

Jayant D.
Kandarkar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL NO. 544 OF 2019
IN
COMM. ARBITRATION PETITION (L) NO. 674 OF 2019
WITH
INTERIM APPLICATION NO. 1 OF 2019
AND
INTERIM APPLICATION NO. 2 OF 2019

M/s. Sadguru Enterprises
a Partnership Firm, through its partner
Mr. Harshad Mohan Bongale, having its
registered office at Shop No.1, Building No.4,
Opp. Chatrapati Shivaji Maidan,
Khernagar, Bandra (E) Mumbai .. Appellant

Vs.

Smt. Asha Sonu Samjiskar & Ors. .. Respondents

....

Mr. Zal Andhyarunjina a/w Mona Bhide a/w Shrey Sancheti,
a/w Neha Shah, a/w Jinay Padh i/b Davex Girish & Co.

Advocate for Appellants

Mr. Mayur Khandeparkar, Mr. Nirman Sharma a/w Mr. Tushar
Gujjar, Deepak Singh and Abhishek Tanna i/b M/s. Solicis Lex
Advocate or Respondents

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CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.
DATED : DECEMBER 20, 2019

ORAL ORDER [PER PRADEEP NANDRAJOG, C.J.]:

1] Heard learned counsel for the parties finally at the admission stage itself.

2] The respondents had sought interim measures under Section 9 of the Arbitration and Conciliation Act, 1996 by filing the application which has been disposed of by the impugned order dated 24th September 2019. Respondents case was that they were owners of a building known as “Geetanjali Buliding” which required urgent repairs on account of wear and tear. They pleaded that building had two wings having 9 and 6 flats respectively which were in possession of the petitioners or their tenants. They pleaded that on 23rd November 2017 a Development Agreement was executed between them and the appellant. The obligations of the parties were set forth in the said Development Agreement. It was pleaded that at the time of execution of the agreement title documents were handed over to the appellant to facilitate the appellant to obtain the necessary permissions and sanctions required by law before the development could be commenced. Pleadings such acts which as per the respondents amounted to a breach of the Development Agreement, it was pleaded that for such breaches

the respondents have terminated the Development Agreement and were thus entitled to a return of the title documents so that the respondents could proceed for redevelopment.

3] As originally drafted, the petitioners had a prayer (a) to the effect that the Court should declare the termination notice dated 12th April 2019 as legal, valid and binding. Post amendment said prayer was given up.

4] Vide impugned order dated 24th September 2019 noting in the first 3 paragraphs the backdrop facts and that the appellant had taken no steps to challenge the termination of the agreement prayer made by counsel for the appellant to file further detailed affidavit has been declined and suffice it to record here that the affidavit filed by the appellant in response to the application filed by the respondents is most wishy-washy and for said reason the appellant had wanted to file a detailed affidavit. But this fact is irrelevant.

5] In paragraph 5 of the impugned order the learned Single Judge has recorded an opinion in a determinative language that the only remedy of the appellant is to claim damages for loss caused on account of it's claim that the

contract was terminated illegally and this would be before the For a of an Arbitrator.

6] The first grievance of the appellant is to the determinative finding recorded in paragraph 5 of the impugned order.

7] It appears to be a case where the learned Single Judge has been influenced by the prayer made in the application filed by the respondents which was given up.

8] On the language of the 5th paragraph of the impugned order we find that it has been penned with expressions which are determinative. Therefore correction is needed.

9] It is settled law that observations in interim orders with reference to the material placed before a Court are always treated as *prima facie* observations and can never be treated as a conclusive finding, which have to await a proper trial and would be returned in light of the pleadings of the parties, the issues settled and on an appreciation of the documentary and oral evidence led.

10] We declare the observation in paragraph 5 of the impugned order to be a *prima facie* view of the learned Single Judge. This would mean that the appellant would be entitled to lay a claim for specific performance and if such a claim is made the Arbitrator would decide whether such a claim is sustainable. We clarify we have only observed regarding maintainability of the claim and not the sustainability.

11] The second grievance in the appeal is to the interim measure granted by the learned Single Judge directing the appellant to return the title documents to the respondents.

12] Two arguments are raised. The first is the title documents were never handed over. The second is that a mandatory interim injunction is granted sparingly and that also to restore the *status-quo ante*, meaning thereby, relegating the parties to the position which existed before the offending act was committed.

13] On the first point, we note that in the reply filed the appellant did not plead that no title documents were handed over to it. This plea the appellant intended to raise in the

additional affidavit which was not allowed to be filed and hence, not taken on record by the learned Single Judge.

14] We have perused the clause in the agreement between the parties which is clause 9 and note that it simply records that within seven day from a date of execution of the agreement the owner shall hand over the original title deeds.

15] We need not return any finding on this aspect of the matter for the reason we are informed that the respondents have written a letter to the appellant informing that if the appellant does not comply with the direction issued, the same would be under pain of contempt if any such petition seeking initiation of the contempt action is filed, the appellant would be permitted to raise said issue.

16] On the issue of the injunction being a mandatory interim injunction, suffice it to state that in an appropriate case where the demand of justice so warrants, it may be permissible to expand the circumstance under which a mandatory injunction is granted. Normally mandatory interim injunctions are granted to restore the *status-quo ante* i.e. the position which existed before the offending act was committed. But in a

case where the party pleads continuous injury by the opposite party who is alleged to be in breach of a contract, injunction of the kind could be issued. Therefore, we find no merit in the second limb of the second contention advanced.

17] Clarifying as above regarding paragraph 5 of the impugned order as also on the issue of custody of the title documents we dispose of the appeal simply observing that if the appellant does not have the title documents the appellant could perhaps have no grievance against the direction issued in paragraph 7 of the impugned order.

18] At this stage learned counsel for the parties state that their consent be recorded and in terms of the arbitration clause in the contract between the parties Shri. Gautam Ankhad Advocate, 5th Floor, Oricon House, Kalaghoda, Fort, Mumbai (Mobile No. 99676 61342) be appointed as an Arbitrator to decide the dispute between the parties clarifying that the appellant would be the claimant and the claims filed by the appellant would be decided by the learned Arbitrator. The respondents would be entitled to not only defend the claim but even to file counter-claim.

19] Thus, the claim of the appellant and the counter

affidavit of the respondents are referred to the learned Arbitrator for adjudication.

20] The appeal is disposed of.

21] Interim Applications are disposed of as infructuous.

SMT. BHARATI DANGRE, J.

CHIEF JUSTICE