

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.6 of 2017

1 M/s. Shirka Constructions,
a Proprietorship firm represented by its
Proprietor Shri Shirish Kamat

2 Shri Shirish Q. Kamat,
son of Shri Q. Kamat,
major of age, Indian National,

Both having office at C-6, Vishal
Apartments, Behind Vishant Theater,
Aquem, Margao, Goa.

... Appellants

V/s.

1 M/s. Appollo Engineers & Contractors
Pvt.Ltd.,
having its office at Ground Floor, Sanrit
Apartments, Near Masjid, Malbhat,
Margao, Goa.

2 Shri Kiran V. Naik,
major of age, Indian National, r/o.
Ground Floor, Sanrit Apartments, Near
Masjid, Malbhat, Margao, Goa.

... Respondents.

Shri Nitin Sardessai, Senior Advocate with Shri G. Panandikar,
Advocate for the Appellants.

Shri Parag Rao, Advocate for the respondents..

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 18th December, 2017

Pronounced on : 11th April, 2018.

JUDGMENT :

1. The appellants who are the original defendants are

challenging the impugned order dated 09.01.2017 passed by the Ad-hoc Senior Civil Judge, Margao pursuant to which he allowed the respondents application for injunction and restrained the present appellants through their servants, agents etc. from interfering in the suit property and carrying out further construction therein.

2. Briefly stated, the respondents had entered into an Agreement dated 22.01.2007 with the members of the Society known as Vidya Vikas Co-operative Housing Society Ltd. ('Society' for short) pursuant to which the respondents were to convey to the Society 30 residential flats in the building/s, which were to be erected by them. The Power of Attorney dated 22.01.2007 was also executed by the members of the Society in favour of the respondent No.2. The respondents had entered into an Agreement with M/s. Vrudhi Buildcon Pvt.Ltd. for carrying out the construction and development of the proposed project but which came to be terminated mutually between the parties and thereafter, the respondents entered into the Memorandum of Understanding for development, construction and sale dated 24.10.2009 for the purpose of development of the suit property with the appellants herein. Pursuant to the said Memorandum of Understanding (MOU, for short) the appellants were to give 38 units to the respondents and one residential flat to M/s. Vrudhi Buildcon Pvt. Ltd. for the

proposed project to be constructed and developed by them and the remaining units were to be of the appellants. They had started work after an initial period of 15-18 months for settling various issues and sometime in 2010-11 the owners of the property i.e. Society questioned the appellants as to what capacity they were carrying out the construction activity. They had informed the Society that the development and the construction work of the proposed project was being carried out on the basis of the MOU entered into between them and the respondents. The Society through its Managing Committee had entrusted the construction and development of the proposed project directly to the appellants vide its letter dated 09.06.2011 and also executed a Power of Attorney dated 21.07.2011 in favour of the appellant No.2 giving full and unfettered right to develop the suit property.

3. The respondents filed a suit for cancellation of Memorandum of Understanding, injunction and consequential reliefs alongwith an application for temporary injunction which came to be allowed by the impugned order dated 09.01.2017. The Agreement and the Power of Attorney dated 22.01.2007 executed by the other members of the Society was illegal and in gross violation of the byelaws and they were never authorised by the Managing Committee to do so. The letter dated 09.06.2011 spelling out the Agreement between the Society and the appellants and the Power

of Attorney dated 22.01.2007 were valid and legally binding on the parties. The appellants had entered into the Agreement of Sale in respect of 21 units prior to the impugned order being passed by the learned Court and the possession thereof had been handed over to the concerned purchasers. The impugned order was perverse and illegal and passed without the application of mind and was unreasonable and therefore, was liable for interference in this appeal and on such and similar grounds raised in the appeal memo.

4. Heard Shri Nitin N. Sardesai, learned Senior Advocate for the appellants, who referred to the Development Agreement entered into by the Society dated 22.01.2007 with the respondents and who were to deliver the possession to the Society of 30 units by 25.02.2009. There was a subsequent Agreement between the appellants and the respondents on 24.03.2009. The Society had adopted the resolution and authorised the appellants vide the letter dated 09.06.2011 to undertake the construction and which authorisation had not been terminated by the Society till date. No demand was made by the Society on the appellants or the respondents nor any proceedings initiated by the Society in any Court qua the developed plots and therefore the question which arose was whether there was any right with the respondents to prohibit the construction when the owner/ Society was supporting

the appellants and the rights of the respondents was restricted to 8 units alone. The Trial Court had not at all consider the letter dated 09.06.2011 authorising them to carry out the construction and which was a fundamental error committed by the Trial Court. The Trial Court also did not considered that the entitlement of the respondents was to 8 units at the highest which was not considered by it. The learned Trial Court had also not considered the fact that the appellants had invested more than ₹14crores in the project while weighing the balance of convenience.

