

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 04.06.2010

**OMP No. 324/2010 & IA Nos 7561/2010 (exemption),
7567/10 (exemption) & 7566/10 (under O. 39 R.1 & 2 CPC)**

M/S TIRUPATI BUILDESTATES PVT LTD

..... PETITIONER

Vs

M/S TEXMACO LTD & ORS

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioner : Mr Anoop Chaudhary, Sr Advocate, Ms Jun Chaudhary, Sr
Advocate with Mr Amulya Dhingra

For the Respondents: Mr Amit Sibal with Mr Vijayender Kumar, Mr Siddharth Silwal & Mr Harsh
Kaushik, Advocates

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may
be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported
in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. Issue notice to the respondents. Mr Amit Sibal, Advocate accepts notice on behalf of the respondents. He submits that he wishes to argue the petition without a reply based on the documents filed by the petitioner and admitted documents which ought to have been placed on record by the petitioner. These being: the review petition no. 1200/2002 filed in the Supreme Court; the order dated 25.03.2010 and the supplementary agreement executed between the parties entitled “This First Supplementary Agreement” dated 03.02.2009 (hereinafter referred to in short as ‘the supplementary agreement’).

2. Mr Chaudhary, the learned senior counsel who appears for the petitioner, on instructions, has submitted that he would have no difficulty if the Court were to examine the said documents as the existence of these documents is not in dispute.

3. I, therefore, proceed to dispose of the captioned petition.

3. Briefly in the petition, the relief sought for is as follows:-

“a. Grant an injunction restraining the respondents from creating any third party rights or entering into any kind of development agreement or collaboration agreement with any third party in respect of property bearing municipal premises No. 7395 Old Sabzi Mandi, G.T. Road, Delhi-110007, measuring approximately 21.45 acres (and commonly known as Birla Mills at Kamla Nagar, Delhi) till the conclusion of the Arbitral proceedings.

b. Grant an injunction restraining the respondents from parting with the possession of the aforesaid property....”

c. xxxx

xxxxxxx

xxxxxxx

(emphasis is mine)

4. The background in which the captioned petition has been filed is as follows:

4.1 The respondent had rights in an immovable property situate at Municipal premises No. 7395, Old Sabzi Mandi, G.T. Road, Delhi-110007 admeasuring 21.45 acres, commonly known as, Birla Mills at Kamla Nagar, Delhi (hereinafter referred to in short as ‘the property in issue’).

4.2 It appears that in a Public Interest Petition filed by Sh M C Mehta, the Supreme Court by an order dated 10.05.1996 passed in ***CWP No. 4677/1985*** entitled ***M.C. Mehta vs Union of India & Others***, inter alia directed in respect of hazardous, noxious, heavy and large industries that they should comply with the provisions of the Master Plan, Delhi which came into effect in 1990. The Supreme Court observed that in so far as hazardous industries were concerned, the said Master Plan required the industries to be shifted out of Delhi within three years. As far as heavy and large industries are concerned, the Master Plan did not permit any new or large industry to be set up and, therefore, with regard to existing heavy and large industries units it observed that they shall have to shift to Delhi Metropolitan area and the National Capital Region keeping in view the National Capital Region Plan and National Interest Policy of the Government of India. The effected land or the land effected by such units were required to be utilized according to the provisions of the Master Plan. (See ***M.C. Mehta vs Union Of India AIR 2000 SC 2701***)

4.3 In the 10.05.1996 judgment, the Supreme Court directed the owners of the land to hand over a percentage of the land, owned by them, to the Delhi Development Authority

(in short 'DDA') for development of "green belts and open spaces". The portion of the percentage of the land, which was required to be surrendered to the DDA for the aforesaid purpose was, as per the stipulation contained in paragraph 9 of the judgment dated 10.05.1996. It is not disputed that the respondent was required to surrender to the DDA 65% of the land for development of "green belts and open spaces". The said order became the subject matter of subsequent orders passed by the Supreme Court on 08.07.1996, 04.12.1996 and 28.04.2000. Review petitions were filed against the orders passed by the Supreme Court. One such review petition bearing no. 1296/2003 was filed by the respondent. There were decidedly other persons who had also preferred the review petitions.

