

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 22 OF 2015.

Eastern Star Hotels &
Resorts Pvt. Ltd having
registered office at E-186,
Greater Kailash New Delhi,
110 001, represented herein
by its Authorized
representative, Vikram
Gohar, son of Javarlal Gohar,
aged 32 years, married,
Indian National, resident of
Betim, Bardez -Goa.

..... Appellant.

V/s

Sanjeev Dhingra, Son of
Shri. Virendra Dhingra,
Resident of R/B-183,
Greater Kailash-1, New
Delhi-110 048.

..... Respondent.

Shri S. G. Desai, Senior Advocate with Shri S. Desai, Advocate
for the appellant.

Shri S. M. Usgaonkar, Senior Advocate with Ms. T. Ghanekar,
Advocate for the respondent.

**Coram :- Nutan D. Sardessai,
Reserved on:-8th July, 2016.
Pronounced on:-8th September,2016.**

Judgment

Heard learned Counsel appearing for the respective
parties.

2. Admit.

3. Ms. T. Ghanekar, learned Counsel waives notice on behalf of the respondents.

4. Shri S. G. Desai, learned Senior Counsel came to be heard on behalf of the appellants and Shri Sudin Usgaonkar, learned Senior Counsel came to be heard on behalf of the respondents.

5. Shri S. G. Desai, learned Senior Counsel for the appellants adverted to the receipt which was the sheet anchor of the respondent's case to buttress a foundation for the agreement regarding the purchase of the property and submitted that by no stretch of the imagination could it be considered. As such it was merely a preparatory document and did not have any of the trappings of an Agreement of Sale. He relied in **Kollipara Sriramulu(dead) Vs Aswatha Narayana [AIR 1968 SC 1028]** in that regard. He next adverted to the Deed of Sale, the Deed of Rectification, the Public Notice issued and the reply. Besides, he contended that the respondent had suppressed the suit filed at New Delhi which was later on withdrawn. The learned Trial Judge in the impugned order had not given any finding that a concluded contract existed between the parties. There was no prima facie finding on the possession nor any reason assigned in that regard. The relief of Section 10

of the Specific Relief Act, 1963 was misplaced and the findings were otherwise not borne out from the records. He relied in **Wander Ltd Vs. Antox India Pvt. Ltd [(1990 supp) 1 SCC 727]** and submitted that the impugned order called for an interference.

6. Shri S. M. Ugaonkar, learned Senior Counsel for the respondent at the outset placed reliance in **Wander Ltd** (supra), and submitted that there was no reason for this Court to interfere with the impugned order unless it was shown that it was fraught with illegality, perversity and/or arbitrariness. Merely because a different view was possible, there was no reason to interfere with the impugned order. The Trial Judge had rather preserved the said property by passing the impugned order. The parties were ad-idem on the issue and the respondent per se had shown that it was a concluded contract which referred to the details of the transaction in the nature of the details of the parties, that a part consideration had been received, referred to the property in respect of which the said amount had been received and its area and that the balance would be paid as per the Memorandum of Understanding to be executed by the parties within 10 days. What all was left for the parties was to identify the modalities of the balance staggered payment and the execution of the formal agreement.

7. Shri S. M. Usgaonkar, learned Senior Counsel for the respondent adverted to the pleadings in the plaint and submitted that there were specific pleadings on the concluded contract. There was no necessity for the issuance of a Public Notice when the plaintiff was substantially contemplating the purchase. He adverted to the reply and submitted that the suit could be filed and was maintainable in terms of order XXI Rule 34 CPC. He further submitted that the judgment in **Kollipara Sriramulu** (supra), was rather supporting his case and on adverting to the contents of the written statement submitted that there was no basis in their defence. Besides he adverted to para 15 of the written statement to substantiate his case that if the defence plea was that there was no concluded contract and the letter was only to put the plaintiff to notice, then how they could be called upon to pay the balance amount within 15 days. He further relied in **Arun Goradia Vs Mashi Jaisukhalal Shah, [2009(1) Mh. L. J.610]** in support of his case.

