

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

ARBITRATION APPEAL (L) No. 74 OF 2016
IN
ARBITRATION PETITION NO. 829 OF 2015

WITH
NOTICE OF MOTION (L) NO. 583 OF 2016

Prajita Developers Pvt.Ltd. .. Appellants
(Orig.Petitioners)

Vs.

1 Yusuf Khan alias Dilip Kumar
2 M/s. Gold Beam Construction Pvt. Limited .. Respondents
(Orig. Respondents)

Mr. Janak Dwarkadas, Senior Advocate with Mr. Zal Andhyarujina with Arup Dasgupta, Ms. Shruti Sardesai Mr. Nirav Merchant and Ms. Deepika Sekar i/b. Jhangiani Narula & Associates for the appellants.

Mr. Milind Sathe, Senior Advocate with Mr.Chirag Shah and Parag Shah i/b. M/s. Mahesh Shah & Co. for respondent No.1

Mr.N.H.Seervai, Senior Advocate with Mr. Rahul Chitnis i/b. Akshay Shah for respondent No.2

**CORAM: ANOOP V. MOHTA AND
G. S. KULKARNI, JJ.**

**CLOSED FOR JUDGMENT ON: February 26, 2016
PRONOUNCED ON : March 04, 2016**

JUDGMENT (Per Anoop V. Mohta, J.)

The Appellants (original Petitioners) have challenged

impugned order dated 14.01.2016 passed by the learned Single Judge, thereby the Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “Act of 1996”) is dismissed.

2 The Appellants, through Section 9 Petition, sought injunction against Respondent No.1, his servants and agents from dispossessing from the property bearing land admeasuring 2,056 sq.mtrs. plot no.16 of Pali Hill Estate in the Village of Danda (Bandra), Taluka-Andheri, Bandra (East), Mumbai 400 051, forming part of Survey No.236, No.3, N.A. No.329 corresponding CTS. No. C/1395, C/1396 and C/1397 (hereinafter referred to as the said Property).

3 Respondent No.1 is 92 years old, a senior citizen, had entered into Development Agreement dated 23.06.2006. The learned Judge referred those facts in paragraphs 4, 5 and 6 in the impugned order, which read thus:

“4 The development agreement dated 23.6.2006 was executed between Yusuf Khan alias Dilip Kumar Respondent no.1, M/s.Sharyans Resources Limited

(hereinafter referred to as M/s.Sharyans) and respondent no.2 M/s.Gold Beam Construction Pvt.Ltd. whereby respondent no.1 granted development rights to the said M/s.Sharyans and to the respondent no.2 as stated therein in respect of the said property upon terms and conditions and for consideration of Rs.10 crores. The development agreement was duly registered with the Sub-Registrar of Assurance. Power of Attorney executed by respondent no.1 in favour of respondent no.2 and its director to enable the developer to commence the development work. As per the said Development Agreement developers paid sum of Rs.1 crores to the respondent no.1 on execution of development agreement and thereafter paid sum of Rs.3 crores. In all they paid Rs.4 crores to the respondent no.1. Some of the relevant clauses of the said development agreement dated 23.6.2006 are as under:

“1. (A) For monetary consideration as hereinafter provided to be paid by the Developers to the Owner and other than the consideration of providing to the Owner free of costs the built-up premises desired to be retained by the Owner, in the buildings to be constructed on the said property the Owner hereby grants to the Developers and the Developers hereby acquired from the Owner the development rights to the extent and in the manner hereinafter provided in respect of the said property more particularly described in the Schedule hereunder written

(hereinafter as aforesaid referred to as “the said Property”) by consuming and utilizing the entire permissible F.S.I. in respect of the said Property (including F.S.I. of staircase, lifts, passage, balcony etc.) as well as by consuming and utilizing entire permissible T.D.R. In accordance with the Development Control Regulations of MCGM.

(B) It is estimated that for development of the said Property the total permissible FSI available is about 2056 sq.mtrs. Equivalent to 22130 sq.ft. and further FSI by way of TDR as permissible under D.C.Regulations of MCGM.

(i) The entitlement of the parties in the development potential shall be as under:

Party	Residential User	CPS
(1)	(2)	(3)
Owner	50%	50%
Developers	50%	50%

(ii) The Owner has retained and/or will be deemed to have retained for his own use and benefit above stipulated entitlement of the Owner out of the total FSI and TDR available for the development of the said property including proportionate entitlement of the total number of car parking slots (CPS) (both stilted and/or open) that may be provided in the complex and the said portion of the FSI (hereinafter collectively referred to as “the Owner's Lot), shall be developed by the Developers at the cost of the Developers in the manner and in accordance with the plans prepared as per the requirement of the Owner and under the supervision of the Architect of the project and in the time frame and in the manner as provided herein.

