

H.A. Srikanth and Another Vs. M/s. Sovereign Developers and Infrastructure Limited, rep. by its Director and Others

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Court : Karnataka

Decided On : Sep-10-2015

Judge : B.S. Patil

Appeal No. : M.F.A.No. 4484 of 2015 c/w M.F.A.No. 4992 of 2015

Appellant : H.A. Srikanth and Another

Respondent : M/s. Sovereign Developers and Infrastructure Limited, rep. by its Director and Others

Advocate for Pet/Ap. : Sri. T. Seshagiri Rao

Judgement :

(Prayer: These MFAs filed u/s 37(1) of Arbitration and Conciliation Act, r/w Order 43 Rule 1(a) of CPC, against the Order dt.30.04.2015 passed on I.A.No.9 in A.A.No.72/2015 on the file of the XX Additional City Civil and Sessions Judge, Bangalore, allowing I.A.No.9 filed u/s 9 of the Arbitration and Conciliation Act, r/w Rule 9 of High Court of Karnataka Arbitration Rules.)

1. MFA.No.4484/2015 is filed by defendants 1 and 2 challenging the order dated 30.04.2015 passed by the XX Additional City Civil and Sessions Judge, Bengaluru, allowing I.A.No.9 filed seeking an order of interim injunction in Arbitration Application No.72/2015 thereby restraining the defendants in the

proceedings from interfering with the peaceful possession, enjoyment and development of the suit property by constructing structures by the applicant “ Company respondent No.1 herein until disposal of the case.

2. MFA.No.4992/2015 is filed by defendants 1 and 2 challenging the order dated 30.04.2015 passed by the XX Additional City Civil and Sessions Judge, Bengaluru, allowing I.A.No.10 filed seeking an order of interim injunction in Arbitration Application No.72/2015 thereby restraining the defendants in the proceedings from encumbering and alienating the suit property in any manner, until the disposal of the case.

3. As the parties in both the appeals are same and the facts and the questions involved are also same, both the appeals are clubbed, heard together and are disposed of by this common judgment.

4. Appellants/defendants 1 and 2 along with defendants 3 to 34 who are arrayed as respondents 2 to 33 in this appeal are the owners of an extent of 10 acres 32 guntas of land comprised in Sy.Nos.26/1 and 26/2 situated at Chikkabettahalli Village, Yelahanka Hobli, Bengaluru-North Taluk, Bengaluru. Respondent No.1 “ M/s. Sovereign Developers and Infrastructure Limited which is the applicant before the Court below has filed applications I.A.Nos.9 and 10 under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, the Act') seeking interim measure based on a Joint Development Agreement and Irrevocable Power of Attorney dated 24.09.2012.

5. As per the said Joint Development Agreement dated 24.09.2012, the applicant “ Company has agreed to develop the lands and in that regard, an Irrevocable Power of Attorney was executed on the same day in favour the applicant “ Company by the landowners. An amount of rupees 5 crores 40 lakhs has been paid to the landowners by the applicant “ Company. According to the applicant, the landowners cancelled the Irrevocable Power of Attorney on 15.09.2014 alleging breach of contract on the part of the applicant “ Company. Further contention of the applicant was that having received huge amount of rupees 5 crores 40 lakhs from the Company, the landowners who were required to have the khatha of their respective lands amalgamated, failed to take any steps, although the applicant “

Company was ready and willing to perform its part of the contract hence it could not proceed with the project on account of said lapse on the part of the landowners.

6. The applicant “ Company contended that it had invested huge amount and there was absolutely no justification for the landowners to unilaterally cancel the Irrevocable Power of Attorney on the ground that the Company was incapable of developing the suit property and that the applicant - Company was running short of money, apart from being engaged in several cases initiated by third parties. The applicant urged that landowners were threatening to interfere with the construction work and were making efforts to alienate the suit property and that if the same were to be allowed, arbitration proceedings contemplated by the applicant as per the Joint Development Agreement would be rendered infructuous.

7. Landowners filed statement of objections contending that the application was not maintainable in law in view of the withdrawal of the earlier suit filed by the applicant “ Company in O.S.No.7341/2014 without reserving any liberty to initiate fresh proceedings. They urged that the said suit had been filed without paying requisite court fee and was got advanced and withdrawn without even serving a copy of the application on the landowners. It is, therefore, contended that as per Sub-rule (4) of Rule 1 of Order XXIII CPC fresh proceedings in respect of the same subject matter was barred. Bar of res judicata was also pleaded.