8. Shri S. M. Usgaonkar, learned Senior Counsel submitted that besides it was his contention that the plea of suppression raised by the defendants/appellants had to be of material and relevant facts. There was no suppression of the material and relevant facts by the respondent and there was an order of withdrawal of the suit simpliciter before the High Court.

Besides they had categorically denied in their rejoinder that the filing of the suit in the Delhi High Court was totally irrelevant for the purpose of the present proceedings and the interim relief sought therein. The application for an interim relief in the suit before the Delhi High Court was not heard on merits and the suit was withdrawn on account of the objection to the territorial jurisdiction of the Court. He further submitted that the Trial Judge had properly considered the material at large before it and took a prima facie view with which the Appellate Court would not interfere with by applying the principles in **Wander Ltd** (supra), only because a different view may be possible. There was no merit in the appeal and therefore it had to be dismissed.

9. Shri S. G. Desai, learned Senior Counsel for the appellants contended in reply that there was no basis in the pleadings on behalf of the respondent that there was no suppression. Such a plea was not tenable as no ex-parte hearing was granted. The plaintiff had to specifically plead the apprehension. The defendants were put to notice of the suit in Delhi and yet the ex-parte hearing was prayed and therefore there was suppression of the relevant and material facts by the respondent. He further submitted that the suit filed for specific performance was fallacious when it did not indicate any

intention to buy the property. No specific performance could be granted in terms of Section 10 of the Specific Relief Act, 1963 and in case the final relief was not tenable, no interim relief could also be granted. The receipt in question was not indicative of a binding bargain between the parties. The receipt required documents to be furnished within 10 days but there was no reference even till the filing of the suit that the documents had not been furnished. The conduct of the respondent was relevant who was silent on the reference to any access in the receipt. There was also no reference to any defective title in the relief and in this scenario there was no basis for the plaintiff to seek the specific performance based on the receipt. The judgment in **Arun P. Goradia** (supra) was clearly distinguishable and could not support the case of the respondent. His concluding arguments were that assuming without admitting that the injunction had to be granted the plaintiff had to be put to terms to deposit the balance amount.

10. In **Kollipara Sriramulu** (supra), the first question which was to be considered in the appeal was whether any oral agreement between the first respondent and all the partners of the firm except the appellants for sale of their shares on 6.7.1952 and whether the respondent no.1 was entitled to the specific performance of that oral agreement. It was the case of

the respondent no.1 that on 6.7.1952, there was a meeting of the male partners in the house at Desu and in that meeting there was an agreement reached between all of them, except the appellants and himself that they should sell to him their shares at a particular rate and a written agreement was to be drawn within 2 or 3 days and the mode of payment of the purchase money was to be settled later. It was further agreed that the sale deeds were to be executed within three months. It was contended on behalf of the appellants that there was no contract because the sale was conditional upon a regular agreement being executed and no such agreement was executed. It was well established that a mere reference to a future formal contract would not prevent a binding bargain between the parties.

11. In **Kollipara Sriramulu** (supra), the fact that the parties referred to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each case. The question in the appeal was

whether the execution of a formal agreement was intended to be a condition of the bargain dated 6.7.1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of the respondent no.1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement and therefore it was not possible to accept the contention of the appellants that the oral agreement was ineffective in law because there was no execution of any formal written document. It was further observed that it is true that there was no specific agreement with regard to the mode of payment but that did not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and the area of the land and the time for completion of the sale were all fixed. This judgment rather supports the case of the respondent unlike the contention of Shri S. G. Desai, learned Senior Counsel that there was no concluded contract between the parties.

