
(2008) 09 BOM CK 0061

In the Bombay High Court

Case No : Civil Revision Application No. 234 of 2003

Smt. Nirmalabai D. Kale and Others

APPELLANT

Vs

Shri Madan Ratan, Managing Director, EMAAR Developers and
Builders Private Limited

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Bombay Court Fees Act, 1959 — Article 23, 7, 6
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 29 Rule 1, Order 7 Rule 11
Companies Act, 1956 — Section 416, 416(2)
Contract Act, 1872 — Section 201, 202, 203, 204, 205

Citation : AIR 2009 Bom 69 : (2008) 6 ALLMR 747 : (2009) 1 BomCR 309

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : Rohit Deo, for the Appellant; A.M. Ghare, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—The matter has been heard on 11.09.2008 and thereafter on 12.9.2008. It was required to be kept today for judgment as Shri Ghare, learned Counsel for the non-applicant wanted to cite some authority from Corporate Law Advisor reported at 1994 (13) Corporate Law Advisor 405. Xerox copy is made available and after going through it, the learned Counsel did not press the ruling into service.

2. The challenge in this Revision Application is to the order dated 11.09.2003 passed below Exh. 11 by 6th Joint Civil Judge, Junior Division, Nagpur, in Regular Civil Suit No. 1051 of 2003 rejecting the application filed by present revision applicants under Order 7, Rule 11 (a), (b) and (c) of Civil Procedure Code. The application also contain a prayer in alternative to issue direction to present non-applicant to correct valuation of his suit and to pay the deficit Court fees. The revision came to be admitted and interim stay to further proceedings in Regular Civil Suit No. 1051 of 2003 has been granted.

3. For the purposes of present revision, it is not in dispute that the present non-applicant filed Regular Civil Suit No. 1051 of 2003 for declaration and permanent injunction basically challenging cancellation of Power of Attorney in his favour executed by present non-applicant on 9.3.2001 and registered on 12.3.2001. The further prayer is to declare it as irrevocable Power of Attorney and to declare public notice dated 21.7.2003 issued by the non-applicant revoking said Power of Attorney to be illegal. A permanent injunction restraining them from revoking said Power of Attorney was also sought with further relief of restraining them from creating any third party interest or alienating suit property. The non-applicant pointed out that present applicants (original defendants) are owners of plot of land and he is a Managing Director of EMAAR Builders and Developers Pvt. Ltd., a company incorporated under the Companies Act, 1956. He states that an Agreement of Development and Sale in relation to this property was entered into between parties on 09.03.2001. As per terms of Agreement and Development, amount of Rs. 3,35,00,000/- has been paid from time to time by non-applicant to present applicants on behalf of EMAAR Developers and Builders company, mentioned above.

4. Along with this suit, the application for grant of temporary injunction was also moved. The present revision applicants filed their reply to that application and also filed application under Order 7, Rule 11 of Civil Procedure Code, pointing out that plaint as filed did not disclose any cause of action, that suit ought to have been for specific performance and ought to have been valued at Rs. 4.80 Crores because that was the loss sought to be avoided. By reply, the present non-applicant opposed that application and on 11.09.2003, after hearing both sides, the impugned order came to be passed. The learned 6th Joint Civil Judge, Junior Division, Nagpur, found that the challenge to cancellation of Power of Attorney was not susceptible to any monetary evaluation and as such the valuation u/s 6(iv)(j) of Bombay Court Fees Act, was proper. It further found that through Power of Attorney, a right in addition to terms and conditions of Agreement of Development and Sale was created and in suit, the terms and conditions of Agreement of Sale were not in dispute and plaintiff was not claiming any charge over suit property. While considering the provisions of Section 202 of Indian Contract Act, it expressed that it was necessary to note that cause of action was specifically pleaded in plaint and hence on the basis of vague allegations in application under Order 7, Rule 11, the plaint could not have been rejected. It found that the Agreement of Development and Sale was between plaintiff i.e. Managing Director and defendants and an agency was created in favour of the Company. It also found that right was created in individual and notice of revocation, therefore, gave individual cause of action to the plaintiff. In view of these findings, it held that only remedy available to the plaintiff was to claim declaration of his status. It, therefore, held that suit was maintainable.

