IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 2370 OF 2014
IN
SUIT (L) NO. 994 OF 2014

M/s.Manas Shelters Pvt.Ltd. …Plaintiff / Applicant
vs.
Madhavlal Narayanlal Pittie & Ors. ...Defendants

Mr.R. Pai for Plaintiff.
Mr.Anil Anturkar, Senior Advocate i/b. M/s.D.J. Kamdin & Co. for Defendant No.1.
Mr.P.M. Jadhav for Defendant No.5.

CORAM : S.C. GUPTE, J.

RESERVED ON : 2 MARCH 2015

PRONOUNCED ON : 15 JUNE 2015

ORDER :

The suit is for specific performance of a development agreement between the parties, which is purportedly terminated by Defendant No.1. The Notice of Motion seeks *inter alia* an interlocutory injunction restraining Defendant No.1 from in any manner acting upon the termination notice dated 16 July 2013.

2 The suit property, which is a plot of land together with the buildings / structures standing thereon, is one of the several properties belonging to the joint family of late Narayanlal Bansilal. The suit property is the subject matter of a suit filed in this Court, being Suit No.224 of 1961, by Madhusudanlal Narayanlal Pittie against Narayanlal Bansilal and others. By an order dated 21 July 1967, Defendant No.1 was appointed as a private receiver of the suit property. (Defendant No.1 is also one of the co-owners of the property.) The buildings and structures in the suit property are tenanted and occupied by tenants and occupants. The property is cessed and covered by the provisions of Maharashtra Housing and Area Development Act, 1976. Under an NOC granted by MHADA for redevelopment of the suit property, the Plaintiff on 16 December 2003 entered into a development agreement with Defendant No.1 (in his capacity as the

Receiver), whereunder the Plaintiff acquired development rights in respect of the property. Thereafter the parties entered into a supplementary agreement dated 15 March 2004 *inter alia* providing for a further and additional consideration. On 2 May 2008, a final decree was passed by this Court in Suit No.224 of 1961 in terms of consent terms, under which Defendant No.1 was continued as a receiver in execution *inter alia* to look after the redevelopment of the suit property. Between 2004 and 2008, various agreements for alternative accommodation were entered into by the parties with tenants / occupants of the suit property. In the meantime, on 8 December 2006, plans for redevelopment were sanctioned by the Municipal Corporation by issuing an IOD. In July 2009, the Plaintiff received vacant possession of the suit property, when the last tenant / occupant vacated his tenement. In November 2009, a Commencement Certificate was issued by the Municipal Corporation for construction upto the plinth level of the rehab building 'B' Wing. The Plaintiff thereafter proceeded to demolish the buildings and structures standing on the suit property, erected a temporary transit accommodation on a portion of the suit property, completed the work of piling and construction of the rehab building upto plinth level by the latter half of 2010. Further work was delayed for want of further commencement certificate from the Corporation. In the meantime, on 18 March 2011, MHADA issued NOC for redevelopment of the suit property on the basis of FSI of 2.5. By end of 2011, a new policy was announced for development of projects under MHADA under Regulation 33(7) of DC Regulations. All redevelopment projects under DCR 33(7) were permitted to use FSI of 3. DC Regulations were accordingly amended in January 2012. In September 2012, the Plaintiff submitted revised plans for the redevelopment project on the basis of FSI of 3. Whilst sanction to these plans was awaited, Defendant No.1 issued the impugned termination letter. Simultaneously, Defendant No.1, by another letter of the same date, proposed redevelopment under Regulation 33(24) by utilizing FSI of 4. The termination is challenged and specific performance of the development agreement is sought in the present suit.

3 It cannot be seriously disputed, and as a matter of fact it was not, that the development agreement is coupled with interest in the suit property

agreed to be crated in favour of the Plaintiff and therefore, the agreement can be the subject matter of specific performance. The real dispute between the parties is about the breach of contract alleged against the Plaintiff and the entitlement of Defendant No.1 to terminate the suit agreement. There is also the question of readiness and willingness of the Plaintiff to complete its part of the contract.

