

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL SIDE JURISDICTION

NOTICE OF MOTION NO.165 OF 2012
IN
SUIT NO.108 OF 2012

Deserve Exim Pvt. Ltd. ... Plaintiff
Vs.
M/s. P Builders & Ors. ... Defendants

Vishal Kanade, Adv. a/w. Saroj Ghatge, Adv. i/b. Divekar Bhagwat & Co. for plaintiff.

Harinder Toor, Adv. a/w. S B Pawar, Adv. a/w. Rajesh Vanzara, Adv. a/w. D. Bhatt, Adv. i/b. S K Legal Associates for defendant Nos.1 to 3.

CORAM : MRS. ROSHAN DALVI, J.

DATE : 25th June, 2015.

P.C. :

1. The parties entered into one Memorandum of Understanding on 9th August, 2007. The suit is filed for Specific performance and also for ancillary reliefs. The suit property was for redevelopment. The suit property consisted of three chawls and three shops consisting of 125 rooms the sheds having of 15 tenants. The redevelopment would, therefore, be affecting those parties. In the agreement executed in 2007 the consideration payable by the plaintiff to the defendant was Rs.3.60 Crores out of which only Rs.25 lacs was paid as earnest. The remainder of the consideration of Rs.3.35 lacs was to be paid at the time of execution (not of the conveyance) but of a joint venture agreement and an irrevocable Power of Attorney in favour of the plaintiff. The plaintiff would, therefore, act upon the Power of Attorney to redevelop the property. The POA can, therefore, be executed only when the remainder of the consideration amount is offered and paid. The expression "at the time of execution" is

important because if consideration is not paid the POA cannot be executed and so also the joint venture agreement.

2. The joint venture agreement was a formal agreement to be executed. The irrevocable POA is the dominant and most important document left to be executed. It appears that it was not executed along with MOU because the entire consideration was not paid. The consideration was not paid as title of the defendants had to be verified.

3. Under clause 13 of the MOU the plaintiff had to verify the title of the defendants and on after satisfaction of the clear title enter into a joint venture and irrevocable General POA. Under clause 9 of the agreement the defendant had to execute the joint venture agreement within 30 days for the payment of consideration. The execution of the joint venture agreement was to be with the Irrevocable POA. Hence the plaintiff had to execute the Irrevocable POA also within 30 days and consequently the plaintiff had to verify the title of the defendants prior to 30 days.

4. After payment of the earnest amount the plaintiff did nothing. It is not known when the plaintiff applied for the search of the defendants' title. The plaintiff received the search report on 19th December, 2007. Even after 19th December, 2007 the plaintiff did not send the balance consideration or the draft of the joint venture and Irrevocable POA to the defendants.

5. Only as late as on 30th June, 2008 the plaintiff called upon defendants to execute the agreement for joint venture. The notice does not mention the execution of Irrevocable POA. The notice does

not offer balance consideration payable by the plaintiff.

6. The notice is shown to be sent by RPAD and UPC and the plaintiff has obtained a letter of the sub post master that it was window delivered. It is stated not to have been replied.

7. The defendants sought to redevelop the property through another redeveloper. Public notice came to be given on 27th August, 2011. It is thereafter the plaintiff has sought to enforce the MOU specifically.

8. The dates become relevant to consider. The agreement was executed on 9th August, 2007. The plaintiff received the search report on 20th December, 2007. The plaintiff sent notice on 30th June, 2008. The defendants published the notice for redevelopment on 27th August, 2011. The suit has been filed on 22nd December, 2011. The agreement has not been sought to specifically performed for more than three years.

9. The plaintiff must show its readiness and willingness. The readiness and willingness must be as per the terms of the contract. The terms of the contract laid down a period of thirty days for execution of the agreement of joint venture and irrevocable POA. The contract also specifies about the verification of title to be done by the plaintiff and upon satisfaction to execute not only the agreement to joint venture but the agreement of joint venture and the Irrevocable POA. Hence the plaintiff has long delayed showing his readiness and willingness. The plaintiff should show readiness and willingness at the time the contract had to be performed. That would be to offer

and pay the balance amount because if the balance amount is not paid despite verification of the defendants' title, the POA could never be executed.

10. The plaintiff has not shown that the plaintiff has offered the amount or the plaintiff even had the amount in bank with the plaintiff as has been required as per the judgments of this Court. The plaintiff now offers to deposit amount. If far too late.

11. The plaintiff has relied upon the judgment in the case of *Arun P Goradia Vs. Manish Jaisukhlal Shah & Ors. 2009(1) Mh L J 611* in which it was held as much as MOU that an agreement for development creates an interest in the land and the MOU having been executed, only formal agreement for development had to be executed when all other reciprocal promises of the parties were already performed and nothing further was to be done. In this case the plaintiff had to do a lot further. The plaintiff had to make payment of almost the entire consideration after the execution of the MOU and upon offer of such consideration get the irrevocable POA.

12. The payment of consideration is the single most important term of the contract which is to be performed by a plaintiff such as developer or purchaser of the property. If the consideration is not paid, readiness and willingness cannot be imputed. The judgment in the aforesaid case is wholly distinguishable.

13. The defendants had to develop the property of 125 occupants and 15 tenants. The defendants cannot be expected to wait for the payment of the amount and the commencement of the

redevelopment from 9th August, 2007 when the agreement was executed until after 21st December, 2011 when the suit was filed.

14. Consequently the plaintiff has not made out a prima facie case of grant of relief of injunction or otherwise in the suit of specific performance.

15. Consequently Notice of Motion is dismissed.

(ROSHAN DALVI, J.)