

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 641 OF 2015**

M/s. Atul Development Corporation, a
registered partnership firm..

..Applicants

Vs

Bhagwandas Gordhandas, since
deceased, and Ors

.. Respondents

Mr. R.S.Apte, Senior Advocate i/b Mr. Roop M. Vasudeo, Advocate
for Applicants.

Mr.Gaurav Joshi, Senior Advocate, with Gautam Ankhad,
R.A.Shah, Purvi Asher, Dharma Pal Dave i/b Mansukhlal Hiralal &
Co, Advocates for Respondents.

**CORAM : R.G.KETKAR,J.
DATE : 16/11/2015**

PC:

1. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), original plaintiffs have challenged the Judgment and order dated 26.2.2015 passed by learned Judge, City Civil Court, Gr. Mumbai in Notice of Motion No.945 of 1991 in S.C.Suit No.8249 of 1984 (High Court Suit No.1423 of 1984). By that order, the learned trial Judge dismissed the motion taken out by the plaintiffs for recording a compromise in the suit as between the plaintiffs and defendants no.4,6 to 10 and 24 to 26, (for short, '**these defendants**') as reflected in writing dated 21.9.1985 which is signed by the parties and to pass a decree in terms of draft consent terms.

2. In support of this Application, Mr. Apte submitted that the plaintiffs had initially instituted suit on the Original side of this Court for specific performance of Agreement of Sale dated 29.12.1980. On 21.9.1985, the parties executed compromise terms in writing thereby settling the dispute between themselves. Mr. Apte submitted that the suit property is under reservation. Clause 2 thereof provided that the plaintiffs will get the reservation vacated and/or released and/or lifted at their costs, charges and expenses by making suitable representations to the Government, Municipal Corporation and/or other Authorities. For that purpose, necessary applications, petitions, representations etc. are required to be signed by the defendants. Clause 2 further provided that "if the said reservation is not released and/or vacated and/or lifted or if the said Dilip or the said Bhanu (only heirs and legal representatives left by Ms Sunderbai Kersondas Kapadia who died at Mumbai on 24.4.1982 intestate) do not confirm the sale or refuse to be joined as defendants to the suit and sign the consent terms, then and in any of such events it shall be our option (plaintiffs) whether to complete the sale by paying balance of the price or to cancel the agreement and obtain refund. If we exercise the option to cancel the agreement then and in such event you (defendants) will refund to us a sum of Rs. 1,11,000/- together with such amount

as you (defendants) may receive from the Municipality being the deposits made by us (plaintiffs) to the Municipality etc as and when received by you (defendants).” Clause 3 thereof provided that the said arrangement will not be acted upon or come into operation till the plaintiffs get the said reservation lifted and/or vacated and/or released or the plaintiffs agree to cancel and terminate the agreement for sale as aforesaid. If the plaintiffs agree to continue with the agreement and have specific performance of the agreement by consent decree then and in such event proper consent terms will be drawn up for conveying and transferring the property to the plaintiffs or to their nominee or nominees.

3. Mr. Apte submitted that the execution of the compromise terms in writing is admitted. The defendants did not allege fraud while entering into compromise terms. In such situation, the trial Court ought to have passed a decree in terms of the consent terms. Mr Apte further submitted that the plaintiffs have already purchased 4/9th share from other co-sharers in pursuance of the compromise terms. It is only **these defendants** (viz. defendants no.4, 6 to 18 and 24 to 26) are opposing to pass a decree in pursuance of the consent terms.

4. Mr. Apte has taken me through the Consent Terms dated 21.9.1985 as also correspondence exchanged between Solicitors

of the parties, namely (1) dated 6.9.1990 addressed by the plaintiffs' Solicitors to **these defendants** and in particular paragraph 8 thereof. He submitted that cheque no.740936 dated 7.9.1990 drawn on Dena Bank was encased by **these defendants**. Along with that letter, the plaintiffs also forwarded consent terms, power of attorney and declaration for approval of the documents from **these defendants**, (2) communication dated 25.6.1992 sent by **these defendants** wherein it was made clear that **these defendants** are agreeable to compromise the subject matter of the Notice of Motion taken out by the plaintiffs subject to certain clarifications and response dated 4.7.1992 of the plaintiffs.

5. Mr. Apte submitted that **these defendants** (viz.defendants no.4,6 to 18 and 24 to 26) are trying to resile from the original consent terms on the basis of terms which were not forming part of the original consent terms. He further submitted that in fact pending the Motion, the defendants repeatedly called upon the plaintiffs to attend hearing in pursuance of the notice issued under section 8(3) of the Urban Land (Ceiling and Regulation) Act, 1976.