(iii) The benefit of the above stipulated entitlement of the Developers out of the total FSI and TDR available for development of the said property as also of the total CPS (both stilted and open) that may be provided in the complex (such Developer's entitlement available for development on the said Property and the CPS-both stilted and open) that may be provided in the complex (hereinafter referred to as “the Developer's lot) shall be

developed by the Developers at its own costs and shall belong to the Developers and shall be at the disposal of the Developers.

(iv) In case any additional area or potential over and above the present development potential is allowed in future to be constructed on payment of premium, the same shall be divided between the Owner and Developers in the proportion as provided in Clause 1(B) (I) above and then ali pro-rata costs of such premium and the costs of construction of such additional area coming to the share of the Owner shall be borne and paid by the Owner and the remaining pro-rate costs of such premium and the costs of construction coming to the share of the Developers shall be borne and paid by the Developers. Above stipulated entitlement of the Owner of such additional built-up area shall form part of the Owner's lot and above stipulated entitlement of the Developer's lot. It is certified that the purpose aforesaid the term "present development potential" shall means F.S.I. available on the said property for redevelopment and additional 50% thereof by way of T.D.R.

3. The Developer's shall pay to the Owner the sum of Rupees Ten Crore as and by way of lump sum monetary consideration in the manner as provided herein:

(a) a sum ali of Rs.1,00,00,000/- (Rupees One Crore Only) on execution of these presents.

(b) a sum of Rs.4,00,00,000/- (Rupees four crore Only) before handing over vacant possession of the said property including the Bungalow standing on the said property to enable the Developers to enter upon the said property and commence development.

(c) the balance sum of Rs.5,00,00,000/- (Rupees five crores Only) within six months from the date of this Agreement provided the Developers are not restrained and/or not prevented from carrying on the development of the property as provided thereunder.

17. Upon payment of the balance monetary consideration by the Developers to the Owner as provided in Clause 3(b) the Owner shall permit and the Developers shall have the license to enter upon the said Property to develop the said Property, to carry on construction on the said Property and for that purpose to do all acts, deeds, matters and things as may be necessary exercising the following rights and authorities:

(a) To put and/erect sign boards upon the said Property as also to issue advertisement in the newspapers and other medias as may be deemed fit by the Developers announcing the construction of the buildings on the said Property and the sale of the flats, shops, offices, garages, parking spaces, tenements, etc. (coming to the share of Developers on ownership basis.

(b) After revalidation of the building plans to commence, carry on and complete construction of the buildings on the said Property by the Developers or through its contractors, sub-contractors or any other agent at its costs.

(c) To dispose of in its own name on ownership basis of the flats, shops, offices, garages, parking spaces, tenements, stilts or any other rights in the buildings to be constructed on the said Property which comes to the share of the Developers to the person or parties of its choice at the price and upon the terms and conditions as the Developers may deem proper.

(d) To receive the consideration from the purchasers of the flats, shops, offices, garages, parking spaces, tenements, stilts or any other rights in the buildings to be constructed on the said Property which comes to the share of the Developers and the Developers shall be entitled to appropriate the same as it may deem fit and proper.

(e) To enter into agreements for sale of the premises which comes to the share of the Developers comprising of the flats, garages, parking spaces, tenements, stilts or any other rights in the buildings to be constructed on the said Property.”

5 Initially, the said M/s.Sharyans applied to the various authorities for permission to develop the suit property. M/s.Sharyans paid an amount of Rs.2,89,900/- on 28.4.2008 to the National Institute of Oceanography to obtain requisite CRZ clearance to load TDR upon the said property. In May 2008, the said M/s.Sharyans applied for height clearance for the building to be constructed to the Airport Authority. The Airport Authority of India granted NOC for height clearance for the building to be constructed on the said property on 22.8.2008. Thereafter the said M/s.Sharyans appointed a Contractor to execute the Development work under the Development Agreement and the said contractor has done demolition of the old bungalow, excavation work necessary to lay foundation of the new building, pilling work, foundation work etc. On 22.9.2008 Municipal Corporation for Greater Mumbai granted commencement certificate for development of the said property.