5. Shri Nitin N. Sardessai, learned Senior Advocate for the appellants adverted to the Agreement between the Society and the respondents dated 22.01.2007 and its various covenants, the Memo of Understanding dated 24.03.2009, otherwise adverted to the letter dated 09.06.2011 and submitted that there was no litigation by the Society for specific performance with the appellants nor any suit for termination filed by the Society. There was no litigation also filed by the Society against the respondents and therefore the case of the respondents was neither bonafide nor genuine. He adverted to the impugned order and submitted that it did not make any reference to the Resolution dated 02.06.2011 or the letter dated 09.06.2011 and submitted that there was perversity in the findings recorded by the learned Trial Court which did not enter into any discussion on the irreparable loss suffered

by the appellants and yet rendered a finding in favour of the respondents. There was perversity in the impugned order which was writ large calling for interference in this appeal.

6. Shri Parag Rao, learned Advocate for the respondents submitted that the Trial Court had considered all the aspects and passed a well reasoned order. There was no palpable perversity to justify any interference only because a different view was possible. It was an appeal on principle and the ratio in **Wander Ltd.& Anr. v/s. Antox India P. Ltd [1990(Supp)SCC 727]**, was applicable and no reversal of the impugned order was justified only because a different view was permissible. He next contended that the letter dated 09.06.2011 which was the sheet anchor of the appellants case was not canvased before the learned Trial Court and there was no scope for the learned Trial Court to deal with the said letter. There was otherwise no reference to the said letter in the Agreement with the buyers. He adverted to the various Agreements in that context to buttress his case in that regard. It was his contention in the alternative that in case the letter dated 09.06.2011 was referred to in the arguments before the learned Trial Court and it had failed to consider the same, the remedy available to the appellants was by way of Review. In the absence of any Review Application being filed, the only irresistible conclusion was that such a letter was not canvased before the Trial

Court. The respondents were otherwise not a party to the letter dated 09.06.2011. It was otherwise inconceivable that the Society would enter into a transaction with the appellants while an agreement was subsisting with them. It was not open for the appellants now to raise the issue of the letter dated 09.06.2011 and therefore their conduct was relevant which was approbating and reprobating at the same time.

7. Shri Parag Rao, learned Advocate for the respondents also submitted that the learned Trial Court had given a clear finding on the Agreement subsisting between the respondents and the Society on a plain reading and construction of the order under challenge. It was his contention that in case the Society had issued the letter dated 15.03.2014 to the appellants, the appellants ought to have completed the building and handed over the possession with the Occupancy Certificate. If at all it was the case of the appellants that they had completed the construction of the flats in the Society and that the same would be completed by March of 2015, then why at all the Occupancy Certificate was not produced before the Trial Court. The appellants had created third party rights without putting the prospective purchasers to notice and, therefore, there was no basis to raise any issue of hardship. He placed reliance in **State of Maharashtra V/s. Ramdas Shrinivas Nayak and another [(1982) 2 SCC 463]** and that in **Central Bank of**

India v/s. Vrajlal Kapurchand Gandhi and another [(2003) 6 SCC 573]. It was his contention that the letter dated 09.06.2011 could not at all be looked into. It was otherwise his contention that there was a tendency in the parties to put additional grounds in the written submissions which were otherwise not canvassed in the course of the submissions before the Court and the same could not be looked into. He relied in **Moons Technologies Ltd v/s. Union of India (Writ Petition No.2743 of 2014)**, to buttress his contention in that regard.

