(2007) 03 BOM CK 0127

In the Bombay High Court

Case No : Chamber Summons No. 925 of 2006 in Execution Application No. 348 of 2006 in Suit No. 34 of 2001

Suresh Enterprises and Others — APPELLANT

Vs

Champaben C. Ashar, Madhukar Chatrabhuj Ashar, Joytikumar Chatrabhuj Ashar and Kishore Ashar — RESPONDENT

Date of Decision : 02-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, 148
Specific Relief Act, 1963 — Section 28

Citation : (2007) 2 ALLMR 834 : (2007) 2 BomCR 792

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Sanjay Jain and J.B. Chinai, instructed by Ranjit and Co, for the Appellant; Shailesh Shah, B.B. Saraf and S. Shroff, instructed by Harish Shroff and Co. for Defendant Nos. 2 to 4, for the Respondent

Final Decision : Dismissed

Judgement

Roshan Dalvi, J.—The Suit is filed by the Plaintiffs who are the developers of the property of the Defendants for declaration that they have a right to sell and dispose of 45% of the constructed area as per the Development Agreement dated 22nd December, 1987, Exhibit B to the Plaint, and for a further declaration that the Defendants had no right to prevent them from carrying out the construction and development of their property and ancillary injunctions in that regard. The suit came to be filed on 26th December, 2000. The parties enter into Consent Terms on 15th January, 2001, Exhibit A to this Chamber Summons.

2. Under the Consent Terms both parties set out their reciprocal promises, obligations and conditions upon which they would obtain certain rights with regard to the property to be developed.

3. The Plaintiffs seek to execute the said Consent Terms in this Chamber Summons, which has been taken out in July, 2006.

4. The Plaintiffs have applied for leave under Order 21 Rule 22 of the CPC to execute the decree passed in terms of the Consent Terms dated 15th January, 2001 since the execution is sought more than 2 years after the passing of the decree. The Plaintiffs have applied for an injunction restraining transfer and sale of the entire property of the Defendants which is described in Exhibit A to the Plaint, preventing their dispossession from the suit premises and preventing them from carrying out and completing the work of construction and development of the suit property. The Plaintiffs have also applied for an appointment of Court Receiver and to be handed over possession of 45% of the flats constructed in the suit property as per the initial agreement between the parties and also the consent terms.

5. The reciprocal rights and obligations of the parties must be first understood. It will have to be seen whether conditional terms mentioned in the Consent Terms are complied by the Plaintiffs to enable them to obtain rights thereunder. The main agreements and undertakings between the parties are thus:

(1) To complete the construction of the six storeyed building, in all respects and obtain the occupation and completion certificate within 12 months of the signing of the Consent Terms.

(2) To carry out plaster, plumbing, electrical, painting and RCC work of the 6th floor of the building within 12 months thereof.

(3) To obtain possession of a Tin Shed occupied by one Suresh Tiwari within two months thereof and also to complete all formalities for transfer of set back area to the Municipal Authorities.

(4) To pay dues of civil, electrical, plumbing and other contractors RCC engineers, Architects and obtain NOC from each of them.

(5) To put the Defendants in possession of 55% of the constructed premises.

(6) To construct and fix electric substation on the rear part of the property after obtaining requisite approval from Competent Authority.

6. If the Plaintiffs fail to comply with the aforesaid obligations within a period of 12 months they were to be deemed to have abandoned project and were not to have any claim of any nature against the Defendants. The Defendants would then be entitled to complete the balance construction work without obstruction from the Plaintiffs.

7. If the Plaintiffs completed the construction of six storeyed building in all respects within 12 months they would be entitled to 45% of the total built-uparea of the stilt plus six upper storeyed building. Accordingly the specified flats and car parking spaces which would come to the Plaintiffs''share were set out in the Consent Terms. Correspondingly those flats and car parking spaces which would come to the share of the Defendants as the balance 55% of the constructed area was also set out in the Consent Terms.

8. Further agreements and undertakings to be performed and carried out by the Plaintiffs for further development of the suit property between the parties were thus:

(a) Pay Municipal property and other taxes and levies from 1st October, 2000 onwards.

(b) Obtain Utilisation Certificate from the concerned authorities upon which the Defendant would purchase TDR for consumption of further development of the property within 6 months after obtaining the Utilisation Certificate and upon which Plaintiffs would obtain all the requisite approvals, permissions and sanctions for utilisation of such TDR.

