IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.155 OF 2015
IN
NOTICE OF MOTION NO.313 OF 2013
IN
SUIT NO.2235 OF 2012
ALONGWITH
NOTICE OF MOTION (L) NO.373 OF 2015
IN
APPEAL (L) NO.155 OF 2015
IN
NOTICE OF MOTION NO.313 OF 2013
IN
SUIT NO.2235 OF 2012

Magic Properties Private Ltd. ….Appellant
(Original Plaintiff)

Versus

Rajpipla Co-operative Housing
Society Limited & Anr. …..Respondents.
(Original Defendants)

Mr. Aspi Chinoy, Senior Counsel alongwith Mr. Simil Purohit i/b M/s Desai Desai Carrimjee & Mulla for the Appellant.

Mr. Gaurav Joshi, Senior Counsel alongwith Mr. Prateik Parija for Respondent No.1.

CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.

DATE: 10th February, 2015

P.C.:- (Per V.M. Kanade, J.)

1. Appellant is challenging the order passed by the learned Single Judge dated 28/01/2015 in Notice of Motion No.313 of 2013 whereby, the learned Single Judge was pleased to dismiss the Notice of Motion with costs.

2. Appellant is the original Plaintiff and it is a Company incorporated under the Companies Act. Appellant is a builder by profession. Appellant filed a suit alongwith Notice of Motion, seeking an order of injunction restraining Respondent No.2 – Cosmos Co-operative Bank Ltd. from making any payment upon invocation of the Bank Guarantee which was given by the Appellant to Respondent No.1.

3. Brief facts which are relevant for the purpose of deciding this appeal are as under:-

4. Respondent No.1 is a Co-operative Housing Society which is registered under the Maharashtra Co-operative Societies Act and it is an owner of the land situated at Santacruz (West) Mumbai – 400 054. The Society also owned three buildings situated on the said property and which are occupied by the members of the Society.

5. Sometime in 2005, Respondent No.1 decided to redevelop the said three buildings since they were in dilapidated condition and appointed the Appellant as Developer for redevelopment of the said property. Accordingly, on 15/10/2005, Appellant and Respondent No.1 entered into duly registered development agreement for redevelopment of the said property. Under the said agreement, Clause 5(k) stipulated that the Appellant should issue Performance Bank Guarantee for a fixed period in favour of Respondent No.1. The said Bank Guarantee was to be given in order to ensure that the Developer – Appellant herein completes the construction within time and upon failure of the Developer to complete the construction within a the stipulated time of 18 months, Society – Respondent No.1 herein would invoke the Bank Guarantee and complete the work at its own costs. The agreement further stipulated that after completing the construction as per terms and conditions of the development agreement and supplementary agreement which was executed thereafter, if any balance or surplus remains with the Society, the same was to be returned to the developer – Appellant herein. It was further agreed that upon the developer developing the said property, a fresh Bank Guarantee would be issued by the Developer in favour of Respondent No.1 for remaining part of the building which was to be completed.

Accordingly, initially, the Bank Guarantee for Rs 4 crores was executed by the Developer in favour of the Society and, thereafter, on 19/04/2011, a fresh Bank Guarantee of Rs 2 crores was issued in favour of Respondent No.1 – Society.

6. According to the Appellant, construction of the building was completed, though there was delay of six months in completing the construction and the Occupation Certificate was granted by the Corporation. According to the Appellant/Developer, the Society did not invoke the Bank Guarantee when the work was not completed on time and waited till the work of construction was completed and Occupation Certificate was granted and after one year Respondent No.1 – Society proposed to invoke the Bank Guarantee. Respondent No.1 – Society invoked the Bank Guarantee on 09/04/2012 by sending a letter to Respondent No.2.

7. Appellant, thereafter, filed a suit and in the said suit Notice of Motion was taken out, restraining Respondent No.2 -Bank from making payment of the said Bank Guarantee. Initially, ad-interim relief was granted in favour of the Appellant. However, by the impugned order, Notice of Motion was dismissed and the ad-interim relief was vacated. The learned Single Judge, however, directed that though the

Bank was permitted to pay the said amount under the Bank Guarantee to Respondent No.1 – Society, a further direction was given to the Society to keep the said amount in a Fixed Deposit with Respondent No.2 - Bank initially for a period of one year and thereafter to be renewed for like period until further orders.

8. Mr. Aspi Chinoy, the learned Senior Counsel appearing on behalf of the Appellant submitted that the learned Single Judge had erred in holding that the Bank Guarantee was an unconditional Bank Guarantee. He submitted that merely because the words “unconditional” or “unequivocal” were used in the Bank Guarantee, the said Bank Guarantee could not be invoked but it could only be invoked upon non-fulfillment of the conditions which were mentioned in clause 5(k) of the said Development Agreement. It was submitted that since the Appellant had fulfilled the conditions mentioned in Clause 5(k) and had completed the construction of the building, Respondent No.1 – Society could not have invoked the Bank Guarantee one year after the completion of the building. Our attention was invited to the said Clause 5(k) as also other relevant clauses under the agreement. The learned Senior Counsel also invited our attention to the Bank Guarantee and submitted that the said Bank Guarantee could not be said to be unconditional or

unequivocal and, therefore, Respondent No.1 – Society did not have unfettered right to invoke the Bank Guarantee on demand payment from the Bank. Reliance was placed on the judgment of the Apex Court in *Hindustan Construction Co. Ltd. vs. State of Bihar and others*[1].

