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

NOTICE OF MOTION NO.942 OF 2013
IN
SUIT NO.453 OF 2013

Urban Infrastructure Venture
Capital Fund And Another ... Plaintiffs
Versus
Joyce Realtors Pvt. Ltd.
And Others ... Defendants

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Mr. Jimmy Avasia I/b Dastur Dadhich & Kalambi for the Plaintiffs/Applicants.
Mr. Nimeet Sharma I/b Kalpesh Joshi for Defendant No.1.
Mr. Sheelang Shah a/w Mr. Abinash Pradhan I/b Wadia Ghandy & Co. for Defendant Nos.2 to 4.
Mr. Chetan Kapadia I/b Ganesh & Co. for Defendant No.5.

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CORAM : S.C.GUPTE, J.

DATE : 17 OCTOBER 2018

P.C. :

. Heard learned Counsel for the parties.

2 This Notice of Motion has been taken out by the Plaintiffs in a derivative suit filed by them for and on behalf, and for the benefit, of Defendant No.1 company, of which the Plaintiffs claims to be 50 per cent shareholders. The Suit seeks enforcement and specific performance of a joint development agreement entered into between Defendant No.1 and Defendant No.5 for development of a particular property at Andheri (East), Mumbai.

3 The Plaintiffs and Defendant Nos.2 to 4, who are individuals carrying on business *inter alia* in real estate development, entered into a share subscription and shareholder agreement for the purposes of joint development of various properties through a 'special purpose vehicle'. Defendant No.1 company was accordingly incorporated as such special purpose vehicle for joint development of the property. It is the Plaintiffs' case that Defendant Nos.2 to 4 made representations about having acquired development rights in respect of nine real estate projects in Mumbai through diverse agreements of sale or development agreements. Defendant No.1 was to jointly develop these nine real projects with separate promoter group entities/affiliates. One of these projects, which we are concerned with in the present Suit, was a project for development of the suit property with the promoter group entity/affiliate who is Defendant No.5 herein. The Plaintiffs claims to have invested a total sum of Rs.110.39 crores by way of subscription to (i) equity share capital, (ii) optionally fully convertible debentures, and (iii) inter-corporate deposits. It appears that disputes and differences arose between the Plaintiffs and Defendant Nos.2 to 4 and as a result, the Plaintiffs exercised their put option in respect of their shares and subscription moneys for optionally fully convertible debentures, and exercised their right for sale of their shares and optionally fully convertible debentures in Defendant No.1 company. Since value of their shares and optionally fully convertible debentures was not paid by Defendant Nos.2 to 4, the Plaintiffs have even proceeded to file an arbitration reference by invoking an arbitration agreement forming part of the subscription and shareholder agreement. The reference arising out of such invocation is presently pending before an Arbitral Tribunal appointed by this court under Section 11 of the

Arbitration and Conciliation Act 1996. The Plaintiffs have claimed before the arbitral tribunal a direction against Defendant Nos.2 to 4 to jointly and severally purchase the Plaintiffs' securities (described in Exhibit 'D' to their statement of claim) and pay a purchase price of Rs.124.90 crores in accordance with the relevant clauses providing for a purchase option under the agreement. The Plaintiffs have also sought an award of damages and/or compensation of Rs.530.50 crores in the arbitration reference. The present Suit has been filed by the Plaintiffs purportedly, as mentioned above, as a derivative action for and on behalf and for the benefit of Defendant No.1 company. It is their case in the Suit that despite Defendant No.1 company having fulfilled its obligations as of date under the joint development agreement, and having paid more than what was currently due under it, Defendant Nos.2 to 4 as promoters of Defendant No.5 have caused several breaches of the joint development agreement on the part of Defendant No.5 and have in fact proceeded to even wrongly terminate the joint development agreement along with other joint development agreements of Defendant No.1 with other promoters group entities for the other development projects referred to above. The Plaintiffs claim that Defendant No.1 was and has always been ready and willing to perform its part of the contract. The Plaintiffs, accordingly, seek specific performance of the suit development agreement and have taken out the present Notice of Motion for a temporary injunction restraining the Defendants from creating third party rights in respect of the suit property in aid of specific performance.