6. Mr. Apte submitted that on 19.11.1985, the defendants' solicitors addressed a letter to the plaintiffs' solicitors for extending time limit for a period of five years for lifting

reservation from the suit property and response dated 11.12.1985 of the plaintiffs confirming the extension of 5 year time limit for removing reservation of the suit property and for obtaining confirmation of Dilip Karsandas and Bhanu Karsandas of the agreement of sale.

7. Mr. Apte submitted that as per Order 23, Rule 3 of C.P.C., once parties have not disputed that consent terms are in writing and that no fraud is alleged while entering into compromise terms, Court has no option but to pass a decree in terms of the consent terms. He submitted that **these defendants** have unreasonably set up demands which are not incorporated in the consent terms and are opposing to pass a decree in terms of the consent terms. He, therefore, submitted that the Application requires consideration.

8. On the other hand, Mr. Joshi supported the impugned order. Mr Joshi submitted that clauses 2 and 3 of the document styled as compromise dated 21.9.1985 leave no room for doubt that the arrangement reflected in clause 2 will not be acted upon till the plaintiffs get reservation on the suit property lifted. In fact, that is even understood by the plaintiffs as is evident from paragraph 6(vi) of the affidavit of Mr Atul Nathalal Patle, partner of the plaintiffs. In short, he submitted that the arrangement reflected in clause 2 of the consent terms dated 21.9.1985 were not acted

upon or will come into operation till the plaintiffs get reservation lifted. He submitted that the plaintiffs had instituted writ petition in this Court challenging the continuation of the reservation. The petition was dismissed in the year 1994 and S.L.P preferred by the petitioners was rejected on 18.11.1996. He further submitted that the reliance placed on communication dated 19.11.1985 addressed by the defendants' solicitors to the plaintiffs' solicitors is misplaced as it merely records extension of the time limit of five years for removing reservation from the suit property. He further submitted that even after filing of the Motion, negotiations were going on between the parties. That apart, in terms of clause 3 of the consent terms, if the reservation is not lifted and if the plaintiffs do not cancel or terminate the agreement for sale and decide to continue with the agreement and have specific performance of the agreement by consent decree, then and in such event proper consent terms will have to be drawn up for conveying and transferring the property. No such consent terms have been drawn up as per clause 3 of the consent terms. He has also taken me through the agreement of sale dated 29.12.1980 and in particular clause 1(b)(ii) and 4(b), which require obtaining sanction of the Court for selling the suit property on behalf of minors. In the present case, defendants no.15,17 and 18 were minors as on 21.9.1985 when the consent

terms were entered into. Apart from that, clause 19(a) requires certificate under section 230A of the Income-tax Act, 1961 as also clause 19(b) requires defendants signing necessary applications for obtaining permission under section 27 of the Urban Land (Ceiling and Regulation) Act, 1976. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

9. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. In order to appreciate the controversy between the parties, it is necessary to reproduce clauses (2) and (3) of the Consent Terms dated 21.9.1985 which read thus;

“2. It is agreed that so far as the reservation upon the suit property is concerned the matter of getting the same vacated and/or released and/or lifted will be attended to by us at our costs charges and expenses and by making suitable representation to the Government, Municipal Corporation and/or other authorities for which the necessary applications, petitions, representations etc will be signed by you and will be liable or responsible for payment of such costs charges and expenses. **If the said reservation is not released and/or vacated and/or lifted or if the said Dilip or the said Bhanu do not confirm the sale or refuse to be joined as defendant to the suit and sign the consent terms then and in any of such events it shall be our option whether to complete the sale by paying balance of the price or to cancel the agreement and obtain refund.** If we exercise the option to cancel the agreement then and in such event you will refund to us a sum of Rs. 1,11,000/- together with such amount as you may receive from the municipality being the deposits made by us to the Municipality etc as and when received by you.

3. It is agreed that this arrangement will not be acted upon or come into operation till we get the said reservation lifted and/or vacated and/or released or we agree to cancel and terminate the agreement for sale as aforesaid. If we agree to continue with the agreement and have specific performance of the agreement by consent decree then and in such event proper consent terms will be drawn up for conveying and transferring the property to us or to our nominee or nominees as provided and subject to the terms of the agreement."