5. In this background, I have heard Shri Rohit Deo, learned Counsel for the revision applicants/ original defendants and Shri Ghare, learned Counsel for the non-applicant/ original plaintiff.

6. Shri Deo, learned Counsel has urged that Power of Attorney was not of a nature as contemplated by Section 202 of Indian Contract Act, and therefore, no interest was created in favour of the plaintiff. He urged that plaintiff was an agent of defendants and hence defendants/ revision applicants were justified in terminating the arrangement. He further states that suit as filed was not suit on behalf of or by a Company and Power of Attorney was also not in the name of the Company. He, therefore, states that neither Company nor its Managing Director in his individual capacity could have maintained any such suit. If any of them had any grievance, their only option was to file suit for specific performance as per law and nothing else. He, therefore, states that suit as filed was misconceived and could not have been entertained. He also invites attention to various paragraphs of the plaint and points out that those paragraphs clearly reveal an intention to save the plaintiff from suffering any monetary loss. Without prejudice to his contentions that there is no question of such monetary loss, he argues that for the purposes of valuation, this plea in plaint is relevant and in view of the provisions of Schedule I, Article 7 of Bombay Court Fee Act, the suit ought to have been valued at Rs. 4.80 Crores.

7. In support of his contentions, he invites attention to the judgment of this Court in the case of SNP Shipping Services Pvt. Ltd. and others Vs. World Tanker Carrier Corporation and another, , wherein this Court has held that while considering the application under Order 7, Rule 11, not only plaint but documents on which claim is based can also be looked into. The judgment in I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, , is also pointed out to urge that the plaint must demonstrate a cause of action. Attention is also invited to the judgment of the Hon"ble Apex Court in the case of Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay, , to urge that the Director or Managing Director has got no personal interest in the property of the Company. By inviting attention to provisions of Order 29, Rule 1 of Civil Procedure Code, it is urged that there is no question of any rectification or amendment to the plaint and the suit as filed cannot be read as one filed on behalf of M/s. EMAAR Developers. He invites attention to plaint paragraph 6 to point out the powers which are delegated through that document to the plaintiff. He points out that the powers are specifically given to the plaintiff in his individual capacity. Lastly, he invites attention to the judgment of Division Bench of this Court in the case of Gulam Mohamed Yunus and Another Vs. Lalchand Chelaram and Others, , to buttress stance that valuation of suit u/s 6(iv)(j) was totally erroneous and it ought to have been valued under Schedule I, Article 7 thereof. In order to substantiate the stand that present plaint cannot be treated as plaint for and on behalf of the Company, attention of this Court is invited to the judgments in the case of Rustom Cavasjee Cooper Vs. Union of India (UOI), ; in Heavy Engineering Mazdoor Union Vs. State of Bihar and Others, ; in Vivek Kumar v. Pearl Cycle Industries Ltd. reported at 1983 (54) Company Cases 77 and in Shyamlal Purohit v. Jagannath Ray reported at 1970 (40) Company Cases 138.

8. In reply, Shri Ghare, learned Counsel has invited attention to pleadings in

paragraphs 17, 18, 20, 22 and 23 of plaint to urge that the plaint has been filed to protect the company from loss. He urges that Power of Attorney has been given to present non-applicant only because of his capacity as Managing Director of M/s. EMAAR Developers. He states that Agreement for Development and Sale is an independent agreement and Power of Attorney was executed in order to facilitate due performance of obligations undertaken thereunder. He also invites attention to stand of revision applicants in this respect and states that it is not their case that Agreement of Sale and Development has been terminated. He, therefore, points out that in such situation, it was not possible to file a suit for specific performance and therefore a suit for declaration and permanent injunction has been filed. He states that personally plaintiff is not put to any loss but his Company has already invested amount of Rs. 3.35 Crores and purpose of suit is to further the interest of company. He invites attention to provisions of Section 2(26) i.e. definition of Managing Director and also to provisions of Section 416 and 416(2) of the Companies Act, to state that there may be an undisclosed principal and Company always has liberty to ratify its actions. He argues that all these arguments including effect of Order 29, Rule 1 of CPC can be gone into after parties lead their evidence fully and at this stage no interference is warranted in revision as there is no jurisdictional error. He invites attention to the judgment of the Hon"ble Apex Court in the case of Union Bank of India v. Naresh Kumar reported at AIR 1997 SC 3, to urge that this Court cannot permit substantial justice to be defeated on account of such technical objections.