8. They also urged that the Irrevocable Power of Attorney had been already cancelled as the applicant had failed to pay the required charges to the Bengaluru Development Authority (BDA), Bruhat Bengaluru Mahanagara Palike (BBMP) and Bengaluru Water Supply and Sewerage Board (BWSSB) in terms of the Joint Development Agreement and the applicant was flooded with litigation and was financially incapable of continuing the project of development of the property.

9. The Court below on consideration of the entire materials on record has come to the conclusion that the application filed under Section 9 of the Act was maintainable. The bar contained under Sub-rule (4) of Rule 1 of Order XXIII CPC was inapplicable for institution of arbitration proceedings after abandoning the suit earlier filed. Therefore, it has held that the applicant “ Company had made out a

prima facie case and balance of convenience was in favour of the applicant for grant of temporary injunction, as otherwise it would be put to irreparable injury. Hence, interim application filed was allowed granting temporary injunction.

10. Sri T. Seshagiri Rao, learned counsel for the appellants contends that as per the provisions contained under Sub-rule (4) of Rule 1 of Order XXIII CPC, a fresh proceeding under Section 9 of the Act was barred as the suit earlier filed had been withdrawn without reserving liberty. It is his next contention that possession of the lands continued with the landowners even as per the Joint Development Agreement and hence, no order of temporary injunction could have been granted. He is critical of the conduct of the applicant " Company in filing the earlier suit without paying court fee and in withdrawing the same, without even serving a copy of the application for withdrawal on the appellants and therefore, urges that temporary injunction could not have been granted in favour of such applicant. It is next contended by him that applicant " company has been facing almost 700 criminal cases regarding its previous projects and its bank account has been treated as non-performing asset and therefore, there is absolutely no hope of the applicant completing the project.

11. As regards amalgamation of khatha, he contends that the landowners have signed the application and have delivered the same which is clear from the legal notice issued by the applicant " Company itself. He invites the attention of the Court to the legal notice dated 01.08.2014 issued by the appellants calling upon the applicant " Company to pay the betterment charges and other dues to the statutory bodies. He also refers to the demand notice issued by the BDA, BBMP and BWSSB calling upon the applicant to pay various dues and urges that huge amount payable by the applicant " Company under the Joint Development Agreement to these statutory bodies has not been paid which clearly disclosed the default on the part of the applicant " Company in not performing its part of the obligation on account of which the landowners were constrained to cancel the Joint Development Agreement and Irrevocable Power of Attorney. He, therefore, urges that no case has been made out for grant of temporary injunction.

12. Learned counsel appearing for respondents 2 to 33 who are other landowners supports the contentions urged by the appellants and requests the Court to allow the appeal and set aside the order of temporary injunction granted.

13. Learned counsel appearing for the applicant " Company " respondent No.1 herein supports the order passed by the Court below. He justifies the action of the applicant " Company in withdrawing the suit in the wake of the arbitration clause contained in the Joint Development Agreement, in order to initiate arbitration proceedings. He contends that the applicant " Company has paid huge sum of rupees 5 crores 40 lakhs to the landowners, whereupon they have executed the Joint Development Agreement and Irrevocable Power of Attorney; having received such huge sum of money, they could not have cancelled the same. Regarding possession of land, he invites the attention of the Court to Clause 1.2 of Joint Development Agreement. It is urged by him that lands comprised in Sy.Nos.26/1 and 26/2 are owned by appellants 1 and 2 and respondents 2 to 33 and without amalgamation of different bits of land by assigning a single khatha, the authorities would not sanction the plan. In this regard, he invites the attention of the Court to Clause 1.5 of Joint Development Agreement which casts obligation on the landowners to take steps for amalgamation of khatha. It is urged by him that no application has been filed by the owners for assigning single khatha. He further points out that required FAR will not be sanctioned unless a single khatha was assigned to different bits of land. It is also urged that after obtaining possession of the land, applicant " Company has carried out several improvements by investing huge sum of money and therefore, the Trial Court has rightly protected the interest of the applicant " Company by granting an order of temporary injunction.