4 It is pertinent to note that though the Suit has been filed as of 2013 and the present Notice of Motion has been taken out around the same time,

there is no ad-interim order in favour of the Plaintiffs as of date. It is also pertinent to note that in fact, in the arbitration proceedings, first, under Section 9 of the Arbitration and Conciliation Act 1996 and thereafter before the learned arbitrator, the Plaintiffs, as shareholders of Defendant No.1, have unsuccessfully sought reliefs against Defendant Nos.2 to 4 herein, which would have the effect of seeking a restraint on creation of third party rights in the suit property, respectively under Sections 9 and 17 of the Arbitration and Reconciliation Act, 1996. The learned arbitrators have simply passed a direction that any transaction made by Defendant Nos.2 and 4 herein touching the project properties (including the suit property herein) shall be subject to the result of the arbitration reference and Defendant Nos.2 to 4 should bring to the notice of prospective purchasers the factum of pendency of the arbitration reference. The Defendants have, however, been allowed to deal with the project properties (including the suit property herein).

5 In the back backdrop of these facts, we have to assess *prima facie* merits of the Plaintiffs' case. Apart from the fact that the parties have a serious controversy on the alleged breaches of the suit development agreement complained of by the Plaintiffs, the fact which stares one in the face and *prima facie* presents an unsurmountable difficulty in the way of the Plaintiffs, particularly in a specific performance suit such as this, is that the Plaintiffs have already exercised their put option and are even proceeding to recover the value of their investment in Defendant No.1. (Whereas the arbitration reference seeks to recover their investment in shares, debentures and application money, a separate suit has been filed for recovery of inter corporate deposits.) In other words, the Plaintiffs are

not willing to contribute any sum towards the development of the suit project and, in fact, are seeking to withdraw their investments from the project. If that is so, can it ever be said by the Plaintiffs that Defendant No.1, as party to the suit development agreement, has been or is ready and willing to perform its part of the contract under the development agreement. In the first place, it must be noted that such assertion is made not by Defendant No.1 but by its shareholder in a derivative suit. In the second place, that shareholder has already exercised his option to sell his shares and is in the process of recovering his investments in Defendant No.1 through proceedings before an arbitral forum and also before this court. As far as Defendant No.1, on the one hand, and Defendant No.5, on the other, assuming that it is Defendant Nos. 2 to 4 who are controlling affairs of both Defendant No.1 and Defendant No.5, are concerned, it is an accepted position as between them that the development agreement has been duly terminated and does not give any rise to any cause of action. In the premises, *prima facie* it is impossible to order specific performance of the suit development agreement at the instance of the Plaintiffs for and on behalf and for the benefit of Defendant No.1.

6 Confronted with this fundamental difficulty of his case, Mr. Avasia, learned Counsel for the Plaintiffs, relies on the judgment of a Division Bench of this Court in the case of **Killick Nixon Limited Vs. Bank of India.**[1] That was a case where an application was made under Sections 397 and 398 of the Companies Act 1956 by a member. One of the defences offered to that application by the company and its other promoter-shareholders was that the members applying for reliefs under Sections 397

1 1985 Company Cases (Vol-57) 831

and 398 have already transferred a part of their shareholding and were not entitled to maintain the action on the basis of the remaining shareholding, as it fell below the statutory minimum. (The transfer of the shares, however, was not registered and the members' name continued to appear on the register of the company as shareholders even in respect of shares which were transferred.) The court rejected the defence offered, holding that term 'member' under Sections 397 and 398 must be construed to include those persons, who continued to be on the register, even if, as such members, they can be said to be constructive trustees representing the interest of beneficiaries, namely, their transferees. The consideration applied by this court in **Killick Nixon Ltd** for allowing the members to prosecute their action is completely different and distinct from the rationale to be applied in the present case. The Petitioners before the court in **Killick Nixon Ltd** were transferors of shares, but their names continued on the register of members and the petition was presented by them on behalf of their transferees as the latter's duly constituted attornies. The court held that the transferors, as constructive trustees and members, were competent to file the petition under Sections 397 and 398 of the Companies Act, 1956. That I am afraid is a clearly different basis and reasoning, which do not hold any significance from the point of view of the controversy before us.

7 In these facts, I am of the considered view that there is no *prima facie* case for specific performance and protective relief at the interim stage in aid of such performance. There is, accordingly, no merit in the Notice of Motion. The Notice of Motion is dismissed. Costs to be costs in the cause.

(S.C. GUPTE, J.)