8. Shri Parag Rao, learned Advocate for the respondents further contended that the Trial Court had recorded a finding that the MOU between the Society and the respondents subsisted. There was no communication from the Society to the respondents on the termination of the MOU nor any communication from the appellants to the respondents in respect of the agreement vide the letter dated 09.06.2011. The respondents were kept in the dark vis-a-vis the agreement vide the letter dated 09.06.2011 between the Society and the appellants till 2015 when the agreement was terminated by the respondents with the appellants. He next adverted to the impugned order where there was no reference to the letter dated 09.06.2011 and to the other relevant paragraphs thereof to submit that there was no perversity in the findings rendered by the learned Trial Court. He invited attention to the

minutes of the Annual General Meeting of the Society held on 01.05.2015 and item No.9 in particular where the Power of Attorney dated 21.07.2011 issued by the members of the Society in favour of the appellant No.2 stood revoked as the same was issued without the consent of the general body of the Society. It was his contention that the letter dated 09.06.2011 was not at all binding on the respondents. There could be no assignment of the rights of the plaintiffs to the defendant without the plaintiff respondents being party to the agreement/letter dated 09.06.2011.

9. Shri Parag Rao, learned Advocate next referred to the notice issued by the Society to the appellant consequent to the meeting of 01.05.2015 conveying that the Society had decided to revoke the Power of Attorney given in their favour by the then Managing Committee dated 21.07.2011 and as the Power of Attorney was executed by two members of the Managing Committee who had relinquished their office a longtime ago and they were not authorised by the Society by any resolution to execute the Power of Attorney. A reference was also invited to the public notice dated 04.05.2015 whereby it was made known to the public in general that the Society had revoked the Power of Attorney dated 21.07.2011 executed in favour of the appellant No.2 and that they had not authorised them and all acts done by the agent on the strength of the Power of Attorney were illegal and without any

authority from the Society. It was his contention that the appellants had no right to act on the basis of the letter dated 09.06.2011 without their intervention. He placed reliance in **Indu Kakkar v/s. Haryana State Industrial Development Corporation Ltd. and Another [(1999) 2 SCC 37]**, **Man Kaur (Dead) by Lrs v/s. Hartar Singh Sangha [(2010) 10 SCC 512]**, **Shrikant v/s. Vasant Rao and others [(2006) 2 SCC 682]** and also referred to the bye-laws of the Society. The Resolution dated 02.06.2011 adopted by the two members of the Society had no prior approval of the general body. It was his contention that as per the byelaws, three members alone could constitute the quorum and that the letter dated 09.06.2011 issued by the two members was without the required quorum and, therefore, illegal. Besides, the meeting of the Committee was required to be presided over by the Chairman who was absent at the time of the meeting on 02.06.2011 and was therefore illegal. The letter dated 09.06.2011 was also not placed before the Committee nor approved by the Committee and, therefore, it did not possess any legal sanctity. He placed further reliance in **Adhunik Steels Ltd. V/s. Orissa Magnanese and Minerals (P) Ltd. [(2007) 7 SCC 125]**, **Smt. Aslhing @ Lhingjanong v/s. L.S. John and others [1984 1 SCC 205]**, **Union of India and others v/s. Modiluft Ltd. [(2003) 6 SCC 65]** and **Maria Margarida Sequeira Fernandes and others v/s. Erasmo Jack De Sequeira (Dead) through**

Lrs [(2012) 5 SCC 370] and pressed for the dismissal of the appeal.

10. Shri Nitin N. Sardessai, learned Senior Advocate for the appellants qua the letter dated 09.06.2011 submitted that the judgment in **Ramdas Nayak** and **Central Bank of India** (supra), both supported the case of the appellants. The written submissions were considered by the Trial Court which referred to the letter dated 09.06.2011 at paragraph 6. Insofar as keeping the respondents in the dark on the letter dated 09.06.2011 was concerned, it was his contention that vide the letter dated 07.09.2012, the respondent's Advocate was kept in the loop and informed that the land owners had given direct authority to the appellants to do the construction through valid and enforceable documentation. The plaintiff had not made any grievance with the Society that it could not entertain the letter dated 09.06.2011. The Society was also not a party to the suit. No action too was taken by the Society against the defendants, assuming without admitting that the action of its members was illegal and not in accordance with the Bye-laws of the society. In that context, Shri Parag Rao, learned Advocate for the respondents in further reply submitted that the Society had taken action inasmuch as it had terminated the Power of Attorney executed in favour of the appellants. They had filed their written statement in October 2015 and yet no

Occupancy Certificate was filed nor photographs were produced on record. The Society was not a party to the suit as no rights were claimed against the Society and rights were claimed against the defendants. No case was made out for a reversal of the impugned order and hence the appeal had to be dismissed.