12. In **Arun P. Goradia** (supra), the plaintiff had essentially been sued for Specific Performance of an Agreement/Memorandum of Understanding executed by and between the plaintiff and the defendants on 8.5.2004. The

defendants claimed that the said agreement had been terminated by their notice dated 10.8.2005 and a suit followed for a declaration that the notice of termination was without authority of law and an injunction restraining the defendants from creating any third party right in the suit property. The plaintiff claimed to have been granted right, title and interest as a developer of the suit plot and also claimed to have purchased TDR in respect of the development pursuant to the Agreement/Memorandum of Understanding entered into by him. He had also claimed that he had been made a co-owner of the suit plot which had been transferred to him upon the payment of consideration pursuant to the Agreement/Memorandum of Understanding dated 8.5.2004. He had acted upon the said agreement to develop the suit plot of land by negotiating and entering into an registered agreement with several of the tenants of the suit plot of land and obtained the ownership right in respect of certain flats in the building to be constructed on the suit plot of the land pursuant to the said Agreement/Memorandum of Understanding. He therefore, claimed that based upon the said Agreement he was allowed to develop the suit plot. It was the defence case that the Memorandum of Understanding did not settle the right of the parties for the development of the suit plot and that the agreement for the development was yet to be entered into

between them. It was contended that the plaintiff was merely a construction contractor who was to demolish the exiting structure on the suit land and construct a new building which agreement was not specifically enforceable.

13. In **Arun P. Goradia** (supra), the learned Single Judge of this Court examined the Memorandum of Understanding in detail and yet on a reading of the entire Agreement/ Memorandum of Understanding as a whole it showed that on the plot belonging to the defendant no.3 Society and leased to the defendant nos.1 and 2, there existed an old structure which was occupied by five tenants. The defendant nos.4 to 8 and all the parties agreed to demolish the said structure and develop the said plot by constructing a new structure. The available FSI was to be used and in addition TDR was purchased by the plaintiff, who was to demolish as well as reconstruct and upon demolition the plaintiff was to offer temporary accommodation and thereafter permanent alternate accommodation to the existing tenants. The plaintiff was also to give possession of the two flats to the defendant nos.1 and 2 and for the remainder of the construction the plaintiff was to be the sole owner. Upon construction the plaintiff was entitled to the extensive access to the terraces and the access to the terrace above the entire construction. The learned Judge further

found from the material that it was an admitted position that the plaintiff had purchased TDR, that the purchase had been made for ₹34,00,000/- (Rupees thirty four lakhs only) and besides he had entered into a registered agreement with some of the tenants offering them a temporary alternate accommodation.

14. In **Arun Goradia** (supra), the learned Judge found on a reading of the entire Agreement that the plaintiff was not a mere contractor and that there was an agreement between the parties that the plaintiff would develop the suit plot of land as a developer, he would have interest in the new construction as also the corresponding interest in the plot of land as a co-owner with the defendant nos.1 and 2 as a member of the defendant no.3 Society upon its construction. It was contended on behalf of the defendant nos.1 and 2 that because the Development Agreement was still to be signed and registered by the parties the Memorandum of Understanding was not specifically enforceable which the learned Judge found was completely misconceived. If a Memorandum of Understanding was entered into between the parties merely agreeing to enter into a Development Agreement for developing the suit plot of land upon terms not agreed by the parties, the Memorandum of Understanding, which does not set out a full agreement between

the parties, would not be enforceable. If, however, the Memorandum of Understanding sets out the entire agreement between the parties for the development of the entire plot of the land as per the sanctioned plan to the extent of the FSI as also the additionally purchased TDR and sets out the extent of the rights and entitlements of the parties being the owner as well as the Developer in the new construction to be put up by the developer at his own cost, the agreement between the parties is complete and such Memorandum of Understanding is itself specifically enforceable, whether or not, a formal Development Agreement was to be further entered into by them.

15. In **Arun Goradia** (supra), the learned Judge further held that the agreement had to be read as a whole, the intent of the parties had to be ascertained from the agreement and if the agreement showed the full extent of the intent of the parties for complete development of the property, the agreement was nothing but a development Agreement, howsoever drafted or titled. The parties were seen to have acted upon the said Memorandum of Understanding and the defendants were seen to have allowed the plaintiff to further act upon it. The notice of termination was of little effect. In the circumstances therefore, the learned Judge held that the plaintiff had made out a prima facie title for the grant of the relief of injunction against

creating of further third party right and made the notice of motion absolute.

