IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 938 OF 2016
WITH
CIVIL APPLICATION NO. 1173 OF 2016

M/s. Mehlabin Builders & Developers .. Appellants
vs.
M/s. Chawre Associates & Ors. .. Respondents

Mr. S. Kanetkar i/b. Sanjukta Dey for Appellants.
Mr. Anil Sakhare – Senior Advocate with N. G. Samant I/b. Mr. Sandeep Mahadik for Respondents.

CORAM : M. S. SONAK, J.
DATE: 14 AUGUST 2018

P.C :

1] Heard the learned counsel for the parties.

2] The challenge in this appeal is to the order dated 10^{th} August 2016, by which the learned trial Judge has dismissed the appellants application for interim reliefs. Mr. Kanetkar, the learned counsel for the appellants submits that the learned trial Judge has failed to take into consideration the averments in the plaint in their entirety. He submits that the learned trial Judge has only focused on the MOU but ignored several attendant circumstances. Mr. Kanetkar submits that the MOU itself makes reference to partnership between the parties. He points out that in fact partnership deeds were entered into between the parties and these deeds also make a reference to the development to be undertaken in the suit properties.

3] Mr. Kanetkar further points out that the appellants have invested an amount in excess of Rupees One Crore or thereabouts in so far as the development of suit property is concerned. He submits that there is no serious dispute with regard to such investment by the appellants. Mr. Kanetkar also points out that the respondents, while taking law in their own hands had attempted to resume possession and even to demolish a portion of the structure in the suit premises. In the orders by which anticipatory bail was granted to some of the partners – respondents, the condition was that such partners / respondents do not even visit at the suit premises. Mr. Kanetkar submits that this fact establishes that it is the appellants who are in possession of the suit property and therefore, the relief of temporary injunction had to be granted.

4] Mr. Kanetkar submits that though the agreement dated 15th February 2010 is styled as a MOU, the learned trial Judge was not justified in focusing only upon the nomenclature of the document. He submits that it was incumbent upon the learned trial judge to focus upon the contents of the documents. He submits that from the perusal of the contents of the documents as also the attendant circumstances, it is quite clear that the appellants were entitled to specific performance of the MOU dated 15th February 2010. Mr. Kanetkar points out that the balance of convenience was also entirely in favour of grant of interim reliefs to the appellants. For all these reasons, Mr. Kanetkar submits that the impugned order is liable to set aside and the interim reliefs as prayed for by the appellants in their application at Exhibit 5 are liable to be made absolute.

5] Mr. Sakhare, the learned Senior Advocate for the respondents points out that there is dispute with regard to the very execution of the MOU dated 15th February 2010. He submits that in any case, the MOU in the present case can only be regarded as an agreement to agree and not some concluded contract. He submits that the learned trial Judge has rightly noted that no development agreement of power of attorneys were executed in pursuant of any such agreement. Mr. Sakhare disputes the contention as regards payment of any amounts by the appellants to the respondents. He points out that there is no dispute whatsoever that the respondents are the owners of the suit property. He points out that even the MOU does not make any reference to parting with possession in favour of the appellants. He points out that the conditions imposed at the time of grant of anticipatory bails are not determinative in the matter of possession. He submits that the learned trial Judge has considered the matter in great detail and there is neither any error of principle nor any unreasonableness in the exercise of discretion by the learned trial Judge. For all these reasons, Mr. Sakhare submits that this appeal may be dismissed.

6] The rival contentions now fall for determination.

7] Substantive reliefs applied for by the appellants – plaintiffs in the suit are as follows :