11. I would consider their submissions, the documents relief upon and in view thereof, decide whether any interference is called for with the impugned order in appeal.

12. At the outset, the impugned order on its indepth reading does not make any reference to the letter dated 09.06.2011 which is the sheet anchor of the appellants' case pursuant to which they claim to have acquired the right to carry on the construction in the suit property. This letter as per the contention of Shri Parag Rao, learned Advocate for the respondents was never canvassed before the Trial Court nor did the Trial Court have any scope to deal with the same. There was also no reference to the said letter in the agreement with the buyers and therefore it was not available to the appellants to base their case on the said letter to claim right and a reversal of the order under challenge. Although it has been the contention of Shri Nitin N. Sardesai, learned Senior Advocate for the appellants that the letter was referred to in the written submissions, then there was every need for the appellants to have

filed a Review Application before the Trial Court. Assuming for a moment, that a due reference was made to the letter in the course of the arguments before the Trial Court and the same was not considered, the fact that the appellants had not filed any Review Application by itself and by necessary implications reveals that there was no reference to the letter before the Trial Court.

13. In **Ramdas Nayak** (supra), the Hon'ble Apex Court held that the statement of fact regarding the proceedings in Court such as admission or concession made by a party, recorded in the judgment of the Court is conclusive and not open to be contradicted in appeal denying the making of such statement. Only the Court recording the statement itself is competent to rectify the error if approached without delay. However, a plea that the statement was made under a wrong appreciation of law made in rare case be allowed by the appellate Court in the interest of justice. It was held at paragraph 4 as below:

"4. We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the

hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

14. In **Central Bank of India** (supra), the Hon'ble Apex Court held at paragraph 12 that the only course open to a party taking the stand that the order does not reflect actual position is to move the High Court in line with what has been said in **Ramdas Shrinivas Nayak** (supra). In recent decisions i.e. **Bhavnagar University v. Patina Sugar Mill Pvt. Ltd. [(2002) AIR SCW 4939]** and **Roop Kumar vs. Mohan Thedani [(2003) 3 SCALE 611]** the view in the said case was reiterated statements of fact as

to what transpired at the hearing recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by an affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to a party to contend before this Court to the contrary. This Court cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy and judicial decorum do not permit it. Matters of judicial record in that sense are unquestionable. However, the Court can pass appropriate orders if a party moves it contending that the order has not correctly reflected happenings in Court.

15. The respondents had maintained the suit for the cancellation of the MOU, injunction, damages and consequential reliefs against the appellants herein carving a case that the property in question being the suit property was owned and possessed by Vidhya Vikas Co-operative Housing Society Ltd., that there was an Agreement for Development dated 22.07.2007 between the respondents and the said Society. But, as the construction work was proceeding at a slow pace and the deadline could not be met, the respondents

were inclined to enter into an agreement with M/s Vrudhi Buildcon Private Limited. However, on its failure to carry out the necessary works, the agreement with M/s Vrudhi Buildcon Private Limited was terminated which had carried out some minor works. The respondents accordingly entered into a Memorandum of Understanding for development, construction and sale dated 24.03.2009 with the appellants to which M/s Vrudhi Buildcon Private Limited was the consenting party and pursuant to which the appellants had to carry out the construction in the suit property within a time frame of 36 months and the flats were to be given to the respondents in consideration thereof. It was their case that the appellants were given the land and the property for the purpose of construction and completion of the works and as the work was not progressing, they were constrained to issue a legal notice dated 14.08.2012 to show cause why the MOU should not be terminated. The appellants replied to the notice and suggested a joint inspection followed by another inspection on 31.12.2013. It was their case that they had extended the time for completion of the works up to 31.03.2014 which remained to be completed and accordingly the respondents as the plaintiffs were constrained to issue a notice dated 21.02.2015 informing the appellants that the MOU stood terminated from the date of receipt of the notice. In the meantime, the respondents had learnt that the Committee of the Society had issued a Power of Attorney to the appellants without

their consent or knowledge or of the other members of the Society. Accordingly, a Resolution was adopted to revoke the Power of Attorney and which was accordingly revoked by the public notice. The respondents accordingly sought for an order of restraint against the appellants from carrying out any further works, for damages and other consequential reliefs alongwith an application for injunction.

