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Court : Mumbai

Decided On : Jul-09-1998

Reported in : 1999(2)BomCR118

Judge : F.I. Rebello, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39 - Rules 1 and 2; Urban Land Ceiling Act; [Income Tax Act, 1961](#)

Appeal No. : Appeal From Order No. 564 of 1998

Appellant : Gajanan Narayan Malik and Another

Respondent : Kolte Patil Developers Ltd. and Others

Advocate for Def. : M.U. Pandey, Adv.

Advocate for Pet/Ap. : R.S. Dada, S.C. and ;V.S. Gokhale, Adv.

Judgement :

ORDER

F.I. Rebello, J.

1. Admit.

2. Respondents waive service. By consent, heard forthwith.

3. The appellants who are the owners of the land are the original defendants in Special Civil Suit No. 1731 of 1997 filed by the respondents herein. The respondents in that suit had also sought an interim relief by way of temporary injunction. The trial Court by impugned order passed below Exh. 5 has restrained the appellants herein from obstructing and disturbing possession of the plaintiffs and from preventing the plaintiffs/respondents from carrying out development acts pursuant to the Agreement in the suit property. Certain other directions have also been given. It is against this order that the present appeal has been filed.

4. Learned Counsel for the appellants has drawn my attention to the agreements between the parties. The first Agreement is styled as a Memorandum of Understanding and is in respect of 8 Acres (3 H & 23 Ares) out of the total area of the property admeasuring 5 H and 18 Ares. The said Agreement provides that the appellants would sell to the respondents the land at a consideration of Rs. 600/- per Sq. Ft. The respondents paid to the appellants Rs. 15 lakhs by three cheques of Rs. 5 lakhs each which the appellants have admitted. The balance amount was to be paid in 45 months in fifteen Quarterly, equal instalments. The first instalment was to commence on the Advocate for the respondents-certifying the title of the appellants or within two months from the date of obtaining approval to the building plans and commencement of work. The first instalment was to be paid on or before the expiration of three months of further Development Agreement. The building approval has been obtained somewhere in June, 1997. There is another letter Exh. B on record wherein the appellants have agreed to give a concession of 93.75 lakhs to the respondents towards permission obtained by them under the Urban Land Ceiling Act and other incidental works. Thereafter on 10th September, 1996 another Agreement came to be entered into between the appellants and respondent No. 2. In the recital it is mentioned that the owners i.e. the appellants had decided to promote ownership scheme on the part of the land described in Schedule 'B'. Schedule 'B' is the land admeasuring 3H and 23 Ares. By the said Agreement, the appellants permitted the respondent to develop the said land. In Clause 3 it was provided that the owners agree to sell to each of the prospective flat/tenement purchaser proportionate undivided share of F.S.I. for a consideration

of Rs. 600/- per sq.ft. and it was responsibility of promoter/developer to collect the said amount of consideration from individual prospective purchaser. In Clause 10, it was provided that the promoter/developer agrees to complete the said scheme within the period of five years from the date of approval of the building plans. There is also a provision therein for extension of time by mutual agreement for factors beyond the limit or control of promoter/developer. The amount of Rs. 15 lakhs was considered as security deposit to be refunded by the owners at the time of final conveyance. In clause 21, it was provided that the promoter/developer shall develop the property and construct buildings thereon at his own costs, etc.

5. On 11th September, 1996 a third Agreement was entered into between the appellants and respondent No. 2. In terms of Clause 1 of the said Agreement reference was made to the Agreement dated 10th September, 1996 which was the Agreement for developing the property. By clause 1, it was agreed that the appellants would sell or transfer their rights in the property described in Schedule 'B' in favour of respondent No. 2 for a consideration of Rs.600/- per sq.ft. By virtue of clause 2 the sum of Rs. 15 lakhs paid by way of deposit was to be treated as part consideration for the property and was accepted as such. The payment of consideration is provided in clause 3. The balance amount was to be paid by the parties of the second part to the party of the first part in 15 equal quarterly instalments within a period of 45 months from the date of the said agreement. The payment was subject to terms and conditions of the Supplementary Agreement as well as Agreement dated 10th September, 1996. In clause 8, it was mentioned that if there be any difficulty in the title, the same shall be cleared or settled within four months failing which the party of the second part shall clear or settle the same at the costs of the appellants. Clause 26 in the Agreement dated 10th September, 1996 was cancelled by clause 9 of the Agreement. Clause 10 provided that the Agreement shall take effect and shall come into force only in the event promoter/developer failed to sell minimum 8.33% F.S.I. within the period of three months from the date of aforesaid original agreement dated 10th September, 1996 to the prospective flat/tenement/shop etc. purchasers, the said agreement of 10th September, 1996 will also be treated as regular agreement of sale and development. It is further pointed out that after coming into force of the present Supplementary Agreement, the parties would apply to the appropriate authority

