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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.2196 2012
IN
SUIT NO.2304 OF 2012

Rodium Realty Limited

..Plaintiff.

V/s.

Kailesh Trading Company & Ors.

..Defendants.

Mr.Arif Bookwala, Senior Advocate with Mr.Chetan Kapadia, Mr.Shyam Lilani and Mr.Tejas Shah i/b. Lilani Shah & Co. for the plaintiff.

Mr.D.H.Mehta i/b. D.M.Legal Associates for defendant No.1.

Mr.Pravin Samdani, Senior Advocate i/b. Mrs.Supriya Rele for defendant No.2.

CORAM : A.K. MENON, J.

DATED : 17TH JULY, 2015

P.C.

1. This Notice of Motion is taken out by the plaintiff seeking appointment of the Court Receiver, High Court, Bombay or any other fit and proper person to be appointed as a Receiver of the suit property described in Exhibit-A to the plaint. The plaintiff also seeks an injunction restraining the defendants from disposing off, transferring, alienating, party with possession thereof or inducting any person or persons in the suit property. In the suit, the plaintiff seeks specific performance of an oral agreement to grant development rights in respect of the suit

property. At the hearing of the ad-interim application, the Court had issued directions to the parties to complete the pleadings and clarified that any steps taken by the defendants in respect of the suit property shall be subject to the further orders passed by the Court. Thereafter, the matter had been adjourned by consent of parties on several occasions and that is how today, the matter is placed for final hearing.

2. A few facts leading to the present controversy are as under:-

(i) The plaintiff is a company incorporated under the Companies Act, 1956 and defendant No.1 is sole proprietary firm of one P.H.Shah (HUF) carrying on business as exporters and manufacturers of plastic household products. defendant No.1 is the owner of a piece and parcel of land admeasuring 2653.70 sq. mtrs. lying and being at Plot No.134, TPS IV and bearing Cadastral Survey No.431 of Mahim Division, situate at 164, Senapati Bapat Marg, Mahim, Mumbai. Structures standing thereon include some which are tenanted, residential rooms and chawls and is identified as "Charring Cross Compound".

(ii) It is the plaintiff's case that the defendant No.1 being desirous of developing the suit property and having neither the expertise nor financial resources to undertake the redevelopment project was in touch with a broker Mr.Arvind Dedhia who then got in touch with the plaintiff. In June, 2011 a preliminary meeting had taken place at Andheri between the plaintiff and defendant No.1. According to the plaintiff, defendant No.1 'decided' to appoint the plaintiff as the developer of the suit property.

(iii) The plaintiff proceeded to contend that discussions took place between the parties and thereafter an oral agreement was arrived at pursuant to which a draft development agreement was drawn up by the plaintiffs. defendant No.1 is stated to have approved the draft but has wrongly not executed the agreement and therefore, committed breach of an oral agreement to grant development rights.

(iv) It is stated that on 4th June, 2012 the plaintiff reduced the agreement into writing and the agreement was finalised. defendant No.1 is said to have informed the plaintiff that the structures were old and demolition of the structures was unavoidable. When the plaintiff raised the issue of negotiations with the tenants, defendant No.1 stated that the tenants would co-operate and that the defendant No.1 would negotiate with the tenants in respect of permanent alternate accommodation to be provided upon redevelopment of the suit property.

(v) On 25th June, 2011, the plaintiff sent an e-mail to defendant No.1 informing defendant No.1 of the plaintiff's proposed visit to the property. The plaintiff did visit the suit property on 28th June, 2011 when defendant No.1 and Mr.Arvind Dedhia were present. The plaintiff is stated to have inspected the the property and taken photographs and defendant No.1 is believed to have provided copies of the title deeds and survey plans to the plaintiff. Thereafter, according to the plaintiff, defendant No.1 caused the plaintiff to prepare and give a draft letter of consent to be obtained from the tenants. The plaintiff states that it also appointed an

Architect who visited the property, took measurements and also proposed that the property be developed under Development Control Rule 33(7) by applying for change of user from industrial to residential. defendant No.1 is stated to have assisted in the development scheme.

(vi) The plaintiff has contended that defendant No.1 negotiated with the tenants but we find no evidence on record of such negotiations. It is the plaintiff's case that in view of certain changes in the development control regulations which came about on 6th January, 2012, further discussions took place between the parties. defendant No.1 agreed with the terms and decided that the tenants should be offered 25% additional carpet area including the fungible FSI. The plaintiff is said to have presented a draft agreement to the defendant No.1 on or about 29th July, 2012. The agreement is said to have been drafted after the parties agreed on the terms.