9. After hearing both learned Counsel, it is apparent that the Agreement for Development and Sale still subsists and it has not been terminated. Both parties have expressly accepted it to be so before me. During arguments, it was pointed out to this Court that present applicants have filed a suit on the basis of said agreement against non-applicant and the non-applicant has also filed a counter claim in it on the basis of very same Agreement. It is also an admitted position that Agreement for Development and Sale does not contain any reference to Power of Attorney and Power of Attorney also does not make any mention for Agreement for Development and Sale. It is to be noted that both the documents are executed on same date i.e. 09.03.2001. In spite of this, when parties have chosen not to make any cross-reference of the other document in first document, the intention of parties is apparent. The parties have treated both the documents as independent of each other.

10. For the purposes of valuation, one has to consider plaint allegations and find out what is the grievance made. The plaint allegations particularly in para 4 shows, the concern expressed therein is huge amount of Rs. 3.35 Crores paid by the plaintiff to the defendants on behalf of M/s. EMAAR Developers and Builders Private Limited. Though the plaint stipulates that it has been paid by the plaintiff but in para 3 it is also mentioned that plaintiff was intending to develop the property. In this paragraph 4, it has been mentioned that the amount has been paid on behalf of M/s. EMAAR Developers and Builders Private Limited. The Agreement for Development and Sale is also with said company. While filing

plaint, the plaintiff has described himself as Managing Director of said Company. However, name of Company has not been mentioned as plaintiff. But then purpose of plaint is to safeguard the total sum of Rs. 3.35 Crores paid by the Company to original defendants i.e. present applicants. In para 12, the plaintiff has stated that the interest of plaintiff was created in the property for value and to protect such interest, an irrevocable power of attorney was executed by the defendants in his favour. Whether this contention or other pleadings are legally justified or not, is altogether different thing.

But then purpose of suit, therefore, was to protect the Company from loss. The judgment of Division Bench of this Court in the case of Gulam Mohamed Yunus and Another Vs. Lalchand Chelaram and Others, , has considered provisions of Section 6(iv)(j) as also Schedule I, Article 7 and distinction between the two provisions has been brought out in paragraphs 11, 12 and 13. It was Letters Patent Appeal and the suit was valued u/s 6(iv)(j). The declaration sought was that Deed of Mortgage dated 07.07.1971 or in similar document of prior date executed by defendants in favour of one of the defendants as illegal and void. In this background, the Division Bench has found that u/s 6(iv)(j), the subject matter in dispute is required to be not susceptible to monetary evaluation and the suit should not be otherwise provided for by the Bombay Court Fees Act, 1959. If these two contingencies are satisfied than only the suit could have been valued at Rs. 300/- and Court fee of Rs. 30/- could have been paid as per said provision then existing. It also found that Article 23(f) of the Second Schedule of Court Fees Act pressed into service by plaintiff also applied when suit was not otherwise provided for and then came to be conclusion that the suit before it satisfied requirements of Article 7, Schedule I. It was held that the subject matter of the suit was not only a mortgage deed of the year 1971 but also any such prior document. Thereafter in para 18, various other recitals in the plaint were looked into and ultimately it has been held that the suit was with a view to avoid loss and, therefore, the provisions of Article 7, Schedule I were squarely applicable. The finding of trial Judge about valuation was, therefore, maintained. The same view is again reached by this Court in the case of Berner Shipping Inc., Bombay and Another Vs. Mrs. Kala Ramchandran, , while expressly following this Division Bench judgment.

11. In present facts, it is apparent that the purpose of suit was to prohibit loss to either plaintiff or to the Developer Company. The suit, therefore, ought to have been valued at Rs. 3.35 Crores as mentioned in the plaint itself. The observation of the Court below that claim in the suit was not susceptible to monetary valuation is misconceived. In the circumstances, non16 applicant in revision (original plaintiff) is given time of four weeks from today to correct the valuation and to pay proper Court fees on his plaint. If the compliance is not done, Court below to proceed to reject plaint as per law.