4 It is submitted by Mr.Anturkar, learned Senior Counsel appearing for Defendant No.1, that time was of essence of the contract and the Plaintiff has failed to perform within the time provided. It is further submitted by Counsel that the Plaintiff has committed various breaches of the suit agreement, such as not taking the permission of Defendant No.1 for amending the plans, not furnishing information or copies of documents to Defendant No.1, etc. It is submitted that Defendant No.1 was, therefore, within his rights to terminate the suit agreement. It is submitted that the Plaintiff has not been ready and willing to perform its part of the agreement and hence, not entitled to specific performance.

5 The arguments of Defendant No.1 are supported and supplemented by intervenors, who are third party purchasers with whom the Plaintiff has entered into agreements for sale for flats forming part of the sale component of the redevelopment project.

6 Let us first examine the question of time – whether the time was of essence and whether the termination on account on failure to adhere to the stipulation of time was proper. The relevant clauses referred to in this behalf are clauses 9(IX), (X), (XI), (XII), and 16. Under Clause 9, the Plaintiff was to carry out the redevelopment at its own risk, costs and expenses. This included (i) obtaining the requisite sanctions and permissions from authorities (Clause 9(IX)), (ii) commencement of construction on the property within one month of the date of the first commencement certificate provided Defendant No.1 gets the tenants / occupants vacated (Clause 9(X)), and (iii) completion of construction within a period of two years from (a) the date of execution of the agreement or (b) the date of the first commencement certificate or (c) shifting of tenants / occupants, whichever is later, provided that the owners / Defendant No.1 shall be put in

possession within two years of the date of execution of the agreement (Clause 9 (XI). These obligations are not absolute, but subject to such further extension, as may be decided by an architect named by Defendant No.1, in the event of delays referred in Clause 9 (XII). Clause 16 stipulates that time for completion of re-development as provided in Clause 9(X) and (XI) is of essence. The clause also provides that in the event of failure of the Plaintiff to commence and complete the construction, Defendant No.1 shall, at the Plaintiff's request in writing, give a six-month extension, and if the redevelopment is not completed within such extended period, be entitled to terminate the agreement by giving a one month's written notice. As may be immediately noticed, much depends on the interplay of Clauses 9(XII) and 16 as far as time, whether of essence or otherwise, is concerned. Mr.Anturkar, in his submissions, made four points in this behalf, namely :

(i) Clause 9(XII) does not result in an automatic extension;
(ii) There is no pleading that it results into any automatic extension;
(iii) Clause 9(XII) must be read with Clause 16; and
(iv) The reasons for failure to adhere to the time line alleged by the Plaintiff are not covered by Clause 9(XII).

Mr. Anturkar, learned Senior Counsel for Defendant No.1, referred to the judgment of the Supreme Court in the case of **Saradamani Kandappan Vs. S. Rajalakshmi** in support of his contention that time was of essence in the present case.

On the other hand, it is submitted by Mr.Pai, learned Counsel for the Plaintiff, that reading the agreement as a whole, time was not of essence; that the Plaintiff's inability to complete the redevelopment was not attributable to any default on the part of the Plaintiff; and that time for performance was mutually extended by the parties. It is submitted that the termination, which came only after the Plaintiff's refusal to change the scheme of redevelopment from one under DCR 33(7) to one under DCR 33(24), was for an extraneous purpose and not in accordance with the agreement. Learned Counsel relies on various clauses of the suit agreement as well as correspondence between the parties in this behalf.