> *“a) The suit of the Plaintiff be decreed with cost.*
>
> *b) The Hon'ble Court be pleased to declare that the Memorandum of Understanding dated 15-02-2010 is legal and valid and is subsisting and in existence and binding on Defendants and the Defendants are liable to specifically perform their part of the Memorandum of Understanding dated 15-02-2010 by starting the work of Development and construction of shopping mall on Survey No. 22(P) at Village Nilemore, Nalasopara (W), Tal. Vasai, Dist. Palghar,*
>
> *c) The Hon'ble Court be pleased to direct, order and decree the Defendants to pay to the Plaintiff the amount of Rs.34,00,00,000/- (Rupees thirty four crores only) as compensation in addition to the claim of Specific Performance.*
>
> *d) The Defendants themselves and/or through their agents, servants, attorneys occupiers, employees and/or any other person claiming on behalf of Defendants be restrained by an order and decree of perpetual injunction from dispossessing the Plaintiff from Survey No. 22 (P) at Village Nilemore, Nalasopara (W), Tal. Vasai, Dist. Palghar, and from not destroying / demolishing / removing the part construction carried out by the Plaintiff in S.No. 22(P) at Village Nilemore, Nalasopara (W), Dist. Palghar.*
>
> *d) The Defendants themselves and/or through their agents, servants, attorneys occupiers, employees and/or any other person claiming on behalf of Defendants by an order and decree of perpetual injunction be restrained from*

creating any type of third party interest and/or from not parting the possession of suit property or part of it in favour of any third person / party. The Defendants further be also restrained from carrying out any type of business including business of Pay & Park and any development work and construction work about the shopping mall on S. No. 22 (P) at Village Nilemore, Nalasopara (W), personally or by appointing any other Developer, Builder, Contractor, Labourer etc. except the plaintiff."

8] The aforesaid substantive reliefs are almost entirely in the context of MOU dated 15th February 2010. The appellants, in sum and substance, seeks specific performance of the MOU dated 15th February 2010.

9] The entire MOU comprises of about 20 clauses and the same are transcribed below for ready reference :

" MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING is made at Nalasopara, Vasai on 15th February 2010 between :

M/s. CHAWRE ASSOCIATES, having its office at Nilemore, Nalasopara (W), Tal. Vasai, Dist. Thane (Hereinafter referred to as "The First Party")

AND

M/s. MEHLABIN BUILDERS & DEVELOPERS, having its office at Nilemore, Nalasopara (W), Tal. Vasai, Dist. Thane, (Hereinafter referred to as "The Second Party")

Both the Parties have decided and confirmed that,

1. *RATIO of Distribution Saleable Space is 66% of the First Party and 34% for the Second Party.*
2. *There will be equal distribution as per their percentage of ratio on every floor including constructed Area.*

3. *All the expenses relating to Project are to be taken care by the Second Party i.e. Construction, Engineers, Interiors, Elevation Designer, Hvac Consultant, Electrical Consultant etc. to be borne by The Second Party.*
4. *Construction to be done shall be as per the Plans given by our RCC Consultants, Design Architects, Engineers, Interiors, Laisioning Officer, Hvac Consultant, Electrical Consultant, and Elevation Designer etc.*
5. *The Material to be used must be as per Specifications.*
6. *Due to Nonavailability or any reason if Change to be done relating to material or design will be done only with mutual discussion between both Parties.*
7. *For interiors or elevation details drawings will be supplied through The First Party and work will be executed as per drawings.*
8. *Prior to Purchase of Materials, samples are to be mutually approved by both parties, Interior Designer or Elevator Designer.*
9. *Construction work must be completed till Lock & Key stage within 4 years from commencement of Construction.*
10. *Due to Partnership Deed of both the Parties in this Project, After deducting total expenses the Income Tax on 34% profit will be paid by the Second Party, T.D.S. or any tax on expenses to be borne by the Second Party.*
11. *Expenses relating to the Tenants whether cash or flat will be borne by The Second party only of those tenants whose list is given to The Second Party and other Tenants Expenses will be borne by The First Party.*
12. *T.D.R. or any Additional FSI other than 132000 Sq. ft. construction at S. No. 22 of Village Nilemore will be exclusively of The First Party.*
13. *System Road Development and RC Development will be on The Second Party.*
14. *Both the parties are free to use the Pavement or Pargola as per their Ratio.*
15. *All the responsibilities regarding Title clearance will be of The First Party.*
16. *Amenities and specification have been given and it should be the same as it is.*
17. *50% have been paid by cash following of this Project. (not legible)*
18. *The Second Party will take 50 Percent of Society Charges of The First Party.*
19. *If any kind of inconvenience happens in this project due to Title of the property then it will be borne by the First Party only.*

20. *Tenant who will take space in the said project or mall, total construction cost of those tenants will be taken by the Second Party.*

Both the parties will cooperate with each other in order to effectual deal of the above said Flat.