12. The second question which needs to be gone into in this matter is whether there was any cause of action available to the non-applicant - plaintiff to

maintain such suit. The contention of revision applicants that it has to be suit for specific performance need not be considered any further because both the parties agreed that Agreement for Development and Sale is still existing and subsisting and it has not been terminated. The question, therefore, is whether a suit simpliciter for restoration of Power of Attorney dated 09.03.2001 terminated by revision applicants could have been filed by the non-applicant. Again it is clear that power of attorney of its own does not contemplate creation of any interest in property in Managing Director of the Developer Company. It speaks of plaintiff as an individual i.e. not in his official capacity. Section 202 of the Indian Contract Act, 1872, is applicable to cases where the agent himself has interest in the property which forms subject matter of the agency. The said section provides that where agent himself has such interest in agency, power of attorney cannot be terminated in the absence of express contract between the parties to prejudice such interest. Section 201 envisages termination of agency in all other cases and Section 203 permits Principal to revoke the authority given to his agent at any time before such authority has been exercised so as to bind the principal. Section 204 contemplates revocation when authority has been partly exercised and Section 205 contemplates compensation for revocation by principal or renunciation by agent. No arguments are advanced touching these provisions & hence, it is not necessary for this Court to go into details of all these provisions.

13. Here, as already stated above, the Power of Attorney does not contain any reference to Agreement for Development and Sale. Similarly, said agreement also does not contain any stipulation about such power of attorney. From documents, pleadings and arguments advanced, it is clear that power of attorney also does not contain any clause showing to be irrevocable. In these circumstances, the question is whether such power of attorney confers any right individually in Managing Director/ plaintiff to support the suit filed by him.

14. In the case of Seth Loon Karan Sethiya Vs. Ivan E. John and Others, , the debtor of a Bank executed Power of Attorney in favour of said Bank authorizing it to effect recovery of loan from decree which he had procured by him against a third person and credit the realizations to the debtor's account. The bank levied execution of the decree. The execution application was filed in the name of the appellant but it was signed by the manager of the Bank as his power of attorney holder. The appellant objected to the execution. In these circumstances, the Hon"ble Apex Court held that Section 202 of Indian Contract Act was applicable because an interest was created in Bank and said power of attorney could not have been terminated.

15. In the case of Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibai Haribai Patel and Others etc. etc., , Clause 17 of the agreement stated that agreement should not be unilaterally rescinded by either party after the plaintiff has been put in possession. In paragraph 50, the Hon"ble Apex Court while disagreeing with the High Court has found that said clause expressly contemplated that before delivery of possession, the contract could be

unilaterally terminated and Section 202 of Indian Contract Act, therefore, had no applicability. It was not a case of agency coupled with interest. This intention was found very clear from the plain language of Clause (17) of the agreement & Section 202 had therefore no applicability. No interest was held to have been created on account of plaintiff there being permitted to prepare the scheme and take ancillary steps.

16. In paras 9 to 16 of *Southern Roadways Ltd., Madurai Vs. S.M. Krishnan*, , Hon"ble Apex Court has also held on these lines only. In present facts also it has not been demonstrated that it was a case of agency in favour of plaintiff coupled with any interest. In plaint itself, the plaintiff has not pointed out any such interest and he is falling back upon the Agreement for Development and Sale in favour of Developer Company. I, therefore, find that Section 202 of Indian Contract Act has no application and therefore, there was no cause of action in favour of present non-applicant to maintain such suit. The consideration of this controversy in paragraph 18 by the Trial Court is totally erroneous.