14. Upon hearing the learned counsel for the parties and on careful consideration of the pleadings and documents on record, in the light of the findings recorded by the Court below, the questions that fall for consideration are:

i) Whether the applicant " Company was precluded from initiating arbitration proceedings by filing application under Section 9 of the Act before the Court below in view of the dismissal of the suit O.S.No.7341/2014 as withdrawn without reserving liberty, in the light of the provisions contained in Sub-rule (4) of Rule 1 of

Order XXIII CPC?

ii) Whether the Court below has committed any illegality in granting the order of temporary injunction in the facts of the case?

15. Sub-rule (4) of Rule 1 of Order XXIII CPC which is relevant for the case is usefully extracted as under:

Where the plaintiff “

(a) abandons any suit or part of the claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. ?

16. As is clear from Sub-rule (4) of Rule 1 of Order XXIII CPC, plaintiff shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim in respect whereof the plaintiff having instituted a suit earlier had withdrawn the same without reserving liberty to file a fresh suit. The Legislature has used the expression fresh suit in Sub-rule (4) of Rule 1 of Order XXIII CPC. Therefore, what is precluded is institution of a fresh suit in respect of same subject matter or part of the claim. The expression fresh suit cannot be construed to mean any other proceeding much less a proceeding under the provisions of the Arbitration and Conciliation Act. The expression suit has not been defined in the Code of Civil Procedure. In the Arbitration and Conciliation Act, definition of Court means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

17. Section 9 of the Act provides for grant of interim measures by the Court. The present proceeding cannot be called as a suit. Therefore, had the applicant “ Company after withdrawing the earlier suit filed challenging cancellation of the

Irrevocable Power of Attorney and the Joint Development Agreement, instituted a fresh suit in respect of such subject matter or part of the claim as was involved in the earlier suit, then bar contained under Sub-rule (4) of Rule 1 of Order XXIII CPC would have applied. Such a bar cannot be made applicable for initiating proceedings under the provisions of the Arbitration Act. Hence, the first point raised for consideration has to be answered against the appellants.

18. As regards the prima facie case made out by the applicant “ Company, execution of Joint Development Agreement has been admitted by the landowners. There is no dispute regarding receipt of advance amount of rupees 5 crores 40 lakhs pursuant to the Joint Development Agreement. Clause 1.2 of Joint Development Agreement makes it clear that the second party/applicant-Company has been held entitled to enter upon the property and commence pre-development works in the schedule property without any interference and interruption and that the landowners had irrevocably authorized and empowered the applicant “ Company to develop the property and they shall not be entitled to revoke the right so conferred on the applicant “ Company, inasmuch as the agreement executed being the one coupled with interest and for consideration. Therefore, the contention of the learned counsel for the appellant that possession of the land was not handed over to the applicant “ Company as per the terms of Joint Development Agreement cannot be accepted.

19. It is true, the terms and conditions of Joint Development Agreement provide for payment of certain charges by the applicant “ Company to various statutory bodies. At the same time, it can be seen from the terms of Clause 1.5 of Joint Development Agreement that the landowners are under obligation to fully cooperate for arranging amalgamation of khatha without any delay or hindrance. Whether it was on account of the lapse on the part of the landowners in fully cooperating with the applicant “ Company that the amalgamation of the khatha could not be obtained or it was because of the lapse on the part of the applicant “ Company to pay the required charges to the statutory bodies due to which the project was delayed are all matters that could be ascertained only at the stage of trial.

20. Merely based on the terms and conditions contained in the Joint Development Agreement or the legal notices exchanged, it cannot be held that the landowners were justified in revoking the Irrevocable Power of Attorney and the Joint Development Agreement. Similarly, having regard to the clauses contained in the Joint Development Agreement which is said to be irrevocable and having admittedly received a sum of rupees 5 crores 40 lakhs whether the landowners could have revoked the Irrevocable Power of Attorney and the Joint Development Agreement are matters that are required to be examined at the stage of trial. Suffice to observe that as rightly held by the Court below, if an order of temporary injunction was not granted, it would result in irreparable injury to the applicant “ Company as they had made out prima facie case in their favour for grant of such an order.

21. In the result and for the foregoing, I do not find any illegality in the order passed by the Court below warranting interference in exercise of Appellate jurisdiction. Hence, the appeals are dismissed. However, having regard to the nature of the dispute and keeping in mind the ends of justice, I am of the view that the Arbitration proceedings shall be disposed of as expeditiously as possible.

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