(c) To complete further construction upon the use of the TDR (2nd phase) within 15 months of the purchase of the TDR through the same Architect and Structural Engineer at the cost of the Plaintiffs.

9. If the Plaintiffs did not commit any default for such further construction they would be entitled to an area of 45% for themselves and they would have to allot 55% of such additional constructed area to the Defendants.

10. It was further agreed and confirmed between the parties that if the Plaintiffs failed to obtain all the requisite approvals, permissions and sanctions for the 2nd phase within 2 months of the Defendants making available the TDR they would not be entitled to any benefit of any nature in such 2nd phase of development. All the Defendants would thereafter be entitled to complete the 2nd phase without interference of or objection by the Plaintiffs and appropriate all the constructed areas to themselves.

11. It was specifically laid down that the security employed by both the Plaintiffs and Defendants would be on the site.

12. The Plaintiffs have sought to execute the consent terms to obtain for themselves, through the Court Receiver, 45% of the total flats constructed on the suit property.

13. The Plaintiffs must show how they have carried out their obligations under the construction and how they have constructed all the flats in the building so as to to be able to obtain 45% of the flats for themselves.

14. The Defendants contend that the Plaintiffs have breached almost all the terms and obligations under the Consent Terms except obtaining the occupation and completion certificates in respect of the first and second floors of the building. They, therefore, contend that under the terms of the contract agreed upon between the parties the Plaintiffs have disentitled themselves to obtain any flats. In fact it is their case that the Plaintiffs breached and abandoned the initial agreement between the parties dated 22nd December, 1987 itself constraining the Defendants to prevent the Plaintiffs from constructing and taking over the construction and development of the property themselves which resulted in the

suit being filed.

15. It is Defendants''case that the same act of default has repeated itself after signing the consent terms and though specific time was laid down for each of the obligations to be performed, the Plaintiffs breached almost all of them.

16. It is the Defendants''case that having completed the construction of the 6th floor which had remained to be completed at the time of the consent terms, they:

(i) entered into agreement for a consideration of Rs. 6 lakhs and obtained possession from the occupant Suresh Tiwari.

(ii) Handed over setback area to the BMC after demolition of the tinshed of Tiwari.

(iii) Had the electric substation removed from the rear part of the property.

(iv) Purchased TDR without the utilisation certificate having been obtained by the Plaintiffs.

(v) Gave public notice for taking over the project and invited objections. (The Plaintiffs did not file any objections).

(vi) Got the stop work notice withdrawn by the BMC.

(vii) Got the plans sanctioned for further construction from time to time.

(viii) Obtained approvals, permissions and sanction for utilisation of the TDR

(ix) Commenced and completed the second phase of the development and construction

(x) Incurred expenses for the actual construction by purchase of material, payment to Contractors, Architects etc.

(xi) Paid municipal taxes and levies.

(xii) Made payment for electricity connection.

(xiii) Obtained completion certificate for further phases of construction.

(xiv) Applied for and obtained permission from the Airport Authority of India for height clearance.

(xv) Obtained an order of the High Court in Writ Petition against the notification issued by the Collector for the usage of the land.

(xvi) Applied for and sought permission for elevator initially up to 6th floor and later up to 12th floor of the building.

17. The Defendants have produced documents to substantiate the aforesaid payments made upon the Courts quarry in that regard. The Defendants have served a compilation these documents upon the Plaintiffs which the Plaintiffs object to consider. They have relied upon photographs of the building completed by them.

18. The Plaintiffs have not shown absolutely any documentary evidence showing any obligations under the Consent Terms carried out by them. The Plaintiffs have only relied upon and annexed the correspondence between the Attorneys to show what work has been carried out by them, the agreements entered into by them with the Contractor on 11th April, 2001, the details of the flats in the building stated to be appropriated to the Plaintiffs and the Defendants and the 2 orders in 2 earlier Notice of Motions taken out by the Plaintiffs which came to be withdrawn.

19. It can be seen that the performance of the various obligations of the Plaintiffs under the Consent Terms can only be substantiated by documentary evidence. There is a complete lack of such evidence. The Plaintiffs contend that because the Defendants prevented the Contractors from proceeding and did not obtain the TDR, the Plaintiffs could not perform their part of the specific obligations under the Consent Terms. The Consent Terms have been executed in January, 2001. The Plaintiffs have not made any applications for extension of time or for relief in respect of their obligations or sought to enter into any novatio with the Defendants since 2001. The Plaintiffs have taken out two Notice of Motions for similar reliefs which they withdrew under Orders dated 7th February,2005 and 21st June, 2006.

