IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 38 OF 2013

Satish Jamnadas Dattani & Ors. ...Appellants
vs.
Samir Bhojwani ...Respondent

Mr.Rajiv Narula with Ms.Shweta Doshi i/b. M/s.Jhangiani Narula & Associates for Appellants.
Mr.S.U. Kamdar, Senior Advocate with Mr.Chirag Kamdar, Mr.D.V. Deokar, Pinakin Modi, Dhruvesh Parikh i/b. M/s.Parimal K. Shroff & Co. for Respondent.
Ms.Sheetal Shah i/b. M/s.Mehta & Girdharlal for Noticee.

CORAM : S.C. GUPTE, J.

RESERVED ON : 24 AUGUST 2015

PRONOUNCED ON : 17 NOVEMBER 2015

ORDER :

This appeal impugns an interim order passed by a sole arbitrator, restraining the Appellants, who are respondents in the arbitration reference, by a temporary injunction from carrying out any further development in respect of a certain measure of FSI available in the suit property or creating any third party rights. The disputes between the parties arise out of a development agreement.

2. A gist of the facts of the case may be noted as follows: One Shantilal Patel and others were the original owners of land bearing Survey No. 6 admeasuring 54,600 sq. mtrs. or thereabouts ("larger property"). By a development agreement the owners authorized the Appellant (and another) to develop the larger property. By a supplemental agreement, a portion of the larger

property admeasuring about 2000 sq. mtrs. was agreed to be retained by the owners for their sole use. A joint venture agreement of 1 April 1994 was executed between the Appellant and a firm by the name of Kalindi Estate Developers ("Kalindi") of which the Appellant was one of the partners, for development of the larger property. A layout plan for the larger property was sanctioned and commencement certificate for one particular building, described as building no.9, for construction upto 12 floors, was issued in course of time. The project was, however, not completed over the next more than six years. In the premises, a development agreement of 26 July 2004 was executed between the Appellant and the Respondent ("the subject development agreement"), appointing the Respondent as a developer with a right to construct building no.9, 12 and 13 by utilizing FSI of 59,000 sq. mtrs. for residential and commercial use as approved by Slum Redevelopment Authority ('SRA'), for the consideration of 38% of the constructed area in the proposed building on ownership basis. The subject development agreement was followed by a Power of Attorney executed by the Appellant in favour of the Respondent. Soon thereafter, the Respondent advanced a sum of Rs.50 lacs by two cheques of Rs.25 lacs each to the Appellant. The Respondent had undertaken a total liability to pay Rs. 3 Crores to the Appellant towards part construction of building no.9 by the Appellant accomplished prior to execution of the subject development agreement. The Respondent made various further payments towards this commitment. (There is dispute, though, between the parties as to the aggregate amount actually paid by the Respondent to the Appellant.) Disputes arose between the parties concerning their respective commitments under the subject development agreement. The Appellant kept asking for complete payment and commencement of construction, failing which the Appellant threatened to start the construction work himself. The Respondent denied his liability to make any further payment and instead called upon the Appellant to get plans of building Nos.9, 12 and 13 sanctioned with 59,000 sq. mtrs. of FSI. (Sanction of 59,000 sq. mtrs. FSI was not possible due to developments in the interregnum.) Finally, by a letter dated 21 September 2006, the Appellant terminated the development agreement and power of attorney, complaining of breaches on the part of the Respondent. Subsequently, there were settlement talks and negotiations between the parties. Nothing, however, came out of those. Finally, by a letter dated 19 August 2009, the Respondent invoked the arbitration agreement between the parties forming part of the development agreement. The hearing of the reference commenced before a sole arbitrator. The learned arbitrator, on an application made to him under Section 17 of the Arbitration and Conciliation Act, 1996, passed the impugned order, granting interim relief concerning development and creation of third party rights concerning FSI of 59,000 sq. mtrs. to the Respondent. That order is challenged in the present appeal.