9. On the other hand, Mr. Gaurav Joshi, the learned Senior Counsel appearing on behalf of Respondent No.1 – Society submitted that Clause 5(k) of the said agreement stipulated that the builder was to complete the construction of the entire building alongwith the specifications mentioned in the development agreement and also supplementary agreement. He submitted that though the Developer had completed construction of the building, other amenities which were to be provided as per the development agreement and supplementary agreement had not been provided and the Certificate to that effect was given by their Architect and, therefore, the Society was entitled to invoke the Bank Guarantee.

10. In order to appreciate the rival submissions, it is necessary to examine the said Clause 5(k) of the said Development Agreement which reads as under:-

1 (1999) 8 SCC 436

"5(k) Immediately upon receipt of IOD and before the Members hand over possession of the premises in their occupation the Developer shall furnish to the Society an irrevocable and unconditional bank guarantee from a Cosmos Co-op. Bank which is a Multi-State Scheduled Bank in the sum of Rs 4,00,00,000/- (Rupees Four Crores only) being the cost of construction of the entire new building as per specifications mentioned in this Agreement as also specifications approved by the authorities concerned. The Society shall be entitled to invoke the bank guarantee in the event the Developer fails to complete the construction within a period of 18 months with further period of 3 months where 2 levels of basement are permitted and 6 months where 3 levels of basement are permitted being a period of grace agreed by the Society. It is however being clarified that if delay is on account of operation of condition of force majure than period of completion stated hereto before shall stand extended by a number of days during which condition of force majure was in operation. The Society shall upon receipt of amount upon invocation of bank guarantee complete the construction of the new building. The bank guarantee referred hereto before shall be for a period of one year. Three months prior to the expiry of the said period of one year value of cost of construction required to be carried out shall be made jointly by the Architect of the Developer and the Architect appointed by the Society at the suggestion of the Developer to supervise the construction. If there is no agreement reached between both the said Architects as to the valuation than the valuation made by the Architect for the Society shall be deemed to be the valuation for completion of the balance construction. After arriving at such valuation the Developer shall furnish to the Society at-least 15 days before th expiry of the period of bank guarantee already furnished, bank guarantee for the amount equivalent to complete the balance construction. In the event the Developer fails to furnish such a bank guarantee the Society shall forthwith be entitled to invoke the existing Bank Guarantee. The Society shall than be entitled to invoke the bank guarantee in its hands and utilise the money so received for the purpose and use stated hereinbefore. The second guarantee to be furnished by the Developer shall be for a period of six months. If any grace period referred herein above is required by the Developer than the Developer shall 15 days before the expiry of the period of second bank guarantee hand over to the Society bank guarantee for a period of 3 to 6 months as the case may be depending upon the number of layers of basement. Each time the bank guarantee is required to be given by the Developer, valuation as stated hereto before shall be made and amount of the bank guarantee shall be for an amount of valuation so arrived at During the subsistence of the Bank Guarantee, the Developer undertakes not to give any instructions to the said Bank whereby the Guarantee gets revoked. If there shall be any surplus in the hands of the Society from out of the monies received under the Bank Guarantee such surplus shall be paid over to the Developer. The certificate given by the Architect of the project Shri__________ certifying that the amount spent by the Society in completing the said new Building as aforesaid shall be final and binding on all."

Under the said Clause 5(k), the Appellant/original Plaintiff was to complete the construction of the entire building as per the specifications mentioned in the said Development Agreement and also the specifications approved by the authorities concerned within 18 months, failing which the Society was entitled to invoke the Bank Guarantee and thereafter complete the balance construction from the said amount.

11. It would also be relevant to take into consideration the clauses in the Bank Guarantee which was given by the Appellant/Plaintiff in favour of Respondent No.1 – Society. Clause 1 of the said Bank Guarantee dated 28/03/2008 reads as under:-

> "1. In consideration of the Rajpipla Co-op. Hsg. Society Ltd., hereinafter called "The Society" having agreed to accept this Guarantee of the Cosmos Bank Branch", Bombay (hereinafter called "the Bank") for a limited/restricted amount of Rs. 4,00,00,000/- (Rupees Four Crore only) from Magic Properties Pvt. Ltd. (hereinafter referred to as "the Engager") for the due performance and observance by the Engager of the terms and conditions contained in Clause 5(k) of the Development Agreement dated 15.10.2005, which have been executed by and between the Engager and the said Society and its members. The bank undertakes to pay to the Society such sum not exceeding Rs 4,00,00,000/- (Rupees Four Crore only) irrevocably and unconditionally on demand

> and without demur in the event of the Engager having failed or neglected to observe and discharge the said terms and conditions as contained in Clause 5(k) of the said Development Agreement."