20. The Defendants''contention that after the property is developed and the entire building is constructed the Plaintiffs seek to execute the Consent Terms for merely appropriating to themselves 45% of the built-uparea is shown to be rather correct.

21. The Defendants contend that the Defendants have themselves relied upon and executed an undertaking of the Plaintiffs given to the BMC on a stamp paper in August, 2001 that they would not execute Civil work except RCC work on the 6th floor and hand over the set back land required to be handed over to the BMC within 2 months, which the Defendants have breached.

22. The Defendants have also shown part occupation for stilt plus 4 of the floors granted by BMC on 8th August, 2001 under specified conditions, several of which the Plaintiffs breached. This related mainly to the set back area not having been handed over to the BMC upon removing encroachment within 2 months from the date of the said Occupation Certificate.

23. The Defendants contend that the Plaintiffs failed to take possession of the tin shed occupied by the occupant Suresh Tiwari for a long time after the Consent Terms were signed and correspondence between the parties ensured. Thus the set back area could not be handed over to the BMC. The Defendants themselves obtained possession from the occupant upon payment of Rs. 6,00,000/to him and handed over the set back area to the BMC.

24. The Defendants have shown a stop work order issued by the BMC on 29/30th October, 2001 for work being carried out beyond the commencement certificate and approval. Both the parties contend that this related to the work on the 6th

floor and allege that either party carried out work in excess of the sanction granted until then. The Plaintiffs have not shown whether they have obtained Commencement Certificate. The Defendants have shown the Commencement Certificate initially issued in 1995 and endorsed from time to time. At the time of the execution of the Consent Terms the Commencement Certificate dated 18th February, 1997 was with regard to the plan approved only as far back as on 13th December, 1996. Thereafter Commencement Certificate for RCC work on the 6th floor alone was granted.

25. The further endorsements of the Commencement Certificates by further endorsements are obtained by the Defendants themselves on 6th April, 2004, 17th November, 2004 and 18th March, 2006. The Defendants have produced letters of the BMC showing the approved plans, subject to additional conditions, obtained by the Defendants for which they had to get the Commencement Certificates endorsed. These letters are obtained by Defendants from time to time on 12th September, 2002, 15th November, 2002 and 15th November, 2004.
26. What is striking is the total absence of the production of any documents by the Plaintiffs who are developers of the property and who must show how they have carried out construction within the timeframe agreed upon by the parties and specified in the Consent Terms.

27. The Defendants have show various Bank statements showing entries, corresponding with the acts done, permissions obtained, expenses incurred, materials purchased by the Defendants. I have gone through some of these entries at random.

28. This application does not require the Court to verify each of these entries as would be the case if damages or compensation is required to be fixed or the specified acts required to be seen. The only function of the Court is to see whether the Consent Terms are complied by the Plaintiffs so as to obtain 45% of the flats constructed in the suit property. For that purpose the Court has to see whether leave under Order 21 Rule 22 of CPC be granted to the Plaintiffs for not executing the decree for the period of more than 2 years and to see whether the mode of execution chosen by the Plaintiffs in obtaining their 45% entitlement in the suit property be allowed to the Plaintiffs for execution of the Consent Terms between the parties.

29. The documents relied upon by the Defendants show that they have carried out the construction in the place and stead of the Plaintiffs. Even if the construction is not complete, the Plaintiffs are seen not to have performed any of the obligations under the Consent Terms. Hence, it is impossible to allow them to execute the Consent Terms at this late stage and after withdrawal of 2 applications by them and specifically without showing how they have carried out their obligations to be entitled to their share under the Consent Terms.

30. It is the main contention of the Plaintiffs that the Defendants did not purchase the TDR and hence, the Plaintiffs could not obtain the Utilisation

Certificate and consequently could not carry out further construction. Clause 21 of the Consent Terms enjoins the Defendants to purchase TDR 6 months after the Plaintiffs obtain utilisation certificate. Hence, if the Defendants were to obtain the TDR consequent upon which only the Plaintiffs could obtain the Utilisation Certificate, the Plaintiffs could have sought a novatio of the contract to that extent. They could have applied in the Court for directions in that behalf. No such application is made. No further agreement is entered into. The Plaintiffs contend that after the Defendants obtained the TDR the stop work notice would have been withdrawn. The Plaintiffs as well as the attorneys letters dated 7th January, 2002 and 30th January, 2002 go no further. The breaches of the Plaintiffs can be enumerated as follows:

31. OCCUPATION/COMPLETION CERTIFICATE

These are not obtained within 12 months from the date of the Consent Terms on the ground that stop work notice has been issued and hence further construction could not be carried out.