16. The appellants as the defendants in that suit claimed that Vidhya Vikas Co-operative Housing Society Ltd., was a necessary and proper party, that the suit was barred by Law, the respondents had no locus standi to file the suit nor any cause of action and pressed for its dismissal. The appellants admitted that the execution of the MOU with the respondents dated 24.03.2009 was in the matter of construction and development of the suit property but spelt out that on account of several factors including the opposition from the neighbouring land owners, they were unable to start the development and for which time was extended till 31.12.2015. A letter dated 09.06.2011 was issued in their favour by the Society as also the Power of Attorney dated 21.07.2011 and which had not been revoked by the Society till date. The development carried out by the appellants initially under the MOU dated 24.02.2009 had been ratified and authorised by the Society vide its letter dated 09.06.2011 and the Power of Attorney dated

21.07.2011. They, however, relented the ownership of the land was still in favour of the Society unlike the possession of the property being with the appellants as they had been carrying out the construction therein. On that premise, the appellants claimed that the respondents were not entitled to any reliefs as prayed in the suit and the application for injunction and pressed for its dismissal.

17. It needs reckoning that despite a plea that the Society had issued a letter in its favour dated 09.06.2011 permitting them to carrying on with the construction and extending the time limit for its completion, it was nowhere their case in defence that such a letter issued by the Society was to the knowledge of the respondents herein and/or with their concurrence. More so, the appellants were carrying on with the construction on the suit property pursuant to the MOU executed between them dated 24.3.2009. The so-called Resolution dated 02.06.2011 pursuant to which two of the members of the Society issued the purported letter dated 09.06.2011 in favour of the appellants cannot stand the test of scrutiny when the respondents were kept in the dark with whom the appellants had entered into a MOU dated 24.03.2009 and pursuant to which the development work was to be carried out and the necessary consideration in kind was to be given to the respondents. This is besides the fact that it has been shown

from the byelaws of the Society that the minimum quorum for such meeting is three members, unlike two members who had adopted the Resolution and issued the letter dated 09.06.2011 in favour of the appellants and without the knowledge and the ratification of the other members of the Society. Hence, the contention of Shri Sardessai, learned Senior Advocate on behalf of the appellants that the learned Trial Court had committed a fundamental error by not considering the Resolution and the letter dated 09.06.2011 cannot stand the test of legal scrutiny and also in view of the fact that there was not even a review application filed before the concerned Court asking it to review its order on the premise that it had not looked into the vital document namely the letter dated 09.06.2011.

18. The letter dated 09.06.2011, which is the sheet anchor of the appellants' case was neither canvassed before the Trial Court as borne out from the records and the impugned order in particular nor did the trial Court have any scope to deal with the said letter. Besides, as rightly contended by Shri Parag Rao, learned Advocate for the respondents that there was no reference to this vital document even in the various agreements entered into by the appellants as the Builder with the prospective purchasers and the Society as the owner of the property being the Agreements dated 10.10.2013, 01.08.2012, 19.10.2012, 24.08.2015 and 11.01.2016. It further belies the case of the appellants that they were acting

pursuant to the letter dated 09.06.2011 issued by the said Society in their favour and/or that the said letter had eclipsed the MOU entered into by them with the respondents and that they were acting pursuant to the Power of Attorney executed in their favour by only two members and the letter in question. This is, besides the fact that the respondents were not a party to the letter dated 09.06.2011 nor kept in the loop and otherwise inconceivable that the Society would enter into a transaction with the appellants while their agreement was subsisting with the respondents. Besides, if the case of the appellants is to be accepted that they were acting pursuant to the letter of the Society dated 09.06.2011 dehors the MOU with the respondents, nothing should have prevented the appellants from completing the building and handing over the possession with the Occupancy Certificate to the Society. Such a conclusion is all the more fortified considering the letter written by the appellants to the Society that they had completed the construction of the flats in all respects and yet not even the Occupancy Certificate was produced by them before the Trial Court to tilt the scale in their favour. Rather, it is apparent that the appellants had created third party rights without putting the prospective purchasers to notice and in that regard too there is no basis in the contention on their behalf that they were suffering hardship and that irreparable loss would be caused to them apart from the balance of convenience being tilted in their favour.