under Chapter XX-C of the Income Tax Act for getting clearance under Form No. 37-1. In clause 10(d) it is mentioned that possession had been handed over to the respondent No. 2 who has entered on the land in the capacity of 'Licensee'. By clause 12 it is provided that the respondent No. 2 has the right to transfer rights etc. By clause 13 rights were given to use entire or additional F.S.I. in respect of the said land. By clause 16, it was provided that a supplementary Agreement is and shall be treated as part and parcel of aforesaid Agreement dated 10th September, 1996. Schedule 'B' to the Agreement again speaks of 3H and 23 Ares (8 Acres).

The next set of correspondence is the correspondence from the appellants to respondents reminding that amount have not been paid. On 19 May, 1997 M/s. Kolte Patil Enterprises, respondent No. 3 herein, wrote to the appellants that one Shri Kanhaiyalal M. Talera had issued a notice claiming rights over the property. The rights claimed was in respect of Survey No. 16/ 1 and Survey No. 17. By letter of 11th July, 1997, on behalf of the appellants, respondent No. 2 was informed that there have been failure to comply with the Agreement and that it seems that the respondents had no intention to make payment as per the terms and conditions of the Agreement. By the same letter, Agreements dated 10th September, 1996 and 11th September, 1996 and any others were terminated. Thereafter some other correspondence has been exchanged and thereafter the suit came to be filed.

6. The trial Court rejected the contention of the respondents in respect of the objections filed by Mr. Talera. The trial Court held that in so far as public notice was concerned, it was only in respect of property Survey No. 16/1 and it had nothing to do with Survey No. 17 and therefore the objection of marketable title did not survive. The trial Court thereafter proceeded to hold that in so far as the interpretation of the document is concerned, the amounts were due and payable only if the amounts were collected by the respondents from the flat purchasers. The trial Court thereafter went on to hold that a sum of Rs. 75 lakhs had been accepted and has been paid on behalf of the appellants by the respondents. The trial Court thereafter proceeded to hold that for the purpose of prima facie case the rights of development of the property given by the appellants with consent has to be considered. The trial Court further held that the appellants have no rights to

obstruct the possession of the respondents or restrain them from making construction on the property and all that the appellants can claim is instalments. Thereafter the trial Court proceeded to give other direction and passed the final order.

It is this order which is the subject matter of this appeal.

7. On behalf of the appellants it is sought to be contended that the trial Court in granting the injunction in the form it has so granted has acted illegally without considering the settled position that for a decree of specific performance the plaintiffs/respondents must plead and show their continued readiness and willingness to perform their part of the contract. In the instant case, this has not been done in as much as the amounts that had to be paid in terms of the agreement have not been deposited. This amounts to failure to show readiness and willingness and on that count itself the order is liable to be quashed and set aside.

On behalf of the respondents it is contended that for the Supplementary Agreement dated 11th September, 1996 to come into force there ought to be compliance with clause 10 of the Supplementary Agreement. As the same has not been complied with, there is no Agreement to Sell and at the highest it is a Development Agreement. In so far as the Development Agreement is concerned it is contended that the respondent themselves have admitted that the appellants have paid to them the sum of Rs. 15 lakhs plus a further sum of Rs. 75 lakhs. This is evidenced by the consent/authority letter whereby the appellants agreed to give a concession of Rs. 75 lakhs on the purchase price on account of the steps taken by respondent Kolte Patil Developers Limited for taking permission under the Urban Land and Ceiling Act and other incidental work for development of the plot. It is further contended that in terms of the Agreement for Development it is only when the amount is received from the purchasers in terms of clause 3 of the Agreement dated 10th September, 1996 the amount is payable to the appellants.

8. At the outset therefore it is clear that the respondents have given up their case for specific performance of the contract based on the Agreement to sell. The trial Court proceeded on the footing that the respondents were put in possession of the

property pursuant to an Agreement to Sell and that the appellants herein had agreed to execute the Conveyance Deed in favour of the flat purchasers. In para 8 the trial Court has held that the Agreements between the parties are not simple agreements but Agreement to Sell.