32. NOC FROM VARIOUS CONTRACTORS Though the Plaintiffs have stated, without substantiating those statements by documentary evidence, that they have made the required payments to the civil, electrical, plumbing and other contractors and RCC specialists and Architects, they have not received NOC from any of those. They claim that the Contractor has been overpaid in sum of Rs. 75 lakh.

Though they contend to have paid by cheques, no Bank entries are shown. The Plaintiffs have shown the amounts paid to the Contractors in Exhibit D of the Chamber Summons. They have not produced any receipts of any of the Contractors.

33. OCCUPANT SURESH TIWARI The Plaintiffs have not obtained possession of the tin shed from the occupant. The Plaintiffs have stated in the correspondence as well as contended before the Court that they were ready and willing to pay Rs. 5.5 lakhs to Suresh Tiwari. However, they never entered into any agreement for the same. The Defendants have entered into an agreement with Suresh Tiwari for payment of Rs. 6,00,000/instead.

34. PUTTING THE DEFENDANTS IN POSSESSION OF 55% OF THE FLATS.

Though the Plaintiffs claim that they had carried out construction up to the 7th floor, the Plaintiffs did not put the Defendants in possession of 55% of the flats constructed by them even in the 1st phase of construction upto 6 floors.

35. OBTAINING UTILISATION CERTIFICATE

The Plaintiffs, who are developers of the property and in the said business entered into Consent Terms to obtain utilisation Certificate of the concerned Authorities for further development of the property after which the Defendants were to make available the requisite TDR for such development. The Plaintiffs contend that unless TDR was purchased, the Utilisation Certificate could not be obtained. The specific agreement between the parties in Clause 21 of the Consent Terms requires the defendants to make available the TDR 6 months after the utilisation certification is obtained. The Plaintiffs have not shown any effort undertaken by them or even any application made by them for utilisation certificate to show that it would be issued such certificate only after TDR is obtained. The Plaintiffs have also not shown any approvals, permissions or sanctions for the utilisation of the TDR obtained by them.

36. CONSTRUCTION OF THE SECOND PHASE

The construction had to be commenced and completed within 15 months of the purchase of the TDR by the Defendants. The Plaintiffs orally allege that they have constructed the upper floors. The Plaintiffs have not obtained Commencement Certificate or the approved plans. They have not obtained any approvals, permissions or sanctions for utilisation of the TDR. They have not shown the construction cost incurred by them by any documentary evidence.

37. The Plaintiffs have applied to execute the decree to obtain45% of the flats constructed in the first as well as the second phase of the building. Since they have not shown efforts undertaken by them, cost incurred by them, approvals or sanctions obtained by them, they cannot be granted any such relief to execute the Consent Terms.

38. Both the parties were in possession. Both the parties had employed their respective security. The Defendants were to commence and continue the construction after the Plaintiffs failed to act as per the Consent Terms. The Defendants have produced photographs to show the completed construction put up by them. The construction of the building is complete. It is too late for the Plaintiffs to take a share therein.

39. It is contended on behalf of the Plaintiffs that all that they require is an extension of time and that extension of time to carry out work can be granted even after the period specified in any contract as has expired u/s 148 of the CPC. Section 148 relates to period fixed or granted by the Court for doing any act prescribed or allowed by the Court. It therefore grants discretion to the Court to enlarge the period, not extending to 30 days in total. The Plaintiffs do not desire extension of any period granted by the Court. The extension required by the Plaintiffs is for the agreement between the parties in the Consent Terms, which of course has become an order of the Court upon filing it in Court. The time that can be extended is at the most of 30 days. The initial time was granted by an agreement between the parties in January, 2001. This application has been taken out in July, 2006. The time of 12 months and 15 months granted to the Plaintiffs expired well prior to the application being made. Time could have even been extended had the construction work remained incomplete. The Defendants have carried out construction as per the agreement and done various acts ancillary thereto. It is absurd on the part of the Plaintiffs to claim extension of time for the

work already done, aside from the fact that it is to claim pre-village under the Consent Terms, so completely breached by the Plaintiff by their inaction.