3. The submissions of the Appellant are broadly as follows:

i) That there is a gross delay on the part of the Respondent in approaching the arbitral tribunal; that such delay in effect amounts to an abandonment of the development agreement and rights of the Respondent thereunder.

ii) That inasmuch as the relief applied for and granted by the learned Arbitrator impinges on the SRA Scheme and its implementation, such relief is beyond the purview of the arbitrator and in derogation of the Maharashtra Slum Area Improvement and Redevelopment Act, 1971 ("the Slum Act").

iii) That the contract between the parties contained in the subject development agreement was actually a contingent contract, conditional upon availability of 59,000 sq. mtrs. of FSI for implementing the development agreement; that at the time of signing of the subject development agreement, only 12,266.9 sq. mtrs. plus FSI of 8,894.82 sq. mtrs. for consumption in building No.9 (upto 12 floors) was available; and that the Appellant not being in a position to obtain 59,000 sq. mtrs. of FSI (which was to be made available by amalgamation of certain lands, and which could not be done due to the Respondent's own fault), the agreement could not be performed due to failure of the contingency. Alternatively, it is submitted that the contract was, in the premises, frustrated. Building No.12 has now to be relocated. Besides, the same has now become a re-hab building.

iv) There was no readiness and willingness on the part of the Respondent to fulfill his obligations under the subject development agreement. It is submitted that there was neither full payment nor construction of Building No.9 for which a commencement certificate was available upto 12 floors.

v) That the rationale of the Sole Arbitrator for granting interim relief despite the Respondent having not taken any steps to restrain the Appellant from going ahead with the construction of building No.9 and completing the same, namely, existence of Clause 31 of the development agreement anyway allowing the Appellant to do so, was clearly wrong inasmuch as there was no plea under Clause 31 on the part of the Respondent and on the other hand, there was an objection by the Respondent to the Appellant commencing any construction in respect of building No.9.

vi) The balance of convenience was clearly in favour of the Appellant. Third party rights were created in favour of various third parties. So also, more than 280 occupants under the SRA Scheme were yet to be accommodated.

4. The slum dwellers, who have to be re-rehabilitated in the building to be constructed (rehab component) under the SRA Scheme, intervene in the matter and support the Appellant.

5. The learned arbitrator held that there was no gross delay or laches on the part of the Respondent so as to disentitle him to interim relief. The learned arbitrator was of the view that the Respondent had *prima facie* established his claim, which *prima facie* called for ordering of specific performance against the Appellant and that the property, in the premises, needed to be protected. He was further of the view that having regard to the discussions which had taken place between the parties between the date of the purported termination of the

development agreement and the invocation of the arbitration agreement, the delay, if any, was explained and there was no case of abandonment. This is definitely a plausible conclusion. It is sustainable on the basis of material on record.

6. The contention regarding impermissibility of the order of injunction in the face of Section 42 of the Slum Act was not raised before the learned arbitrator and is being raised for the first time before this Court. That apart, the order of the learned arbitrator concerns only FSI contemplated under the subject development agreement and that is not a matter which the authorities under that Act have jurisdiction to determine. So also, the order does not involve any injunction in respect of any action taken or to be taken in pursuance of any power conferred by that Act. There is, thus, no question of applicability of the bar under Section 42.

7. As far as the FSI of 59,000 sq. mtrs. is concerned, the development agreement had a clear stipulation that the Appellant had already got lay-out and building plans for development of buildings with a ground area of 13,879 sq. mtrs. and FSI of 59,000 sq. mtrs. sanctioned and that if due to any reason, the available FSI was reduced, that shortfall would be made up by amalgamation of the property belonging to Dattani Group known as “D” Series property. Besides, what was expressly agreed was that such amalgamation would be carried out before commencement of construction of building No.9. It was clear, therefore, that *prima facie* it was the responsibility of the Appellant to ensure the total FSI 59,000 sq. mtrs., if necessary, by amalgamating the adjacent area. The learned

arbitrator's conclusion, therefore, that at the interim stage it was not possible to accept the contention about non-availability of FSI or the contract, being contingent on such availability, was incapable of being performed on account of non-availability of FSI, cannot be faulted in any way. Besides, it is the Appellant's own case that it was on account of lapses on the part of the Respondent that the Appellant could not acquire 2000 sq. yds. of land left to the owners and was not, therefore, in a position to obtain the balance FSI. If that is so, it really reflects on the performance of the contract. The question is, whether there was any breach of contract on the part of the Respondent and as a result the FSI was not available in full measure, and not whether the contract was void due to failure of the contingency.

8. For the same reasons, there is no *prima facie* case for invocation of the doctrine of frustration of contract. Besides, as rightly held by the learned arbitrator, the main issue was, whether in absence of FSI being available in full measure due to subsequent events, the relief of specific performance could or could not be granted, and that if the area as claimed by the Respondent was still available and the Respondent was willing to go ahead with development with the available area, it was possible for the tribunal to consider granting of specific performance for the remaining area. The question of frustration, in that case, would be a matter of trial and would depend on appreciation of evidence.