16. At the outset there is no basis in the contention of Shri S. G. Desai, learned Senior Counsel that the plaintiff had indulged in suppression by withholding the information about the suit earlier filed by him in the Delhi High Court and later on withdrawn. There was nothing material or relevant in that regard which was necessary to be incorporated in the pleadings regarding its institution when the appellants/defendants had notice of the suit and had raised objection to its territorial jurisdiction on account of which it came to be withdrawn and filed before the Civil Court at Mapusa in Goa pressing for the necessary reliefs. The plaintiff therefore could not be denied the equitable relief of injunction on the specious premise that the plaintiff had indulged in suppression.

17. The plaintiff had particularly carved out in his pleadings that after the considerable talks between the parties, the terms were agreed and finalised between them and pursuant to which it was agreed that the plaintiff would make a part payment of ₹15,00,000/- (Rupees fifteen lakhs only) from the total sale consideration of ₹4,58,16,000/- and the defendants agreed to issue a receipt stating therein that the detailed

Memorandum of Understanding would be executed within a period of 10 days from the receipt of the documents numbering 10. From the tenor of the receipt and as earlier observed, it was apparent that there existed a concluded contract between the plaintiff and the defendants whereby the defendants had agreed to sell the suit property for the total consideration as agreed upon and in respect of which an earnest money of ₹15,00,000/- was paid to them. From the tenor of the receipt it is apparent that only a formal Agreement to Sale had to be executed delineating the mode of the payment of the balance amount. It was not particularly in dispute that the sale was executed between the appellants and their predecessor in title and followed by a Deed of Rectification dated 17.1.2014.

18. The respondent/plaintiff had categorically pleaded that in the course of the meeting between them, it was finally agreed that the plaintiff would purchase the suit property for the total consideration of ₹4,58,16,000/-. The defendants had agreed to issue a receipt wherein they had categorically stated that the detailed Memorandum of Understanding/Agreement to sell would be executed within 10 days from the receipt of the documents numbering 10 which had to be furnished by the defendants to the plaintiff and the balance payment would be made as per the terms that would be agreed in the said

Memorandum of Understanding. In other words from the tenor of the pleadings it is apparent that there was a concluded contract between the plaintiff and the defendants whereby the defendants had agreed to sell to the plaintiff the suit property for the consideration of ₹4,58,16,000/- out of which the plaintiff had paid an earnest amount of ₹15,00,000/- to the defendants. It also flows from the tenor of the receipt which can be considered as a concluded agreement between the parties that what all remained to be done was the execution of the Memorandum of Understanding/Agreement to chalk out the modalities of the payment of the balance outstanding on the payment of the earnest money.

19. It was also borne out from the plaint i.e. the case of the plaintiff that the plaintiff had been requesting the defendants to immediately provide the documents which they had assured to furnish and that they were always ready and willing to pay the balance consideration and purchase the suit property but the defendants had neither furnished the documents and quite on the contrary their predecessor-in-title had raised an objection with regard to the right, title and interest over the only approach road of the landlocked suit property.

20. The defendants who are the appellants in the

present appeal had taken a specific plea that there was no valid and subsisting right disclosed by the plaintiff and therefore, no relief or that claimed could be granted in his favour. The suit was also barred under Section 41 of the Specific Relief Act, 1963 and considering the nature and import of the receipt dated 22.8.2013, there could be no specific performance of the receipt. The suit as filed seeking the enforcement of mere receipt was not maintainable and the reliefs sought too were not sustainable. There was no concluded contract between the parties and the plaintiff could not seek the specific performance of the receipt. Rather, the admission that the terms of the sale had not been finalised and that the balance payment would be made as per the terms that would be agreed in the Memorandum of Understanding by itself proved that there was no concluded contract between the parties. The suit as such would liable for dismissal apart from the fact that there was suppression of material facts and documents from the Court. They had by their letter dated 31.3.2014 through their advocate informed the plaintiff's advocate that they had clear and absolute title over the suit property and only token money was received from the plaintiff. The plaintiff was specifically put to notice that the balance payment should be made by him within 15 days thereof and on failure to effect the balance payment within stipulated time else the receipt would stand cancelled and

the token money would be refunded to the plaintiff. The plaintiff had no right of whatsoever nature to seek the relief on the basis of the said receipt and therefore, the suit and the application for injunction were not tenable.