4.4 After the review petition had been filed by respondent no.1, a Memorandum of Understanding (in short 'MOU') dated 15.06.2006 was executed between the petitioner and respondent no.1. The orders in the review petitions including that of respondent no.1 were reserved on 29.04.2010.

4.5 It may be pertinent at this stage to note what transpired in the interregnum and thereafter.

4.6 On 08.04.2008, the petitioner wrote to respondent no.1 giving it an account with regard to the proceedings in the review petition upto the said date. Respondent no.1 by a return communication dated 20.05.2008, thanked the petitioner with regard to the update received on the proceedings pending in the Supreme Court.

4.7 In addition a request was made that it be kept similarly informed in future. By yet another communication dated 28.07.2008, the petitioner informed respondent no.1 that the Supreme Court had reserved orders in the review petition on 29.04.2008, as noticed above. Once again by a return letter dated 01.08.2008, respondent no.1 requested the petitioner to communicate to it the factum of pronouncement of the "final judgment"; with a copy thereof.

4.8 Apprehending the time stipulated in the MOU was expiring the petitioner vide letter dated 29.04.2008 sought extension of time for compliance of the conditions

contained in Clause 4.1 of the MOU. Respondent no.1's response was communicated vide letter dated 01.10.2008. In the reply, respondent no.1 pointed out to the petitioner that the request for seeking an extension was "premature". Furthermore, the petitioner was once again requested to forward a copy of the judgment as and when the same was pronounced. Undeterred the petitioner vide communication dated 30.01.2009, once again sought extension of timeline under the MOU for a further period of 15 months on the ground that there was fixed date given for pronouncement of judgment in the matter. This request was reiterated by the petitioner vide its letter dated 22.07.2009. In a response sent vide letter dated 24.07.2009, it was brought to the notice of the petitioner that there had been a considerable delay in giving effect to the MOU (as was modified by the supplementary agreement) causing considerable loss to it. The petitioner was consequently put to notice that any default or delay would result in it being mulcted with necessary consequences. The petitioner's request for extension of time though, was rejected.

4.9 The petitioner, however, persevered and accordingly sent another request for extension vide its letter dated 27.07.2009. It was sought to be explained that extension of time was required for obtaining sanctioned plans as also with respect to overall time frame which was given to the parties with regard to the project, in continuation of its earlier request contained in letter dated 22.07.2009. It appears that respondent no.1 finally yielded to the request of the petitioner, and extended time vide its letter dated 30.07.2009. Since the contents of this letter will have a bearing on the result of the captioned petition, for the sake of convenience, I intend extracting the relevant portions of the letter:-

"I refer to your letter dated 27th July, 09. In view of your contention of the necessity of change of land use, ***we are willing to extend the period for obtaining sanction of the plans sanctioning the FAR for the entire 21.45 acres of land*** from the appropriate authorities and obtaining all relevant and appropriate permissions and sanctions as are necessary and as may be required for development of the Project etc., from 31st March 2010 to 30th September 2011 and also to extend the period from 70 months to 2007....

.....Kindly note that save as modified as aforesaid, all other terms and conditions of the MOU dated 15.06.2007 and the First Supplement Agreement dated 03.02.2009 shall apply mutatis mutandis....”

(emphasis is mine)

4.10 Notably, the petitioner did not reply or controvert the contents of the letter, in particular, that portion of respondent no.1's letter dated 31.07.2009 which, alluded to the fact that the sanction of the plans pertained to the entire 21.45 acres of the property in issue.

4.11 To complete the narration, on 25.03.2010 the Supreme Court delivered its judgment in the review petitions including that filed by respondent no.1. The review petitions were dismissed subject to certain clarifications, which were made by the Supreme Court in paragraphs 13, 16, 17 and 18 of its aforementioned order.

4.12 Immediately after the pronouncement of the judgment the petitioner vide letter dated 21.04.2010 called upon respondent no.2 to give effect to its obligations under the MOU by inter alia executing in its favour a power of attorney, and a development agreement. Respondent no.2 was given a week's time to do the needful in that regard. The petitioner followed aforesaid communication with a legal notice dated 16.05.2010. Once again the petitioner called upon respondent no.2 to take necessary steps towards execution of the power of attorney and development agreement, in its favour, as contemplated in the MOU. The petitioner also put respondent no.1 to notice that, in the meanwhile, it should not deal with any third party in regard to the property in issue, in any manner whatsoever.