19. The finding of the learned Trial Court that the MOU between the Society and the respondents still subsisted is consistent with the case of the respondents, unlike that carved out on behalf of the respondents that they had acquired right to develop the property pursuant to the Power of Attorney and the letter dated 09.06.2011 in their favour. Besides, there was also no communication from the Society to the respondents on the termination of the MOU or from the appellants to the respondents qua the letter dated 09.06.2011, unlike the submission of Shri Sardesai, learned Senior Advocate to the contrary. It was rightly contended by Shri Parag Rao, learned Advocate for the respondents that they were kept in the dark qua the letter dated 09.06.2011 between the Society and the appellants till even 2015 when the agreement was terminated by the respondents with the appellants and on that premise equity lay in favour of the respondents. Shri Rao, learned Advocate had also invited attention to the minutes of the meeting convened by the two members of the Society dated 02.06.2011 pursuant to which the appellants were given an irrevocable Power of Attorney when two members could not have done so contrary to the byelaws of the society.

20. In **Indu Kakkar** (supra), the Apex Court observed at para 19 that the question was not whether there is any legal bar for the allottee to make assignment of the plot. The real question was

whether the assignee had a legal right to claim performance of any part from the allottor. The answer of the said question depended upon the terms of allotment. Assignment by an act of the parties may cause assignment of rights or of liabilities under the contract. As a rule, a party to a contract cannot transfer his liabilities under the contract without consent of the other party. This rule applies both at the Common Law and in Equity. Where a contract involves mutual rights and obligations, an assignee of a right cannot enforce that right without fulfilling the co-relative obligations.

21. In **Man Kaur (Dead) by LRs.** (supra), the Apex Court held at para 28 as below:

“It is thus clear that for a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. [The Act](#) makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance, the party

in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a provision for specific performance, the court cannot grant specific performance. But, where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible”.

22. In **Adhunik Steels Ltd.** (supra), while considering the scope of Section 9 of the Arbitration and Conciliation Act, 1996, the Apex Court held that the well-recognised principles applicable to the exercise of general power to grant interim relief, including specific injunctive relief, under Order XXXIX CPC and the Specific Relief Act, would be applicable to the exercise of powers under Section 9 of the Act. In **Modiluft Ltd.** (supra), the Hon'ble Apex Court held that for an order to be an order in equity, it should be equitable to all the parties concerned.

23. In **Maria Margarida Sequeira Fernandes and others** (supra), the Hon'ble Apex Court considered its judgment in **Ramrameshwari Devi Vs. Nirmala Devi [(2011)8 SCC 249]** where it was observed that unless wrongdoers are denied the profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for

litigation. It is a matter of common experience that the Courts otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. It had also observed that on imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. The Apex Court went on to observe at paragraphs 83 to 86 as below:

“83. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant.

84. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness. The safe and better course is to give short notice on injunction application and pass an

appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction.

85. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.

86. Ordinarily, three main principles govern the grant or refusal of injunction.

- a) prima facie case;
- b) balance of convenience; and
- c) irreparable injury,

which guide the Court in this regard;

.... and ultimately crystallising the principles of law at para 97 while dealing with the issue whether a Caretaker could set up a title against the landlord.

24. The learned Trial Court had assessed the case carved on behalf of the respondents-plaintiffs and that on behalf of the appellants-defendants and noticed that the Society had neither terminated the Agreement for Development executed with the respondents nor revoked the Power of Attorney given to them. The Trial Court had found on the basis of the correspondence exchanged between the parties and the Resolutions adopted from time to time that the intention of the Society was never to terminate the agreement entered into with the respondents and to sort out the issue amicably between the respondents and the appellants. Insofar as the aspect of possession is concerned, the learned Trial Judge had found that the status of the appellants was of a mere Contractor-BUILDER, who was permitted to do the construction in the suit property by virtue of the MOU and that the ownership continued with the Society. To substantiate his reasonings, the learned Trial Judge had considered the contents of the MOU entered into between the respondents, the appellants and M/s Vrudhi Buildcon Private Limited as the confirming party and rightly arrived at the conclusion that the status of the appellants vis-a-vis the suit property was that of a Contractor to whom the possession was entrusted for the sole purpose of carrying on the construction activities as per the terms of the MOU and that their right to remain in possession was subject to the terms and conditions of the MOU and nothing more. Even, insofar as the

Power of Attorney executed by the Society in its favour was concerned, the learned Trial Judge found favour with the contention on behalf of the respondents that the said Power of Attorney had been revoked by the Society and necessary notice was given to the public and, therefore, the appellants could not derive any mileage out of the said Power of Attorney dated 21.07.2011.