21. The plaintiff had reiterated his case and denied that of the defendants that there was no concluded contract between them. The payment of the earnest money clearly reflected the intention of the plaintiff to purchase the property and it was not an act to confirm his intention to purchase the property as was the case set up by the defendants. The receipt was not in the nature of any preliminary negotiations but there was a concluded contract between the parties.

22. A cursory perusal of the receipt clearly indicates that the defendants through its director had received from the plaintiff a sum of ₹15,00,000/- as a part consideration with respect to the sale of property alongwith the two houses situated therein admeasuring 1660 sq. mts bearing the distinct Survey Number and location and the balance consideration of ₹4,43,16000/- would be paid as per the the terms of the Memorandum of Understanding/Agreement of Sale to be executed within a period of 10 days from the receipt of the documents numbering 10. From this receipt it is apparent that

all the details of the transactions were reflected therein and what was all left for the parties to do was to identify the modalities of the balance staggered payment by the execution of a formal agreement. Therefore there is much force in the contention of Shri S. M. Usgaonkar, learned Senior Counsel for the respondent that the receipt had all the trappings of the contract coupled with the pleadings in the plaint.

23. The notice issued to the defendants dated 21.2.2014 also makes a clear reference to the fact that the defendants had taken a token/advance amount of ₹15,00,000/- towards the purchase of the property from the plaintiff bearing the distinct name, with specific area alongwith the houses situated therein and calling upon the defendants to clear the title in view of the litigation in the title between the defendants and their predecessor-in-title. The reply on behalf of the defendants addressed to the Advocate for the plaintiff would make it abundantly clear that the defendants still had intention to conclude the transaction inasmuch as the defendants had called upon the plaintiff to make the balance payment within 15 days of the receipt of the notice and to do the transaction. In other words it is apparent that the defendants had conveyed their intention to perform their part of the agreement which was styled as a receipt. Such reply on behalf of the defendants

believes their claim that there was no concluded contract and even as late as March, 2014 for that matter the plaintiff through his Advocate by his letter dated 22.4.2014 had once again reiterated his willingness to buy the suit property and that the delay was on account of the defendants on one ground or the other.

24. Though Shri S. G. Desai, learned Senior Counsel for the defendants adverted to the notice dated 4.4.2014 issued on behalf of their predecessor-in-title, it cannot be read in isolation and had to be read in the context of the other correspondence exchanged between the parties particularly the reply on behalf of the plaintiff whereby it was clearly made known to the defendants that they had authorised the plaintiff to put a notice on the news papers calling for objections, if any, from any person/persons/individuals/banks/financial institution having any claim, right, title, interest relating to the said property in any manner whatsoever. He contented that there was no finding by the learned Trial Judge that there was a concluded contract existing between the parties nor had the learned Trial Judge recorded a finding on the possession of the plaintiff entitling him to the relief of injunction.

25. However, the contention of Shri Desai does not stand

the test of scrutiny on a perusal of the impugned order inasmuch as the learned trial Judge had taken due note of such a contention on behalf of the appellants and also considered the case of the plaintiff that the receipt disclosed a concluded contract pursuant to which the defendants had agreed to sell the suit property for the consideration of ₹4,58,16,000/- of which he had paid an amount of ₹15,00,000/- to the defendants. The learned Trial Judge for that matter had recorded though not specifically as contended by Shri Desai, learned Senior Counsel that the plaintiff could not go ahead with the execution of the detailed agreement in view of the breach committed by the defendants by non-furnishing of the documents as agreed to and specified in the receipt. The learned Judge for that matter was equally seized of the fact that the plaintiff had issued a public notice disclosing his intention to purchase the suit property and inviting objections from the people at large who would be affected by such sale transaction. For that matter the learned Judge had also recorded a finding that the original owners had lodged their claim in the house existing in the suit property and the access leading to the suit property though it must be said that there was no specific finding that there was a concluded contract between the plaintiffs and the defendants.