6 On 20.4.2010, the deed of assignment came to be executed between M/s.Sharyans and the petitioners by which M/s.Sharyans have assigned their right, title and interest of the development agreement dated 23.6.2006 to the petitioners. As per the said deed of assignment dated 20.4.2010 the petitioners acquired M/s.Sharyans right in development agreement dated 23.6.2006. Pursuant to the said deed of assignment, partnership deed between respondent nos.1 and 2 modified and the petitioners

became a partner of the said partnership firm whose aim was to develop the said property as per the development agreement. Because of the dispute between the parties, the petitioners invoked Arbitration Clause of development agreement dated 23.6.2006 calling upon the respondents to appoint the Arbitrator to dissolve their disputes. The Arbitration Clause of the development agreement dated 23.6.2006 reads thus:

“40 All disputes differences and questions whatsoever arising between the parties hereto and/or the persons claiming by under or through them at any time touching these presents or any matter arising out of this transaction if not resolved mutually between the parties, the same shall be resolved by arbitration of a single arbitrator if both parties agree upon one such, or by two arbitrators one each appointed by each party and third Arbitrator appointed by them, and the decision of the Arbitrator/s shall be final and binding upon the parties. The Venue of such Arbitration shall be Mumbai and subject as above, the same shall be in accordance with the Arbitration and Conciliation Act, 1996.”

4 The learned Judge referring to the affidavit so filed on record, including the documents read with judgments so cited, noted even the rival submissions in paragraphs 13 to 17 of the Order.

5 The learned Judge ultimately concluded in paragraphs 21 to 23 and dismissed the Petition.

6 The Appellants/Petitioners/Prajita have obtained the leasehold rights in the property together with the bungalow standing thereon by virtue of Lease dated 25 September 1953. Since they wanted to develop the said property, applied to the Corporation of Greater Mumbai (MCGM) and obtained IOD dated 6 October 2000. Therefore, for the same, a Memorandum of Understanding of 1 July 2004 was executed with M/s. Sharyans Resources Limited (Sharyans), who was appointed as the Project Manager for the development of the property. Sharyans and M/s. Gold Beam Construction Pvt Ltd (Gold Beam) entered into a Partnership on 16 June 2006 for development of the property. A fresh Partnership Deed was executed on 10 December 2008 (the Partnership Deed) with Respondent No.2/Gold Beam. Based upon the Partnership, the monetary burden was upon them to develop the property. Gold Beam was required to bring its contribution of 50% of the cost and 50% of monetary consideration through Respondent No.1 (owner). The profit of the firm was to be shared equally between the Sharyans and Gold Beam. A development agreement was entered into with Sharyans on 23 June 2006 and Gold Beam. The same was further

rectified by the Deed of Rectification on 11 September 2006 (the Development Agreement). The owner executed a Power of Attorney (POA) in favour of Gold Beam to authorise various agreements. Sharyans and Gold Beam were supposed to develop the said property as per the said agreement (the Developer). A monetary consideration of Rs. 10 crores as per clause 3 was required to be paid to the owner. The said instalments are mentioned in the above paras as noted by the learned Judge. Based upon the Development Agreement, the Sharyans and the Gold Beam were permitted to enter upon the property as developers. The remaining amount was required to be paid from the date of Development Agreement (23 December 2006). The remaining said amount was not paid to the owner in full. The amount paid was approximately, 7,14,00,000/-. The part payment apart, no progress of construction and development as agreed was made.

7 As per the agreements, Sharyans and Gold Beam were to get 50% of the development potential area to be constructed which was subject to further division equally between the Sharyans and the Gold Beam. There is no dispute that as per clause 19 (d) of the

Development Agreement, the entire development work was to be carried out by the developer/Appellant/Petitioner at their own costs, including to procure the permissible TDR as per clause 2 of the agreement. There is nothing to show that the developers have procured any part of TDR in view clause 11-A(a). Admittedly, as per the agreement, the development was supposed to commence within 30 days and should be completed within a time period of 12 months from the date of IOD/Commencement Certificate. The plans were approved on 2 January 2008 and CC was obtained on 22 September 2008. No steps to initiate even construction were taken. Admittedly the development of the remaining was not completed before September 2011 – even the foundation was not laid, except some piling work with two columns. The position remained same till the year 2013-2014. The said position of 2013 and 2014 still remained same till this date. In the background, such construction/development contract so entered into by Respondent No.1/owner to develop his property as a owner within his lifetime considering his age. The agreement clause itself shows that time was an essence of the contract to complete the development so that all the parties including the Appellants/Petitioners would get his 25% share

after completion of the construction at this costs. The Appellants/Petitioners entitlement was only after completion of the development. The remaining 25% was admittedly of Gold Beam. In the remaining 50% area, the Appellants and/or Gold Beam and/or Sharyans had no right whatsoever. Their rights/interest/entitlement was also subject to to the development and construction for the development potential area. The Developers could not even obtain permission, NOC, though obtain re-validation of CC till the year 2013. The Sharyans and his assignee/Petitioner/Prajita, therefore, failed to develop the property further as per the agreement.