3. Mr.Arif Bookwala, learned Senior Advocate submitted on behalf of the plaintiff that all the terms of redevelopment have been agreed upon. According to Mr.Bookwala, as a consideration of defendant No.1 of granting development rights to the plaintiff, the plaintiff agreed to pay to defendant No.1 Rs.1,51,00,000/- and defendant No.1 was also entitled to receive 32.5% of the net saleable area in the new building. The balance area after excluding the parking area and area used for rehabilitating the existing tenants of the chawl was available to the plaintiff for free sale. Mr.Bookwala submitted that these and other financial terms were agreed upon. defendant No.1 represented by

Mr.Kailash Shah attended the office of the Advocate for the plaintiff along with two other persons and the terms were finalised. Even a public notice was drafted for this purpose and handed over to defendant No.1. It is stated that the draft public notice was forwarded to defendant No.1 for approval on 12th June, 2012 by e-mail. On the very next date, defendant No.1 is stated to have replied, expressing reservations as regards the contents of the notice and requested further discussions.

4. According to the plaintiff, a meeting was fixed on 25th June, 2012 but defendant No.1 did not remain present and the meeting was cancelled. The plaintiff then reminded defendant No.1 about the matter and a meeting was held on 4th July, 2012 when the terms were reiterated and confirmed. It is contended that defendant No.1 by e-mail dated 9th July, 2012 attempted to wriggle out of the agreement citing differences amongst the family members of defendant No.1. Mr.Bookwala submitted that the terms and conditions of the agreement were reduced to writing, a copy of which is at Exhibit-B and only a final document incorporating all the terms had only remained to be executed. He submitted that the plaintiff had a right to sell the flats to be constructed on the property and it is not merely a redevelopment agreement simplicitor. Therefore, he submitted that the plaintiff is entitled for a specific performance of the agreement.

5. The issue of whether the agreement is now capable of specific performance may be a vexed issue, inasmuch as, defendant No.1 had entered into an Memorandum of Understanding (MOU) with

defendant No.2 on 25th July, 2012. Mr.Bookwala pointed out that this disclosure was made in the affidavit of defendant No.1 filed on 26th September, 2012 after which the plaint came to be amended and defendant No.2 was impleaded as a party defendant. Mr.Bookwala submitted that the MOU between defendant Nos.1 & 2 for development of the suit was already executed. A Power of Attorney also came to be executed on the same day. Mr.Bookwala submitted that documents executed between the defendants inter se are ante-dated and collusive. According to him, these are neither properly stamped nor registered and they are also not valid and / or binding between the parties. The plaintiff, therefore, seeks cancellation of the same.

6. In defence, Mr.Samdani, learned Senior Advocate appearing on behalf of defendant No.2 submitted that the case of the plaintiff is misconceived and unsustainable. He submitted that no oral agreement was arrived at on 4th June, 2013 nor was any document finalised. Making reference to the e-mail dated 6th August, 2012, Mr.Samdani pointed out that the plaintiff had himself admitted that the documents were received from the plaintiff "last month" which is clearly indicative that the documents were ready only in July, 2012 and there was no chance that an agreement could have been finalised between the parties on 4th June, 2012 as contended. Furthermore, Mr.Samdani submitted that perusal of the letter dated 8th September, 2012 by the plaintiff appearing at page 96 of the plaint reveals that it is the plaintiff's own case that the agreement was not arrived at and terms were not finalised or agreed. Furthermore, the public notice was not issued. Therefore, he submitted that no

conclusive agreement was arrived at.

7. Mr.Samdani confirms that no part of the consideration was paid by the plaintiff. Mr.Samdani further submitted that a MOU was executed between the defendants inter se on 26/7/2012 and it appears at page 100 (Exhibit-Q). Rs.5,00,000/- was paid as earnest money and the MOU also covers the interests of the tenants in the suit property. Making reference to the affidavit-in-reply of defendant No.1, he submitted that only discussions were held between the parties and no agreement was arrived at or executed. Therefore, defendant No.1 entered into negotiations with defendant No.2. A public notice was issued by defendant No.2 on 2nd August, 2012 in the Free-press Journal, and in Navshakti newspapers on 3rd August, 2012. No claims were received in response to the public notice and accordingly a Development Agreement came to be executed on 20th August, 2012. A Power of Attorney was also executed which is signed by all the co-parceners of the defendant No.1 (HUF), who are joint owners. Mr.Samdani, therefore, submitted that no relief should be granted in this suit or motion.