9. On readiness and willingness of the claimant (i.e. Respondent in this appeal), the learned arbitrator came to a conclusion that in terms of the sequence in which the contract and the reciprocal obligations of the parties

thereunder were to be performed, the Respondent had performed his obligations and on the building plans being sanctioned, he was willing to perform the other obligations. The Respondent's performance included two main obligations. One, payment of construction cost of Rs. 3 crores for the portion of building No.9 constructed by the Appellant and also, the cost of vacating the tenants from the area earmarked as building Nos. 12 and 13 upto the maximum of Rs. 2 crores and the cost of construction of building No.1 of Rs.50 lacs. And two, the construction of building Nos.9, 12 and 13 in accordance with the development agreement. As far as the payment is concerned, the Respondent claims to have paid a total sum of Rs.3.38 crores to the Appellant under the development agreement. The Appellants admits having received only Rs. 2.63 Crores under the development agreement. It is the Appellant's case that Rs. 1.25 crores claimed as having been paid by the Respondent under the development agreement, was actually paid towards a different purpose, namely, as a consideration for the intended sale of the flats admeasuring an area (saleable area) of 6250 sq. ft. from out of the Appellant's 38% share in the development. On the other hand, it is the Respondent's case that this amount could be adjusted, at the Respondent's option, towards the payment obligations of the Respondent under the subject development agreement, and that the Respondent did actually exercise such option and require the amount to be so adjusted. There is correspondence on record, which suggests that there was such option and the same was exercised by the Respondent. Besides, the Appellant has already sold his entire 38% entitlement to third parties. Thus, there is a *prima facie* case for treating this payment of Rs. 1.25 crores towards the payment obligation of the Respondent under the development agreement. As far as the payment of Rs. 2

crores for vacating the tenants / occupants is concerned, the Respondent’s case is that it was the Appellant's responsibility to make arrangements for shifting of tenants and procure their consents and this obligation having not been fulfilled by the Appellant, the reciprocal obligation of the Respondent to pay Rs. 2 crores did not become due. Even here, there is an eminently arguable case on the part of the Respondent and in the premises, considering the fact that a substantial sum of Rs. 3.88 crores was paid by the Respondent under the development agreement, there was a case for protecting his interest pending the arbitration reference. As far as construction is concerned, it was for the Appellant to have brought building approvals and in their absence, it was not possible for the Respondent to commence construction. Even as regards building No.9, there is an arguable case of there being an embargo on its construction. There is a stop work notice of SRA on the ground of the building falling within the buffer zone. The SRA has issued a notice as late as on 18 June 2007 reiterating that the work on building No.9 was stopped for long time (i.e. since about 2001) and despite such stop work order, work was being illegally carried on at site. In the premises, it cannot be said with any assurance that the Respondent’s not having commenced construction of building No.9 amounts to lack of his readiness or willingness. The arbitrator’s conclusion about the Respondent having *prima facie* established his readiness and willingness cannot, thus, be faulted.

10. There is nothing wrong also with the conclusion of the learned Arbitrator about the construction of Clause 31 of the development agreement. Even in the absence of specific pleadings, the learned arbitrator was well within his rights not to hold the circumstances of the Respondent having allowed the

Appellant to go ahead with the construction of building No.9 and not taken steps to restrain him from doing so, as something fatal to granting of interim relief to the Respondent.

11. The issues of irreparable loss and injury as also balance of convenience have been fairly dealt with by the learned arbitrator. The arbitrator's reasoning goes like this: The Respondent has parted with large sums of money; the agreement for transfer of property envisages specific performance and, as understood by the parties, is irrevocable; the Respondent has a case for specific performance; in this light, considering the area being still available for development, allowing the Appellant to go ahead with further development would cause an irreparable loss and injury to the Respondent rather than to the Appellant; and to hold otherwise would be to accept the odd contention that though it was the Appellant's obligation to make available the requisite FSI from "D" Series property, on the Appellant's failure to bring in such FSI, the performance of the contract would nevertheless be frustrated. These are plausible conclusions to draw and on them, an order of temporary injunction can certainly be sustained.

12. No doubt there are slum dwellers and third parties, whose interests are also involved. But then, the hearing of the reference has made a substantial progress. The claimant's evidence is over. The respondent's witness is being cross-examined. It is reasonable to expect the reference to be concluded soon. The learned arbitrator is bound to consider all pros and cons, whilst framing final reliefs. In the meantime, there is no serious harm if the interim order, which has

held the field since 16 July 2013, is allowed to continue.

13. There is, thus, no merit in the appeal and the same is dismissed. No order as to costs.

(S.C. Gupte, J.)