8 Sharyans executed a Deed of Assignment (the Deed of Assignment) on 20 April 2010 and assigned its rights and liabilities arising out of the Development Agreement in favour of the Appellants/Petitioner/Prajita, by which the Appellants were entitled to 25% share in the development rights, but it was subject to all liabilities and obligations of the Sharayans under the agreement. The Deed of Assignment was confirmed by the Respondents also. On the same day, a Deed of Admission-cum-Retirement was executed by and between the Sharyans and the Appellants/Petitioners/Prajita and Gold

Beam, whereby the Sharyans retired from the said firm and Prajita/Appellants was treated as new partner on the same terms and conditions in place of Sharyans under the Partnership Deed. Admittedly, the Appellants, therefore, stepped into the shoes of Sharyans with all rights and liabilities mentioned in the said development agreement. The Appellants, therefore, knowing the background and the obligation, including the time being the essence of the contract in view of the nature of construction and the reason for development of the property by the owner, the Appellants as well as the Gold Beam/Respondent No.2, failed to comply with the essential terms and conditions of the Development Agreement in time. They have not complied with the various conditions mentioned in the IOD and the NOC till this date. There was no dispute with regard to the title/ownership of Respondent No.1. There was no restraintment order of any kind passed against Prajita/the Sharyans and/or the property in question. There was nothing to prevent the developer to carry out the construction activities in time. The suit by Sameer Bhojwani, even if any, about rent, pending in Small Causes Court, Bandra, ad-interim injunction was only between 25 September 2013 which was vacated on 31 October 2013 i.e. only for 37 days.

Therefore, there was no constraint of any kind for the development of the property in question. There was no any such communication and/or agreement to stop the construction work. The Developers including the Appellants, therefore, failed to stick to the time so agreed. The submission that for some time, Respondent No.1 asked to stop the construction on account of third party claim against his title in the Suit which was for short time is of no assistance to claim the defence of stopping of work by Respondent No.1. The Appellants, therefore, as noted, has not shown any progress of construction. This shows that the developers were unwilling to develop the said property for various reasons including the requisite funds to carry out the development work. Admittedly, they did not commence and complete the development of the property. In the meantime, there was no question of touching the portion of the bungalow as it was subject to other clause of the agreement and basically when developer for eight years except two coloums and carry out piling work, made no construction as per the agreements, as they agreed to complete the building and made ready for occupation within 25 months from the date of obtaining CC. The Appellants, as recorded, have not done any activity of construction except by Sharyans so made before the

assignment. This itself, as rightly expressed by the learned Judge and we have also noted the inability and unwillingness to pursue the development as per the agreement.

9 The nature of agreement itself shows that the Appellants/Petitioners and the Sharyans and/or Developers were permitted to enter into the property as developer only after part payment of consideration. The said licence was for limited purpose and for ancillary activities. The intention was made known to all. This licence, in our view, also cannot be read to mean and as sought to be contended by the counsel appearing for the Appellants, that the interest was created in the property in perpetuity.

10 The reliance was placed on a judgement of a Division Bench in *Chheda Housing Development Corporation v. Bibijan Shaikh Farid and ors*¹., in support of their contention. In that case, the agreement was totally different. There was no such development agreement whereby share of the Petitioner, at the most is 25% i.e. after completion of the construction and developing the further

1 2007 (3) Mh. L. J. 402

property. In the facts and peculiar circumstances and basically the clauses so read and referred and the agreement so entered into and as admittedly, the Petitioner was not in picture at the time of basic development agreement and admittedly came into picture in the year 2010 and as no property was developed at any point of time, though permitted to enter into the premises, the said judgment is of no assistance to claim the interest in the property based upon the agreement itself.

11 The submission that time was not the essence of the contract based upon the decision in *M/s.Hindu Construction Contractors v. State of Maharashtra*,² is also unacceptable. The findings given by the learned Judge, based upon the clauses so read and referred and as we have also considered those rival contentions and submissions and as there was no progress whatsoever shown and it is a case where the Petitioners who subsequently entered into the suit property based upon the agreement so referred and unable to show willingness and desire to complete the construction as agreed on the basis of 2006 Development Agreement and as we have also come

2 (1979) 2 SCC 70

to a conclusion, looking to the facts and circumstances, the time was the essence of the contract,, the Appellants therefore failed to perform their obligations. The invocation of arbitration clause and the termination of the contract by the Appellants/Petitioners in no way can be stated to be wrong and/or impermissible. The breach committed by the Appellants and Respondent No.2, therefore, goes to the root of the agreement of such contract and as there is no case of any waiver and/or extension of agreed time for further development, in view of express provisions, the contention that the time was not the essence of the contract, is unacceptable.