17. This brings me to consideration of question whether present suit can be treated as a suit filed by Company. As already stated above, the plaintiff has given his full name, age and thereafter he has mentioned himself as Managing Director of said Developer and Builder Company. Order 29, Rule 1 of CPC speaks of suits by or against Corporations and all subscription and verification of pleadings. It states that pleadings may be signed and verified on behalf of such corporation by its Secretary or any Director or other Principal Officer, who is able to depose about the facts of the case. In the entire plaint, it is nowhere mentioned that it was being filed for the Developer and Builder Company and verification also does not disclose that it was being verified on behalf of such Developer and Builder Company. On the contrary, paragraph 4 mentions that the parties to the Agreement for Development and Sale are applicants on one hand and M/s. EMAAR Developers and Builders through its Managing Director i.e. plaintiff on the other hand. Though at some places plaintiff has identified himself with the company, still it is nowhere shown that the plaint has been presented in accordance with Articles of Association of the Company by its authorized representative.

18. In *R.C. Cooper v. Union of India*, (supra), in para 13, the Hon"ble Apex Court has observed that a Company registered under the Companies Act, is a separate and distinct legal person than its individual members and property is not the property of the shareholders. A shareholder, a depositor or a Director may not, therefore, be entitled to move a petition for infringement of rights of Company, unless by the action impugned by him, his rights are also infringed. Thus, such an individual action is permitted, if there is individual injury. The facts before this Court do not disclose any such individual/ private injury to present non applicant.

The Company i.e. Developer and Seller has not preferred to file any suit challenging the cancellation of Power of Attorney executed by land owners in favour of its Managing Director or plaintiff. In *Shyamlal Purohit v. Jagannath Ray*

(supra), it has been held that a shareholder of a company which is being compulsorily wound up, has no locus standi under Order 21, Rule 90 of CPC to apply for setting aside a sale of the property of the company on the ground of irregularity or fraud.

19. In *Vivek Kumar v. Pearl Cycle Industries Ltd.* (supra), again the finding is on same lines and there the principle enunciated by Federal Court in *Dr. Satya Charan Law v. Rameshwar Prosad Bajoria* (1950) 20 Company Cases 39, has been considered. It has been held that said principle had no application. According to said principle, majority of shareholders have a right to file proceedings, in the name of the company only when those in the Management of the Company are themselves wrong doers and, therefore, did not initiate such proceedings. In the case before the Delhi High Court, it was found that the Company itself was under liquidation and Official Liquidator was competent to initiate proceedings for Company.

20. In *H.E.M. Union v. State of Bihar* (supra), it has been held that Company in holding its property and carrying on its business, is not the agent of its shareholders and an infringement of its right does not give a cause of action to its shareholders. The judgment of the Hon''ble Apex Court in *United Bank of India v. Naresh Kumar* (supra), relied upon by Shri Ghare considers the case of a Nationalised Bank and in it, the question was whether suit was properly instituted on its behalf. The trial Court decreed the suit and said judgment was reversed by the Additional District Judge, having found that the signatory had no valid authority to file a suit on behalf of the Bank. The Bank then approached the High Court where its appeal was dismissed in limine and thereafter it approached the Hon''ble Apex Court. The Hon''ble Apex Court has held that in such circumstances, public interest should not be permitted to be defeated on a mere technicality and procedural defects which do not go to the root of the matter, should not be permitted to defeat a just cause. The Hon''ble Apex Court observed that there are sufficient powers in Court under CPC to ensure that injustice is not caused to a party, who has a just case. These observations are in the background of other findings that money had been taken by other side from the Bank and they were guarantors and said money was to be recovered by the Bank. The Hon''ble Apex has concluded that in such circumstances, these findings arrived at could not be defeated merely on account of technicalities. In the facts before this Court, the position is otherwise. The suit is not instituted by Developer and Builder and though matter is being heard for three days, the Developer and Builder has not come forward with any ratification or authorization in the matter. It is, therefore, difficult to hold that the suit as filed by the non-25 applicant can be treated as suit filed on behalf of EMAAR Developers and Builders Private Limited.

21. I, therefore, find that there was no cause of action in favour of present non-applicant to file such a suit and suit filed by him is, therefore, not maintainable. With the result, objections raised in application under Order 7, Rule 11, vide Exh.

11 by present revision applications are allowed. The said application is also allowed and plaint is rejected under Order 7, Rule 11 Clause (a) thereof. The Civil Revision Application is accordingly allowed. However, in the circumstances of the case, there shall be no order as to costs.