7 Whether time for performance in a contract is of essence or not must be understood in the light of the agreement read as a whole. Where the agreement appears to be ambiguous, the Court takes into account the conduct of the parties in the backdrop of facts and circumstances of the case to ascertain the real intention of the parties. In our case, the property is a cessed property, covered by the provisions of the MHADA Act, and thus requiring NOC of MHADA for redevelopment with FSI of 2 (Recital (f) of the agreement), but the parties had obviously expected the available FSI to be 2.5 (Clause 14 of the agreement). This evidently involved approaching MHADA, getting the requisite paperwork done before such FSI could be availed of. The agreement also contemplated that all tenants / occupants on the property would have to vacate their respective premises and then, be accommodated in transit accommodation to be constructed on site. The agreement envisaged that there would be part commencement certificates (Clause 9(XII) of the agreement) and the construction would be in stages. It appears from the reading of the agreement as a whole that the parties, in the premises, did anticipate that there would be delays and occasions for extension of time for performance and made stipulations for such contingencies. Clause 9(XII) of the agreement took into account delays on the part of the Municipal Corporation in issuing commencement certificate/s from time to time and provided for the entitlement of the Plaintiff to get extension of time. In fact, non-issue of commencement certificate/s from time to time was placed on par with force majeure conditions. Clause 16, on the other hand, provided for one extension of six months in the event of the Petitioner's inability to commence and complete the redevelopment with the time originally provided for and after such extension, upon failure to complete the work within such extended period, for the entitlement of Defendant No.1 to terminate the suit contract. There is some apparent ambiguity in the provisions of Clause 9(XII) and Clause 16. But the agreement read as a whole and in the backdrop of circumstances noted above, it clearly appears that leaving aside the general inability of the Plaintiff to commence and complete the redevelopment work, such inability on account of non-issuance of commencement certificate/s from time to time allows the Plaintiff

to get further extension/s from time to time. No doubt Defendant No.1 is right in contending that such extension is not automatic, but as may be decided by the designated architect. But there is no requirement of a formal extension by having recourse to the architect. Now, if we have regard to the facts of the case, it is not disputed that the vacant possession of the suit property was not handed over by Defendant No.1 to the Plaintiff anytime before 15 July 2009. The Plaintiff, thereafter, proceeded to demolish the structures and construct alternative transit accommodation for the tenants / occupants. A Commencement Certificate was obtained on 27 November 2009 for construction of rehab building – B Wing – upto plinth level. MHADA NOC for construction upto FSI of 2.5 was obtained on 18 March 2011. Thereafter, DC Regulations came to be amended in January 2012 providing for FSI of 3 for redevelopment projects under DCR 33(7). Revised plans were, accordingly, submitted for construction upto FSI 3 in September 2012 and the sanction of the Corporation was awaited by the time the agreement was purportedly terminated by Defendant No.1. These facts *prima facie* show that the Plaintiff was throughout entitled to extension of time for performance in terms of Clause 9(XII) and the same was mutually extended from time to time. There is nothing on record to show that all this while Defendant No.1 insisted on keeping to the scheduled time or made the time as essence.

8. In **Kandappan's case** (supra), the Supreme Court held that the intention to make time stipulated in the agreement as essence of the contract shall be gathered from the express terms of the contract or the circumstances necessitating the sale set out in the agreement. On the facts of that case, the Court found that there was a clear indication. In the facts of our case, as noted above, it emerges from the reading of the agreement as a whole and considering the conduct of the parties, *prima facie* time cannot be said to be of essence in an absolute sense, but that the Plaintiff was entitled to extension from time to time and such extension appears to have been mutually agreed to between the parties.

9 Let us now consider whether the Plaintiff has committed any breaches of the suit agreement as alleged by Defendant No.1. It is alleged that