4.13 In the interregnum, that is, between the issuance of letter dated 21.04.2010 and the legal notice dated 16.05.2010, respondent no.1 through its advocates issued a communication dated 15.05.2010. By this communication respondent no.1 adverted to the fact that the MOU was pivoted on the success in the review petition, and this aspect of the understanding obtaining between the parties got reflected in the supplementary agreement which, specifically alluded to the fact that the joint development of the

property in issue would be undertaken only if 'whole' of the "subject property" was available for development and not otherwise.

5. Based on the aforesaid facts it has been argued by Mr Chaudhary, appearing on behalf of the petitioner, that the relief as sought for in the petition ought to be granted pending the commencement of arbitration proceedings between the parties. Mr Chaudhary has contended that the MOU required respondent no.1 to execute a development agreement within 30 days of the final decision in the review petition by the Supreme Court, as contemplated in Clause 4.1 of the MOU. It was contended that since the decision of the Supreme Court was delivered only on 25.03.2010, the petitioner called upon respondent no.1 to fulfill its obligations vide its letter dated 21.04.2010 well before the expiry of 30 days period. It was contended by Mr Chaudhary that on a reading of the response of respondent no.1 dated 15.05.2010, it is quite clear that the respondent no.1 is reneging on its obligations undertaken under the MOU.

6. Mr Sibal, on the other hand, contended that the present petition ought to be dismissed for the following reasons:-

(i) the petitioner curiously did not append the most crucial document which is the supplementary agreement dated 03.02.2009, even though the same has been mentioned several times in the correspondence exchanged between the parties. Therefore, on this ground alone the petition should be dismissed as this document which refers to as a "vital document" has been kept away from the Court by the petitioner;

(ii) the supplementary agreement, in particular Clause 2.2, made it clear that respondent no.1 would be interested in a joint development of the property in issue only if whole of the subject property is made available for development and not otherwise. Therefore, the fundamental basis of the contract having disappeared no relief, as prayed for in the petition at this stage, could be granted.

6.1 In order to buttress his submission that the word "whole" appearing in Clause 2.2 of the Supplementary agreement referred to the entirety of the land, which admittedly admeasured 21.45 acres; recourse was taken to Clauses 2.1, 4.1 and the Schedule

appended to the MOU. Reference was also placed for this purpose on the letters dated 22.07.2009, 27.07.2009 issued by the petitioner, and letter dated 31.07.2009 issued by respondent no.1. These documents were referred to, to contend that the fundamental term of the MOU (read with supplementary agreement) was the availability of the entire land admeasuring 21.45 acres, for respondent no.1 to be interested in the project involving joint development of the property in issue, in terms of Clause 6.1 of the MOU.

7. In the rejoinder, Mr Chaudhary submitted that respondent no.1 had obviously misled the petitioner as regards the area of land which was available for joint development. Mr Chaudhary contended that after the judgment of the Supreme Court dated 10.05.1996, it was quite clear that the land available for development was not the entire land admeasuring 21.45 acres but what was left with respondent no.1 after 65% of the land, as directed, had been surrendered to the DDA. It was next contended by the learned counsel that the petitioner would be entitled to seek specific performance of the land remaining with respondent no.1. It was further contended by Mr Chaudhary that since the review petition had been filed in the year 2003, while the MOU was executed in June, 2007, the petitioner had no way of knowing the contents of the review petition. It was submitted that, in any event, after 10.05.1996 judgment, the only issue raised before the Supreme Court, in the review petition, was vis-à-vis compensation, and not the area of the land; therefore, the MOU could not have been executed between the parties with regard to the joint development of the entire land, as against the land which was available with respondent no.1. Mr Chaudhary vociferously contended that if the MOU alluded to that area of the land which could not, in law, have been the subject matter of the agreement between the parties to that extent, the MOU was void. According to Mr Chaudhary, respondent no.1's obligation qua the remaining land remained intact. Mr Chaudhary relied upon the provisions of Section 36 of the Contract Act, 1872 to support his submission.

8. I have heard the learned counsel for the parties and also perused the documents on record as also the documents handed over by Mr Sibal, as noticed in the earlier part of my

judgment. The first issue which arises for consideration is whether the parties had agreed to joint development of the entire land admeasuring 21.45 acres or that portion of the land which was in possession of respondent no.1 pursuant to orders of the Supreme Court dated 10.05.1996. If that be the position, then could the Court at this stage grant any ad-interim relief in favour of the petitioner?