12 The submission is raised for the first time in Appeal that the Appellants are entitled to claim specific performance and/or related reliefs from Respondent No.2 being part of the Development Agreement as well as Assignment Deed in question. Admittedly, Respondent No.2 has not raised any such issue and/or not claimed any specific performance and/or not made any demand from Respondent No.1. Therefore, having accepted the position including the termination by one of the partner/party to the Development Agreement/Deeds, the intended claim of specific performance, even if

any, in the present facts and circumstances, in our view, is an additional ground and reason, to hold that the Appellants/Petitioners are not entitled for interim protection and/or relief so sought by restoring the terminated contract. Out of two partners, one partner has already accepted the termination, the interest even, if any, as noted, of 25% share, which was also subject to completion of construction, the Appellants/Petitioners are at the most entitled for the damages and/or similar compensation. However, after considering the totality of the matter and as admittedly, the Appellants/Petitioners have no right or interest till other remaining 75% of the property in question, no case for interim relief/or protection and/or restoration of possession so stated, is made out.

13 The judgment referred to Order 1, Rule 1 of Code of Civil Procedure (CPC) to join parties for specific performance and for related claims, based upon *Jahar Roy (Dead), through L.Rs v. Premji Bhimji Mansata*,³ *Poonuswami Gounder v. Rama Boyan and ors.*,⁴ are of no assistance to interfere with the impugned order so also the judgment revolving around Section 45 and Section 23 of Specific

3 (1977) 4 SCC 562

4 AIR 1979 Madras 130

Relief Act in *Kandaswami and ors v. Venkatachala Kandar and ors.*⁵, specifically when it is settled that the remedy of specific performance is an equitable one and is in the discretion of the Court. As noted, the facts and circumstances, though we are not expressing final opinion, as it will be subject to Suit and/or Arbitration, if initiated, but we are inclined to observe that the Appellants and the Plaintiffs claim, even if any, in no way, can be more than damages and/or compensation. These observations are for deciding this Appeal against judgement on Section 9 Application. The main relief of specific performance, in view of above admitted position, as not possible and would not be executable, the interim protection and/or relief in aid to the same, as prayed in Section 9 Application, therefore, as not granted by the learned Judge and we see no case is made out to interfere with the same, considering the scope and power of Appellate Court under Section 37 of the Act of 1996. The Apex Court in *Wander Ltd and anr v. Antox India P Ltd*⁶, has dealt with the power of Appellate Court to interfere with the reasoned order passed by the learned Judge in exercising and taking note of basic principle of law of injunction.

Even otherwise, as noted, no case is made out to substitute the order

5 1972 The Madras Law Journal Reports 401

6 1990 (Supp) SCC 727

so passed as the same is not illegal, contrary and/or perverse. The order so passed is well within the frame work of law and the record.

14 The judgment so cited by the learned senior counsel appearing for the Appellants in ICICI Bank Limited v. United Breweries (Holdings) Limited and ors., in Appeal (L) No.409 of 2015 in Notice of Motion (L) No. 905 of 2015 in Suit (L) No. 290 of 2015 with Notice of Motion (L) No. 1285 of 2015 dated 3 December 2015 (V. M. Kanade, Acting Chief Justice & Dr. Shalini Phansalkar-Joshi, J.), in support of his submission that if case is made out, the Appellate Court is required to interfere even with the reasoned order so passed by the learned Judge. In the facts and circumstances, the Division Bench of this Court interfered with the reasoned order, apart from the reasons which we have noted above, as it would be difficult for the Court, even the Arbitrator to pass order of specific performance except, subject to material and evidence, compensation/damages, if any. This is subject to counter claim/damages by Respondent No.1 also.

15 In the result, the Appeal is dismissed. There shall be no order as to costs.

16 In view of dismissal of Appeal, Notice of Motion (L) No. 583 of 2016 does not survive and stands disposed of accordingly.

17 At this stage, learned senior counsel appearing for the Appellants submits that the statement of Respondent No. 1 to continue for a period of two weeks. Considering the issue so involved and the reasons so recorded and in the interest of justice, we are inclined to continue the statement of Respondent No.1 for two weeks. Order accordingly.

(G. S. KULKARNI, J.)

(ANOOP V. MOHTA, J.)