the Plaintiff did not seek any permission of Defendant No.1 to the amended plans. Mr. Anturkar refers to Clause 12 of the development agreement, and the Plaintiff's letters dated 18 January 2012, 5 June 2012 and 3 September 2012 in this behalf. He also refers to the letter dated 11 February 2011 addressed by Defendant No.1 to the Plaintiff, which is part of the additional affidavit filed by the Defendant No.1 on 24 February 2015. Based on these documents, it is submitted that the Plaintiff was enjoined upon to take the permission of Defendant No.1 before any amended plan could be filed; that the Plaintiff could not make any application for any additional or further FSI unilaterally and without recourse to Defendant No.1; that Defendant No.1 had put the Plaintiff to the express notice of these obligations; and that the Plaintiff neverthless failed to adhere to these obligations. In the first place, the relevant clause of the suit agreement, Clause 12, entitles the Plaintiff to submit to the planning authority plans including amended plans for construction of new building on the suit property, but he is required to forward the same to Defendant No.1 for the latter's approval. Defendant No.1 was entitled to suggest modifications and/or changes for consideration of the Plaintiff. Only those modifications or changes suggested by Defendant No.1, which related to the area to be retained by the Owners / Defendant No.1, were necessary to be incorporated in the plans. All modifications / suggestions had, however, to be communicated by Defendant No.1 to the Plaintiff within seven days of receipt of plans by the former from the latter. The letters dated 18 January 2012, 5 June 2012 and 3 September 2012 show that complete set of plans (amended plans) were sent by the Plaintiff to Defendant No.1. There is nothing to show if Defendant No.1 had made any modification or suggestion, much less relating to the owners' area, etc. This *prima facie* indicates that the plans were consented to by Defendant No.1, without any suggestions or modifications. Anyway, there is no complaint about this particular breach in the letter of termination issued by Defendant No.1 to the Plaintiff. There is no *prima facie* case, thus, of a breach on the part of the Plaintiff in this behalf. It is secondly contended by learned Counsel for Defendant No.1 that the agreement between the parties required the Plaintiff to furnish copies of all agreements, deeds and instruments entered into with third party flat purchasers to Defendant No.1, but the Plaintiff failed to furnish any such copies or even provide information about the same. Learned Counsel for Defendant No.1 also refers to an email dated 11 June 2013 sent by the Plaintiff to Defendant No.1, forwarding certain projections about the net profit of the project. It is submitted that these projections show that an area of about 26,656 sq. mtrs. from out of the new construction proposed at site has already been sold by the Plaintiff. It is submitted that sale of this area without furnishing information or copies of agreements, etc. is clearly in breach of the agreement. In reply, learned Counsel for the Plaintiff submits that firstly, the development agreement, which supersedes all covenants between the parties entered into earlier, does not cast any such obligation on the Plaintiff; secondly, there are no agreements executed between the Plaintiff and third parties, but there are only allotment letters issued, which broadly indicate the area for which commitments have been received from third parties. It is submitted that these commitments were only tentatively expressed in the projections submitted to Defendant No.1. Based on the pleadings and material available today before the Court, the Plaintiff appears to have an arguable case on this point. *Prima facie* there is no breach on the part of the Plaintiff on account of not submitting copies of the agreements, etc. to Defendant No.1.

10 In the premises, the Plaintiff has made out a *prima facie* case that the Plaintiff has not been guilty of any breach of the suit agreement; that the termination of the agreement was unauthorized and illegal; and that the Plaintiff has been ready and willing to complete its part of the contract.

11 The considerations of irreparable prejudice and balance of convenience clearly weigh in favour of the Plaintiff. Under the suit agreement, Defendant No.1 / Owners were to get a fixed area from out of the new building proposed to be constructed, whereas an interest was sought to be created in favour of the Plaintiff in the land and even if the latter were to dispose of the same eventually, the entire profits of the redevelopment work were to go to the Plaintiff. As and when Defendant No.1 / Owners get the agreed area they would have the benefit of appreciated value of the area coming to their share and are not likely to suffer any prejudice, which cannot be compensated, but on the other hand, considering the fact that what is dealt with in favour of the Plaintiff is an

immovable property and for which the Plaintiff has accepted commitments from third parties, the Plaintiff would suffer irreparable and greater prejudice if the interim relief were not granted in its favour.

12 Accordingly, the Notice of Motion deserves to be allowed and the same is made absolute in terms of prayer Clauses (a) and (c). There shall be no order as to costs.

(S.C. Gupte, J.)