9. In so far as the first issue is concerned, I am of the view that on a perusal of the documents placed before me, it appears prima facie that the parties proceeded on the basis that the joint development of the property in issue would take place if the entire land was available. My reasons for coming to this conclusion are as follows:-

- (i) First, in the review petition the relief sought is for the recall of the entire order dated 10.05.1996;
- (ii) Second, a perusal of the order dated 25.03.2010 passed by the Supreme Court itself show that a submission to that effect was made which was rejected by the Supreme Court. The relevant extract from the judgment would clearly establishes this fact.

“.....It was contended that transfer of ownership of freehold land otherwise than by acquisition or by conveyance or by inheritance was not known to law; and Article 300A of the Constitution barred any person being deprived of this property save by authority of law. It was further contended that the mere fact that this court did not want the Government to undertake the time consuming process of acquisition under Section 15 of the Delhi Development Act, would not in any way detract from the rule of law which requires the land owners of Delhi Industries to be treated on par with owners of land in other parts of the country which are acquired for the purposes of urban development. It was submitted while Section 15 deals with compulsory acquisition of land where the land is required for the purpose of development or any other purpose under the DD Act, Section 55 of the said Act dealt with modification of the Master Plan or zonal development plan in certain cases. The said section provided that where any land is required by the Master Plan or a zonal Development Plan to be kept as an open space or un-built upon or is designated in any such plan as subject to compulsory acquisition, then if at the expiration of 10 years from the date of operation of the plan under section 11 or where such land has been so required or designated by any amendment of such plan, from the date of operation of such amendment, the land is not compulsorily acquired, the owner of the land may serve notice on the Government requiring his interest in the land to be so acquired; and if the Government fails to acquire the land within a period of six months from the date of the said notice, the Master Plan or the Zonal Development Plan, shall have effect, as if the land were not required to be kept as an open space or un-built upon or were not designated as subject to compulsory acquisition. It is submitted this provision was completely ignored by this Court, while passing the order dated 10.5.1996.”

It was argued that as relevant constitutional and statutory provisions had not been taken note of by this Court, and as there is an apparent error on the face of the record, the impugned order dated 10.05.1996 should be reviewed....”

(emphasis is mine)

(iii) Third, the prayer in the petition itself is with regard to an injunction qua the entire land i.e., 21.45 acres;

(iv) In Clause 2.1 of the MOU “subject property” has been shown as admeasuring 21.45 acres as described in the schedule appended to the agreement, and as delineated in the plan annexed to the said MOU. The portion as delineated in the plan, as per Clause 2.1 of the MOU, is bordered in red. To be noted, the petitioner has not, for some curious reason, filed the plan with the petition. The schedule to the MOU, however, makes this position clear that, what is bordered in red is the entirety of the land admeasuring 21.45 acres;

(v) Fourth, Clause 4.1, which alludes to one of the conditions precedent, obliged the petitioner to prepare plans for sanctioning of the FAR at its own cost in respect of the entire land comprised in the “subject property”. The petitioner was further obliged in terms of Clause 4.1 to obtain sanction of the site plans, in the name of respondent no.1, from the appropriate authorities for development of the project at the “subject property”. A bare perusal of Clause 2.1 alongwith Clause 4.1 would establish quite clearly that the petitioner was required to discharge its obligations, that is, prepare plans and obtain sanction with respect to the entire land which was the “subject property” admeasuring 21.45 acres;

(vi) Fifth, the correspondence, which was exchanged between the parties, in particular the letter dated 22.07.2009, by which the petitioner sought extension of time there is reference to, not only the MOU and Supplementary agreement but also to the site plan. The site plan in issue was the plan which was referred to in the schedule to the MOU;

(vii) Sixth, the respondent no.1’s letter dated 31.07.2009 categorically referred to the petitioner’s obligation to obtain sanction with respect to the ‘entire’ 21.45 acres of land

from the concerned authorities. Curiously, this aspect was never ever controverted by the petitioner; and