(emphasis supplied)

The suit property is admittedly under reservation. It was agreed between the parties that if the reservation is not lifted or if said Dilip or Bhanu do not confirm the sale or refuse to be joined as defendants to the suit, then and in any of such events, the plaintiffs will have option whether to complete the sale by paying balance of the price or to cancel the agreement and obtain refund. Clause (3) thereof provided that the said arrangement will not be acted upon or come in to operation till the plaintiffs get the said reservation lifted and/or vacated and/or released or the plaintiffs agree to cancel and terminate the agreement for sale as aforesaid. In my opinion, clause (3) thereof clearly provided that the parties agreed that the arrangement reflected in clause 2 above will not be acted upon or come into operation till the plaintiffs get the reservation lifted. That is also understood by the plaintiffs as is evident from what is stated in paragraph 6 (vi) of the affidavit dated 15.4.1991 made by Mr Atul

Nathalal Patle in support of the Motion. The said paragraph reads thus;

“(vi) The said writing also provides that only on the reservation being lifted, the arrangement would come into operation or in event of the decision to cancel the agreement and if the said defendants agree to continue the agreement and have specific performance then consent terms would be drawn up and a decree would be obtained for conveying and transferring the suit property in favour of the plaintiffs or their nominees.”

10. That apart, as per clause 3 if the plaintiffs agreed to continue with the agreement and have specific performance of the agreement by consent decree then in such event proper consent terms will be drawn up for conveying and transferring the property to the plaintiffs or to their nominee or nominees. As noted earlier, the plaintiffs have purchased 4/9th share in the suit property from other co-sharers. During the course of arguments, Mr Apte stated that in pursuance of clause 3, the consent terms were entered into with these co-sharers before purchasing their 4/9th share. Admittedly in the present case, no such consent terms have been entered into between the plaintiffs and **these defendants** (viz. defendants no. 4, 6 to 18 and 24 to 26). In fact, precisely for this reason the learned trial Judge framed issue no.1 to the following effect:

“Do the plaintiffs prove that despite clause 3 of the agreement of 1985 they are entitled to continue with the agreement and enforce it?

11. It is also material to note that parties entered into consent terms on 21.9.1985 and the present Motion is taken out on 19.4.1991. Mr. Apte submitted that by letter dated 19.11.1985 addressed by Solicitors on behalf of **these defendants** to the plaintiffs' Solicitors, time limit for removing reservation upon the suit property is extended for a period of 5 years and that time expired in 1990. Immediately on 19.4.1991 the plaintiffs took out present Motion and thus there is no delay. I do not find any merit in this submission. Perusal of the Consent Terms dated 21.9.1985 and correspondence dated 19.11.1985 and 11.12.1985 clearly shows that the arrangement stipulated in paragraph 2 of the consent terms was not to be acted upon till the plaintiffs get the reservation lifted. By letter dated 19.11.1985, **these defendants** merely extended the time limit by a period of five years for lifting the reservation. Clause 3 thereof provided that even if the plaintiffs fail to get the reservation lifted and they do not terminate the agreement for sale and agree to continue with the agreement, they have to prepare proper consent terms for conveying and transferring the property. In short, the extension of time for lifting reservation could not justify filing of the present Motion after six years from the date of compromise.

12. Apart from that, by letter dated 13.7.1992 addressed by Solicitors of **these defendants** to the plaintiffs' Solicitors, **these**

defendants have terminated the arrangement under the writing dated 21.9.1985 with immediate effect. The plaintiffs have not challenged the said termination of arrangement under the writing dated 21.9.1985 till date. Mr. Apte submitted that as the compromise terms were reduced in writing and these defendants did not allege commission of fraud while arriving at compromise terms, the Court has to pass a decree in terms of the consent terms. It is not possible to accept this submission as well. Order 23, Rule 3 of C.P.C. contemplates that before passing a decree in terms of consent terms, the Court has to record its satisfaction about a suit having been adjusted wholly or in part by any lawful agreement in writing and signed by the parties. Recording of satisfaction of the Court before passing a decree in terms of consent terms is a condition precedent. As noted earlier, by communication dated 13.7.1992 **these defendants** have terminated the arrangement under the writing dated 21.9.1985 with immediate effect, which action is not challenged by the plaintiffs till date.

13. It is admitted position that as of today the reservation on the suit property continues and is not lifted. In view of clauses (2) and (3) of compromise dated 21.9.1985, I do not find that the learned trial Judge has committed any error while dismissing the Motion. Hence, no case is made out for invocation of powers

under section 115 of C.P.C. Application fails and the same is dismissed. Liberty is reserved to the parties to apply for expeditious disposal of the suit. It is made clear that the observations made herein are tentative and prima facie only for the purpose of considering correctness of the impugned order. The learned trial Judge will decide the suit on the basis of material on record and on its own merits in accordance with law uninfluenced by the observations made herein.

14. At this stage, Mr. Apte orally prays for stay of this order for a period of six weeks from today. Having regard to the fact that C.R.A. is pending admission since June, 2015, I find that request made by Mr Apte is reasonable. Hence, notwithstanding dismissal of C.R.A , further proceedings of the suit pending in the trial Court are stayed for a period of six weeks from today. Order accordingly.

(R.G.KETKAR, J.)