The question is whether the Supplementary Agreement dated 11th September, 1996 is operative in as much as the Promoter/Developer has failed to sell minimum 8.33 F.S.I. within a period of every three months from the date of the earlier agreement dated 10th September, 1996. The stand of the respondents is that they have not done so and consequently the agreement dated 11th September, 1996 has not come into force. Once the plaintiffs/ respondents themselves plead that the agreement to sell has not come into force, the question of granting relief of specific performance will not arise. Therefore prayer (a) would not be capable of being granted. If prayer (a) cannot be granted then the question is whether the respondents can be said to be in possession of the property pursuant to the Development Agreement of 10th September, 1996. Agreement of July 1996 and Supplementary agreement dated 10th September, 1996. The area in respect of which the development was to take place was admeasuring 3H and 23 Ares out of the total property admeasuring 5H and 18 Ares. In terms of clause 6(c), the amount was to be paid was at the rate of Rs. 600/- per sq. ft. The initial amount to be paid was Rs. 15 lakhs which had been paid and the balance within the period of 45 months in fifteen Quarterly equal instalments. In terms of clause 6(c), the first instalment was to be paid on the Advocate for the respondents certifying title or within two months from the date of obtaining approval for the building plans and commencement of work. It is admitted that the work has commenced. In the Supplementary Agreement of 10th September, 1996 in terms of clause 3, it was agreed that it shall be the responsibility of Pro-Promoter/ Developer to collect the amount from individual prospective Purchaser. It is sought to be contended from this that the promoter is bound to pay only if he receives the payment from the purchaser. It was therefore contended that the respondents have not breached the contract and having spent substantial moneys the order of the Court below should not be interfered with.

9. This Court has consistently taken a view that the Development Agreement cannot be specifically enforced and that damages are an answer except where the Developer has invested substantial money and altered his position by creating third party rights. In the instant case the only amount is Rs. 15 lakhs paid to the appellants and the concession of Rs. 75 lakhs given by the Developers. The appellants have claimed that till date there is due and payable to them an amount of Rs. 9,73,13,440/- (Rupees Nine Crores Seventy three lakhs thirteen thousand four hundred and forty only). It can be further seen that interpretation sought to be given that the Developers would only pay after collecting the money is not in consonance with the agreement whereby the amount has to be paid in 15 instalments of three months each. The first instalment commencing at least from the date of obtaining approval and commencement of work. Work has commenced. It was not the intention as can be gathered from the construction of the various agreements that it is only in the event the purchaser paid the monies the amount will be payable to the appellants. What happens in a case where the Developer has not sold all the tenements. Then the clauses of 45 months and 15 instalments of three months each will be rendered incapable of performance. It may be further noted that merely because some development activities have been carried out by itself is not sufficient reasons to grant interim relief. The Statement of Work of progress filed as of 28th February, 1993 shows that at the highest some footing and plinth in respect of some buildings have commenced as also some columns. Beyond that nothing has been done. Respondents have failed to show their bona fide by paying the instalments due or atleast offering to pay a substantial amount of the instalments due and payable. The possession of a Developer is possession on behalf of the owner. He has no independent right on the land except and on behalf of the owners. In clause 12 of the Supplementary Agreement it was agreed that the Promoter/Developer would develop the property and construct building at his own costs and keep harmless and indemnified the owners/appellants herein. In the light of the material on record, the impugned order below Exh. 5 is liable to be quashed and set aside. The application Exh. 5 is rejected.

10. In order to obviate further difficulties the trial Court to appoint an Architect as a Commissioner. The Commissioner to submit a Report to the Court as to the work

that has been completed till date or at the time when the Commissioner visits the site. The Commissioner also to give the valuation of the work done in order to enable the Court to pass appropriate directions at the time of final disposal of the suit. The Cost of the Commissioner to be shared by both the parties.

11. In the circumstances of the case, appeal is allowed. Impugned orders dated 23rd October, 1997 and 6th February, 1998 passed by the Civil Judge, Senior Division, Pune in Special Civil Suit No. 1731 of 1997 are set aside. Costs by the respondents.

12. Counsel for the respondents seeks stay of the order in order to enable him to take legal steps if any. The order of this Court not to be given effect to for a further period of four weeks from today subject to the condition that the respondents do not create any further third party rights and/or carry out any further development.

13. Issuance of certified copy expedited.

14. Appeal allowed.