are submitted and could not be sanctioned by Municipal Corporation other than for the default of the Appellants; (iv) There was nothing to indicate that the owners had committed any default, nor had the Appellants made any such grievance about the failure of the owners to comply with their obligations; and (v) the conduct of the Appellants indicated that they had abandoned their interest in the agreement and that they were not ready to perform their obligations. However, the learned Single Judge passed a protective order requiring the owners to deposit an

amount of Rs. 1.38 Crores to secure the interest of the Appellants. That amount was deposited. During the course of the appeal against the ad-interim order, the Court was informed about the execution of an agreement by the owners with the Fourth Respondent when the Appeal was disposed of by the Division Bench on 16 April 2012.

11. In the Appeal, which arises from the order of the learned Single Judge on the Motion, this Court as a court of appeal would be slow to interfere with the exercise of discretion unless in a given case, the Court comes to a conclusion that the exercise of the discretion is perverse or contrary to law. This principle has been reiterated in the judgment of a Division Bench of this Court in *Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Others*, , thus:

In our opinion the learned Single Judge has construed the various terms of the agreement and the other material on record and at the prima facie stage has come to the conclusion that the Agreement can be specifically performed. An Appellate Court, more so a Court considering an interim order which involves exercise of discretion normally will not interfere with the finding of fact recorded by the trial Court and the exercise of discretion unless the finding is perverse.

12. It is impossible to come to the conclusion that Clause 20 of the agreement has effect of conferring upon the Appellants an unbridled right to decide whether or not to develop the property and that even if, the Appellants were not to develop the property, all that the owners would be entitled to is to continue in occupation of the premises in their possession. The intent of the parties must be construed by the reading agreement as a whole. The subject matter of the agreement is the development of a cessed building, which admittedly as the agreement recites is in a dilapidated condition. It would be far fetched to presume that the parties contemplated that the owners would have no more than a right to continue in occupation despite the failure of the developer to carry on development and that the owners, tenants and occupants should only wait, stand by and see the building in their occupation collapsing, as a result of the dilapidated position of the structure. Such an interpretation which will lead to an absurdity must be avoided and the agreement between the parties should be attributed a business meaning. The interpretation of such agreements must be infused with a robust common sense. Ordinary persons, when they enter into such agreements particularly in the island city with its corrosive and saline conditions of weather expect expeditious redevelopment. The interpretation suggested by the Appellants will leave the owners and tenants to the mercy of the builder. That was obviously not the intent as reflected in the terms of the agreement, noted earlier. Clause 20 refers to a situation where building plans could not be sanctioned and/or approved by the Municipal Corporation, which presumes that the building plans have been submitted to the Municipal Corporation, in the first place, but have not been sanctioned for reasons beyond the control of the developer. Clause 20 would not apply to a situation where there is a failure on the part of the developer to negotiate with the tenants and

to submit building plans for sanction.

13. The Appellants, in their letter to the Income Tax Authorities (which is not in dispute) dated 17 December 2010 stated that there was extremely slow progress or no progress, which was sought to be explained on the ground of a global melt down and also due to an alleged absence of clarity of the Government on the redevelopment of cessed category buildings. The fact that no development work was physically started was also admitted. Hence, the Appellants were in breach of their obligations and failed to establish a prima facie case.

14. However, even if the Appellants were held to have made out a prima facie case, it would manifestly not be proper for the Court to grant injunctive relief. A suit for specific performance is in the nature of an equitable remedy and the Court would not grant injunctive relief merely because a prima facie case is made out. The balance of convenience is against the grant of relief. There are sufficient circumstances in the present case which would weigh in favour of the judgment of the learned Single Judge not to grant injunctive relief. The interest of the Appellants, if any, has been secured. It is in the interests of the owners, occupants and tenants that a dilapidated cessed building should be redeveloped. We, however, reiterate and clarify that no prima facie case has been made out.

15. For the sake of completeness, we would also briefly deal with the submission based on Section 202 of the Contract Act, 1872. Section 202 provides that where an agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. As held in the judgment of the Supreme Court in *Seth Loon Karan Sethiya Vs. Ivan E. John and Others*, , "it is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked". Before Section 202 can be invoked, the agent must have an interest in the property. The agreement for development, which was entered into between the parties does not create any interest of the agent in the property. The power which is conferred upon the developer to negotiate or settle with the tenants and to obtain a surrender of the tenancy rights was to effectuate and facilitate the redevelopment of the property and would not by itself create prima-facie an interest in the property. It is not possible to come to the conclusion that the Appellants were conferred with an interest in the property under the terms of the development agreement.

16. Hence, we hold that the grant of any injunctive relief was not warranted in view of the clear failure on the part of the Appellants to fulfill their obligations under the agreement. Hence, the order of the learned Single Judge does not call for interference in appeal. The appeal is accordingly dismissed. In view of the dismissal of the Appeal, Notice of Motion (L) No. 326 of 2013 in the Appeal will not survive and is accordingly disposed of.