(viii) Lastly, what is most revealing is the letter dated 21.04.10, issued by the petitioner pursuant to the judgment of the Supreme Court in the review petition. In the said letter the petitioner has very clearly accepted the fact that, even in their understanding one of the issues before the Supreme Court was the area of the land. The portion of the letter extracted below makes that amply clear:-

“.....you are very well aware that when a reserved judgment is to be delivered is entirely on the Hon’ble Supreme Court, and till the judgment was delivered, *we could not have known the area for development available and as such any step towards fulfilling our commitments arises only from the date of judgment...*” (emphasis is mine)

10. In view of the aforesaid facts and circumstances, the only meaning which can be given to: that portion of Clause 2.2 of the supplementary agreement which, refers to the fact that respondent no.1 would be interested in joint development “in case the whole of the subject property” is available for development and not otherwise— is that it adverted to the entire land admeasuring 21.45 acres. Prima facie, the petitioner’s contention to the contrary does not appear to be correct. Mr Chaudhary’s contention that parties could not have entered into an agreement contrary to the law, i.e., the judgment of the Supreme Court dated 10.05.1996, which made it clear that the petitioner could make use of only a part of the land excluding the area which had to be surrendered to DDA in terms of paragraph 9 of the said judgment, in my view, instead of furthering the cause of the petitioner would result in bringing the rights of the petitioner under the MOU and the supplementary agreement to a complete naught. The MOU, appears to be in agreement between the parties whereby they agreed to execute in future a development agreement, only if, parties were to succeed in a review petition, and consequent thereto the entire land was available for joint development.

10.1 I must confess that the agreement by itself is curious to say the least. Notwithstanding this aspect, prima facie, the fundamental term of the MOU has collapsed.

10.2 Nevertheless, during the course of the arguments Mr Sibal fairly conceded that in terms of Clauses 5.1 and 5.3 of the MOU read with Clauses 2.4 and 3.1.2 of the supplementary agreement, respondent no.1 would be required to refund without interest, at least 50% of Rs 6 crores deposited by the petitioner in the form of security. In so far as balance Rs 3 crores is concerned, it was his contention that the petitioner had agreed to suffer pre-determined liquidated damages, in addition to bearing the cost and expenses as, contemplated in the MOU.

10.3 In my opinion, respondent no.1 should accordingly deposit a sum of Rs 3 crores in Court for immediate payment to the petitioner. As regards the balance Rs 3 crores whether respondent no.1 could or could not have forfeited the amount would be one of the disputes arising between the parties, to be tried by the Arbitrator, as and when the proceedings are commenced in that regard.

11. The other contention of Mr Chaudhry that the petitioner was unaware of the averments made in the review petition or what had transpired in Court is, according to me a submission which is totally inaccurate to say the least. A bare perusal of the letters dated 08.04.2008, 28.07.2008, 24.09.2008, 31.01.2009 and 21.04.2010 addressed by the petitioner to respondent no.1 would demonstrate that it was the petitioner who was keeping track of the proceedings in Court and that it was the petitioner who finally informed the respondent of the fate of its review petition; and this conduct of the petitioner was perhaps not out of the ordinary, in view of the obligation undertaken by the petitioner in terms of Clause 4.2 of the MOU to bear expenses related to legal costs, bills of attorneys and other miscellaneous expenses in respect of the review petition. Therefore, for Mr Chaudhary to contend that they were kept in dark, as regards the proceedings in the Court or the contents of the review petition, cannot be believed.

12. For the forgoing reasons, I find no merit in the petition. The same is rejected save and except as regards the following:-

(i) respondent no.1 shall deposit a sum of Rs 3 crores in Court, within a period of one week from today, with the Registrar General of this Court. The said amount, if deposited

by respondent no.1, shall be invested by the Registrar General in an interest bearing fixed deposit with a scheduled bank. The petitioner shall be at liberty to apply to the Court for release of the said amount; and

(ii) if respondents choose to deal with the property in issue, pending final adjudication of disputes, they shall do so at their own risk and cost. No equities shall be claimed by them or their successors in interest, who will be put to notice as regards this order, if they were to lose upon a final adjudication of the disputes. This condition shall, however, operate for a period of six weeks from today within which time the petitioner should commence the arbitration proceedings. Parties shall abide by a final decision in the matter.

13. With the aforesaid directions, the petition is disposed of.

RAJIV SHAKDHER, J

JUNE 04, 2010
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