8. Mr.Mehta, learned counsel appearing on behalf of defendant No.1 submitted that defendant No.1 entered into an agreement with defendant No.2 after the plaintiff failed to provide answers to queries and issues raised by the tenants of defendant No.1. According to him no conclusive contract was arrived at. The parties only had negotiations which did not fructify into an agreement. Mr.Mehta submitted that his client did not receive any payment pursuant to the negotiations between

the plaintiff and defendant No.1 and did not even provide a draft agreement for discussions for over a year though admittedly, the plaintiff had taken inspection of the property on 26th June, 2011. In these circumstances, Mr.Mehta submitted that the Motion has no merits and the same is required to be rejected.

9. Mr.Mehta also submitted that the draft agreement annexed to the plaint by the plaintiff at Exhibit-B is not the document received by defendant No.1 during the negotiations. Defendant No.1 has annexed to its affidavit, copy of the draft received by defendant No.1 by e-mail from the plaintiff. The draft received by defendant No.1 contains the terms which are at variance with those contained in the purported development agreement said to have been issued by the plaintiff and agreed to by defendant No.1 on 4th June, 2012.

10. Having heard learned counsel for the parties, I am of the view that the plaintiff has failed to make out any prima facie case that there was an oral agreement which was reduced into writing in the form of the draft development agreement. On the issue of existence of an oral agreement, I have no doubt in my mind that merely exchanging drafts without any approvals in writing cannot be interpreted as a concluded agreement between the parties. As such, the oral agreement pleaded is merely an agreement to agree to terms and conditions for development of the property. The oral agreement, If any, did not result in a contract. The parties do not appear to have been ad-idem. Furthermore, I find that there is no evidence whatsoever that defendant No.1 at any stage offered

to negotiate with the tenants. There is also no reason why the public notice though drafted and provided to defendant No.1 was not issued if indeed there was a concluded contract. The plaintiff could not have gone ahead with the public notice without approval of defendant No.1. As a result, without such notice being published and without inviting any objections, it is difficult to believe that the plaintiff was satisfied about the title of defendant No.1 to the suit property. In the absence of such satisfaction on title, no prudent businessman would enter into an development agreement. Thus, in my view, the plaintiff has not made out any case for grant of any such relief.

11. Quite apart from the fact that the public notice is not issued, the agreement is obviously not even stamped. If the plaintiff's version was to be accepted, the plaintiff would have taken steps to get the document stamped since the agreement of the plaintiff was ready for execution. In other words, it is not the case of the plaintiff that some other stamped agreement was ready for execution. On the other hand, defendant No.1 submitted that the draft agreement relied upon by the plaintiff was not the one which was sent to him. I am of the view that at least on 9th July, 2012 the plaintiff had knowledge that defendant No.1 was not interested in the plaintiff's proposal. Mr.Kailash P. Shah, the deponent of the affidavit dated 26th September, 2012 has confirmed that the draft agreement Exhibit-B to the plaint was never approved by defendant No.1. He submits that the plaintiff is fully aware of the fact that property belongs to P.H.Shah (HUF) and despite which the members of the HUF are not joined as party. It is further seen that on 16th July, 2012,

defendant No.1 responded to the e-mail on the same date from the plaintiff and informed the plaintiff that Mr.Kailash Shah had no problem to attend the meeting but defendant No.1 will have a second look at the terms and assess one more option which was available and till such option is assessed, the meeting will not be necessary.

12. The other option which Mr.Kailash Shah was alluding to is probably the discussion between the defendants inter se which resulted in the agreement of MOU dated 25th July, 2012. This e-mail put the plaintiff to notice that defendant No.1 is negotiating with a third party. defendant No.1 may have been uncomfortable with the transaction proposed by the plaintiff and in any event, was not bound to accept the plaintiff's proposal. Furthermore, perusal of the first defendant's affidavit-in-reply discloses that defendant No.2 had already issued a public notice before execution of the Development Agreement on 20th August, 2012 and no objections were received to the public notice issued on 2nd August, 2012 till 18th August, 2012. In the circumstances, even before the e-mail dated 16th July, 2012, a public notice has been issued. In view of the above, the plaintiff is not entitled to any reliefs in the Notice of Motion and the following order is passed:-

- a) Notice of Motion is dismissed.
- b) There will be no order as to costs.

(A.K. MENON, J.)