Both parties have signed this M.O.U. in front of the witness on the date above mentioned.

Signature :
M/s. CHAWRE ASSOCIATES
Witness.
1.
2.

M/s. MEHLABIN BUILDERS & DEVELOPERS.
Witness :-
1.
2.

Enclosed :
1. SPECIFICATIONS OF AMENITIES (Page No. 4, 5)
2. list of tenants (Page No. 6)" ……

10] From the aforesaid, it is clear that there is absolutely no reference to the appellants being placed in possession of the suit property of which, admittedly, the respondents are the owners. The MOU at least, prima facie, suggests that the parties agreed to develop the suit property and thereafter share the profits in proportions set out in the MOU.

11] The learned trial Judge has observed that in pursuance of the MOU dated 15th February 2010, neither were any power of attorneys executed nor was any development agreement also executed. The *prima facie* finding that the MOU did not spell out any concluded contract is not vitiated by any unreasonableness or perversity.

12] From the perusal of the MOU, at least *prima facie* it can be said that this was some sort of development agreement entered into by and between the parties. The learned trial Judge has referred to certain decisions in which it has been held that there can ordinarily be no specific performance of MOUs, which are in the nature of agreements to agree. Similarly, in matters of development agreements simplicitor, again, ordinarily, there is no question of specific performance. No doubt, the party which alleges breach will be entitled to damages. The circumstance that ordinarily these type of agreements do not admit of specific performance as a valid consideration for denial of relief of injunction.

13] On the aspect of possession again, at least, documentary evidence, does not support the appellants case that it is they who are in possession of the suit premises. The conditions imposed upon some of the defendants at the stage of securing anticipatory bail, do not establish the possession of the appellants. Normally, possession follows the title unless, the party is able to independently establish possession.

14] The material in so far as payment by the appellants to the respondents is also not quite clear. At least the MOU of which the appellants seek specific performance does not speak of any payments. In any case, even assuming that some payments may have been made or some expenses may have been incurred these are all matters which can be redressed in the form of recovery of such amounts or even damages. This is yet another consideration relevant for the purposes of denial of interim reliefs in the form of injunctions.

15] Since there is no dispute that the respondents are the owners of the suit property normally, no relief of temporary injunction can be granted against such owners unless of course, a good case for such purpose is made out.

16] The trial Court, has exercised the discretion appropriately. As has been observed by the Hon'ble Supreme Court in the case of ***Wander Ltd. & Anr. vs. Antox India P. Ltd. 1990 (Supp) SCC 727***, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion unless it is shown that the discretion has been exercised by the courts of the first instance arbitrarily, or capriciously or perversely or where the court had ignored settled principles of law regulating grant of or refusal of interlocutory injunctions. The

Hon'ble Supreme Court has held that appeal against exercise of discretion is 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 solely on the ground that if it had considered the matter at the trail 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. Applying the aforesaid principles as well, no case is made out to interfere with the impugned order.

17] For all the aforesaid reasons, this appeal is dismissed. There shall be no order as to costs.

18] However, at the request of Mr. Kanetkar, it is clarified that none of the observations in the impugned order or for that matter the present order to influence the learned trial Judge whilst disposing of the suit on its own merits and in accordance with law. The observations are only in the context of determining whether *prima facie* case is made out for grant of interim reliefs.

19] Mr. Kanetkar points out that vide order dated 20th April 2016, the learned trial Court by way of ad interim protection had directed both the parties to maintain status quo in relation to the suit property. He submits that this order was extended by the learned trial court even after it made the impugned order. He requests for further extension of this limited protection for a period of six weeks. Since, the *status quo* order was in operation since 20th April 2016, the same is extended by a period of six weeks from today.

20] In view of dismissal of the appeal, civil application does not survive and is disposed of accordingly.

(M. S. SONAK, J.)

Chandka