25. The learned Trial Court for that matter had also considered the alternative that such Power of Attorney was executed by the Society in favour of the appellants during the subsistence of the Development Agreement and the Power of Attorney executed in favour of the respondents and there was deliberate concealment by the appellants on the execution of this Power of Attorney. Besides, the Trial Court had not held against the appellants on the Power of Attorney but arrived at a finding that the validity or otherwise of the Power of Attorney required a detailed enquiry and that it could not be decided summarily at that stage of the proceedings. The learned Trial Judge had not given a convenient go by to the Power of Attorney dated 21.07.2011 and even gone to the extent of expressing a view that the Society could execute such a Power of Attorney in favour of the appellants but while doing so, it could not infringe upon the legal rights accrued in favour of the respondents by virtue of the Agreement for Development and the Power of Attorney executed in their behalf. In that context, the

learned Trial Court held that the act of the Society in executing the Power of Attorney in the appellants' favour in respect of the very same subject matter during the subsistence of the Agreement of Development and the Power of Attorney was impermissible and it ought to have terminated the agreement with the respondents before doing so.

26. The learned Trial Court for that matter also dealt with the argument that the MOU could not be terminated for want of any clause of termination therein and the only remedy available to the parties was to seek for specific performance of the contract. The learned Trial Judge considered the contrary submission and on a reading of the MOU found that there was no clause for its termination and reading of Section 49 of the Contract Act dealing with the termination thereof concluded that the promisee may put an end to the contract if the promisor refuses or fails to perform the promise in entirety. He had found considering the various documents that though sufficient time was given to complete the construction activities, there was delay by the appellants in completing the construction as per the MOU and, therefore, in his assessment the termination of the MOU by the respondents could not be termed as illegal only because of absence of a clause to that effect.

27. The Trial Court had dealt with the matter at large before him in all its ramifications and ultimately held that the appellants had no right to continue to remain in possession of the suit property on the termination of the MOU. It also held and rightly so in favour of the respondents that irreparable hardship and the injury would be caused to the respondents in case the appellants were not enjoined from causing injury to the respondents on account of the repeated breach of the contract and that non-interference by the Court would aggravate the situation. In that view of the matter, the learned Trial Court found that the compensation in terms of money was not the remedy available to the respondents and that the loss suffered by the respondents was irreparable. On an examination of the matter in all its complexities, the learned Trial Judge had found that the balance of convenience was tilted in favour of the respondents and opined on the conduct of the appellants which was highly improper and inappropriate and having kept the respondents in complete dark in respect of the Power of Attorney dated 21.07.2011 executed in their favour.

28. The order passed by the learned Trial Judge securing the respondents with the order of injunction, therefore, does not warrant any interference applying the principle in **Wander Ltd. and another** (supra), where the Hon'ble Apex Court held that the Appellate Court will not interfere with the exercise of discretion of

the Court of the first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of the interlocutory injunctions. An appeal against the exercise of discretion is said to be an appeal on principle. The Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one reached by that Court was reasonably possible on the material. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the Appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion.

29. In that view of the matter, this appeal being that on principle apart from the fact that the learned Trial Judge had considered all aspects and passed a well reasoned order and there was no palpable perversity or justification to interfere with the order under challenge, I pass the following:

ORDER

The Appeal is dismissed and the impugned order securing the respondents with the order of injunction is confirmed with no order as to costs.

NUTAN D. SARDESSAI, J.

mukund/mv

At this stage, Shri G. Panandikar, learned Advocate for the appellants seeks stay of the order passed by this Court today since they were secured by an ad-interim relief before the Trial Court for a period of 30 days which thereafter continued in this Appeal From the Order. He seeks to challenge the order and meantime prays for stay of six weeks of the operation of this order. Shri Anand, learned Advocate holding for Shri Parag Rao, opposes the same.

Considering the urgency in the matter and that the appellants were all along secured with the interim relief, stay is granted of the order passed by this Court and that of the trial Court for a further period of six weeks from today.

NUTAN D. SARDESSAI, J.

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