40. In the case of Smt. Periyakkal and Others Vs. Smt. Dakshyani, relied upon by the Plaintiffs, it has been held that the jurisdiction to extend time u/s 148 could not be done ordinarily, nor for mere asking. It would be granted in rare cases to prevent manifest injustice. The Court would not rewrite a contract but only relieve against the forfeiture clause.

41. It is contended on behalf of the Plaintiffs that clause granting 12 months time to carry out various acts is a penalty clause, the default of which entails forfeiture which the Courts in its discretion can whittle down in the interest of justice. A reading of the Consent Terms shows no penalty and no default clause. It is a conditional agreement. The entitlements are subject to the performance of the obligations. It must therefore disentitle the party who defaults in the performance of the reciprocal obligations under the contract.

42. It is argued that the Court must relieve the Plaintiffs against forfeiture. In the case of Vaman Vishwanath Bapat v. Yeshwant Tukaram reported in 1947 BLR 688 the full Bench of this Court held that the Court had no liberty to relieve a defaulting Defendant against the consequences of failure to pay the decretal amount on equitable considerations when the whole amount became due on failure to pay the installments. Consequently the Court''s power of relief against forfeiture even in case of a one-sided decree is not shown. This is also a case of reciprocal promises and obligations.

43. In the case of Niwas Builders v. Chanchalaben Gandhi 2003 (3) MLJ 312 the Division Bench of this Court held that in the case of a suit for specific performance of contracts the Court is expected to take into consideration circumstances prevailing in each case, the conduct of the parties and their respective interests under the contract. In that case the Plaintiff/ Developer mere to construct for the Defendant/ owner a flat of 2000 sq. ft. and the Defendant was to vacate the bungalow and hand over its possession to the Plaintiff. That having not been done, it was held that the readiness and willingness of the Plaintiff need not be further evidenced by actual cash in hand. Hence, the nonpayment of further consideration did not constitute any default in the absence of the Defendant not performing her reciprocal obligation of vacating the bungalow and refusing to execute the sale deed in favour of the Plaintiff.

44. The Contract in this case is by way of Consent Terms in the suit, enjoining both parties to perform certain obligations. These obligations are reciprocal and several are only to be performed by the Plaintiffs. Keeping in mind the sound mandate enunciated by the Full Bench of this Court 60 years ago, about the lack of the powers of the Court in relieving the defaulting party in the judgment in case of Vaman Bapat supra, and appreciating that this is a case where there is a specific right provided in the contract itself in favour of the Defendants - to take over the project - the Court would "rewrite" such contract if it interfered to grant

further time to do the work already done.

45. It is also argued on behalf of the Plaintiffs that u/s 28 of the Specific Relief Act the decree for specific performance can be rescinded on account of the defaulter not complying of the conditions and the Defendants have not rescinded the contract. I do not see how the Defendants are required to apply for rescinding the Consent Terms in this case. There are reciprocal promises and obligations and an inbuilt safeguard for the entitlement upon defaults as well as the entitlement of the other party on specific events having taken place. The reliance upon Section 28 of the Specific Relief Act is entirely misplaced. So also upon the judgment in the case of Yashoda v. K. Nagarajan reported in (1996) 11 SCc 228. In that case the rescission of the decree applied for was refused and time for making deposit of the further amount directed to be paid upon the passing of the decree was granted. That was a case where a decree for specific performance was passed only upon further payment to be made. No other reciprocal promises were to be performed. Hence, mere extension of time for payment was required, which the Court granted. In this case interference by the Court for allowing to construct what has already been constructed is sought.

46. The Plaintiff has made out absolutely no case for granting leave under Order XXI Rule 22 of the CPC to execute the Consent Decree dated 15th January, 2001, well after it has been acted upon by the Defendants by completing the entire construction. Consequently, as a corollary the Plaintiffs have failed to make out any case for grant of any injunction, or for appropriation of any flats in the building or for the appointment of Court Receiver in execution or otherwise. No execution of the Consent Terms dated 15th January, 2001 can proceed by a defaulting Consent Decree Holder.

47. The Chamber Summons as well as the Execution Application are dismissed with costs of Rs. 10,000/.