The said Clause-1 stipulates that the Bank Guarantee was given for due performance and observance by the developer of the terms and conditions mentioned in Clause 5(k) of the Development Agreement and upon the Developer having failed or neglected to observe or discharge his obligation under the said terms and conditions mentioned in Clause 5(k) of the Development Agreement, the Society could invoke the Bank Guarantee and the Bank thereupon to unconditionally, on demand, pay the said amount to the Society. Upon conjoint reading of Clause 5(k) of the Development Agreement and Clause-1 of the Bank Guarantee, in our view, it is abundantly clear that the Bank had no option but to honour the Bank Guarantee on the certificate given by the Architect of the Society that the conditions contained in Clause 5(k) of the Agreement dated 15/10/2005 were not performed within the stipulated period.

12. In our view, the submission made by the Mr. Aspi Chinoy the learned Senior Counsel appearing on behalf of the Appellant that upon completion of the entire building, the obligation of the builder under Clause 5(k) had been fulfilled

and, therefore, the Bank Guarantee could not have been invoked cannot be accepted. The relevant Clause 5(k) clearly stipulates that the entire building has to be completed as per the specifications contained in the agreement. If the entire building had already been completed and the Occupation Certificate was issued immediately after the Bank Guarantee was given, there was no occasion for the Developer to have given further Bank Guarantee of Rs 2 crores. According to the learned Senior Counsel Mr. Gaurav Joshi appearing on behalf of Respondent No.1 – Society, the Occupation Certificate was issue on 11/04/2011 though, according to the learned Senior Counsel Mr. Aspi Chinoy for the Appellant, it was received after 19/04/2011 when the Bank Guarantee was issued. The fact remains that, practically, if the entire building had been completed and the Occupation Certificate was likely to be received in a couple of days then there was no occasion for the Developer to have executed fresh Bank Guarantee of Rs 2 crores. It is, therefore, obvious that though entire building was constructed, other amenities were not provided by the Developer as per the specifications in the original agreement dated 15/10/2005 and the supplementary agreement which was executed thereafter. The Architect has given the Certificate to that effect. Under these circumstances, therefore, the conditions which were imposed in Clause 5(k) were not complied with and the obligation to complete the construction alongwith the specifications had not been discharged within the stipulated time and, therefore, the Society was entitled to invoke the Bank Guarantee.

13. Mr. Aspi Chinoy, the learned Senior Counsel appearing on behalf of the Appellant also invited our attention to the Certificate issued by the Architect. He submitted that the grievance of the members of the Society was in respect of insufficient parking space and such other issues which were not the part of the original agreement dated 15/10/2005. He submitted that the grievance was not in respect of not giving amenities which were to be provided under the agreement. He further submitted that there was no provision in the agreement for payment of penalty and, as such, the Society could not have invoked the Bank Guarantee under the guise of non-completion of the entire building and thereby secure the amount which was guaranteed towards the compensation which they had claimed or penalty which they wanted to impose on the developer.

14. In our view, the said submission of the learned Senior Counsel appearing on behalf of the Appellant is without any substance. Perusal of the said Certificate discloses that apart from grievance of less parking space and less open space

which was available to the members of the Society, there is also reference to certain amenities which had not been provided by the Developer. There cannot be any dispute regarding the ratio laid down by the Apex Court in its judgment in *Hindustan Construction Co. Ltd. vs. State of Bihar and others*[1] on which reliance was sought to be placed by the learned Senior Counsel appearing on behalf of the Appellant. However, ratio of the said judgment would not be applicable to the facts of the present case. We are, therefore, not inclined to interfere with the order passed by the learned Single Judge.

15. Apart from that, it is an admitted position that parties have referred the dispute to the Arbitrator and arbitration proceedings are pending before the Arbitral Tribunal. The question as to whether the Bank Guarantee was properly invoked or not is one of the issues which is required to be decided by the Tribunal. Secondly, though the Bank Guarantee is in respect of making payment to the Society, the learned Single Judge has imposed a condition on the Society to deposit the said amount in a Fixed Deposit with Respondent No.2 – Bank. It is therefore obvious that if the Appellant succeeds in arbitration, the Arbitrator would be in a position to pass suitable orders and the rights of the

1 (1999) 8 SCC 436

Appellant/Developer are secured by virtue of the order passed by the learned Single Judge. The Society has not challenged that part of the order passed by the learned Single Judge.

16. Appeal is therefore dismissed.

17. At this stage, the learned Senior Counsel appearing on behalf of the Appellant seeks continuation of the interim order which is in force since 2012. The learned Single Judge has also continued the said order for a period of two weeks from the date of the impugned order passed by the learned Single Judge. Under these circumstances, we direct that the said interim order which was continued by the learned Single Judge, shall further continue to operate for a period of four weeks from today.

18. Appeal is disposed of in the aforesaid terms. Since the Appeal itself is disposed of, Notice of Motion (L) No. 373 of 2015 taken out by the Appellant in this Appeal does not survive and disposed of accordingly.

(REVATI MOHITE DERE, J.) **(V.M. KANADE, J.)**