26. The learned Trial Judge had clearly recorded a

finding that the plaintiff was claiming a right to purchase the suit property on the basis of the contents of the receipt and in that context observed that it had to see whether the parties to the receipt had the intention to bind themselves and subsequently to enter into a detailed agreement. The learned Trial Judge had observed that the contents of the receipt disclosed that the property agreed to be sold was specifically described, that the defendants had willingly accepted the amount, that documents were to be furnished by the defendants and the time limit for furnishing the same was clearly specified and that the publication of the public notice by the plaintiff in the local daily were clear pointers to the fact that the plaintiff had intention to buy and the defendants had intention to sell the suit property to the plaintiff. Therefore, there is no basis in the contention of Shri S. G. Desai, learned Senior Counsel for the appellants that the learned trial Judge had not examined the status of the receipt and the conduct of the parties in arriving at a finding that there was an express intention to purchase and an express intention to sell the property in question.

27. The learned Judge for that matter had unlike the contention of Shri S. G. Desai, learned Senior Counsel for the appellants clearly recorded a prima facie finding that the equity lay in the favour of the plaintiff who would suffer irreparable loss

and injuries in case the suit property was sold or alienated and in the circumstances therefore the balance of convenience also lay in favour of the plaintiff. The learned Judge for that matter also recorded a finding that the receipt prima facie established that there was binding agreement between the parties as regards the sale of the suit property, that the plaintiff had proved that he was ready and willing to perform his part of the obligation and in those set of circumstances deemed it appropriate to secure the plaintiff with the relief of injunction. Though the order may not have been happily worded, the fact of the matter remains that there is no warrant for interference with the findings recorded by the learned Trial Judge only because a different view may be possible in the circumstances of the case. I therefore do not find any reason to concur with the contention of Shri S. G. Desai, learned Senior Counsel for the appellants that the plaintiff was unduly secured with the relief of injunction by the learned Trial Judge on the specious premise that the plaintiff had not expressed his intention to buy the property nor was there any indication on behalf of the defendants to sell the same to the plaintiff.

28. Section 10 of the Specific Relief Act, 1963 sets out the cases in which the Specific Performance of Contract is enforceable, however within the discretion of the Court. Looking

to the tenor of the pleadings and the reasons assigned by the learned Judge, it cannot at all be heard on behalf of Shri S. G. Desai, learned Senior Counsel for the appellants that the plaintiff had failed to make out a case for specific performance of the contract. Moreover there is also no warrant for entertaining the contention on his behalf that the relief of injunction was barred in terms of Section 41 of the Specific Relief Act when the plaintiff had clearly set out his apprehension that he would suffer irreparable loss in case the defendants were not restrained by an order of injunction from creating any third party rights in respect of the suit property.

29. In the circumstances therefore there is no reason to interfere with the findings recorded by the learned Trial Judge. It goes without saying therefore, the appeal is not tenable and therefore i pass the following:-

O R D E R

The appeal is dismissed and the impugned order securing the plaintiff with the relief of injunction is confirmed. However, i find myself in agreement with the contention of Shri Shivan Desai, learned Advocate for the appellants that the plaintiff had to be put to the terms considering the fact that a substantial part of the consideration had yet to be paid to the appellants and that he was secured by an order of injunction to restrain the

defendants from creating any third party right or interest therein. To that extent the plaintiff is put to terms to deposit the balance amount before the Trial Judge which he shall do within 6 weeks from today.

NUTAN D. SARDESSAI, J.

vn*