

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

NOTICE OF MOTION NO.2783 OF 2011
IN
SUIT NO.567 OF 2005

Lallubhai Amichand Limited
A Company incorporated under the
Companies Act, 1956 having its
Registered office at 48/50, Kansara Chawl,
Kalbadevi Road, Mumbai – 400 002.
v/s.

...Plaintiff

1. Akruti Nirman Limited
A Company incorporated under the
Companies Act, 1956 having its
Registered office at Akruti Trade Centre,
Road No. 97, MIDC, Marol, Andheri (E),
Mumbai 400 093.
2. Vyomesh @ Vimal M. Shah
An adult
Resident of Andheri (E), Mumbai 400 093.
3. Hemant M. Shah
Ad adult
Office at Akruti Trade Centre,
Road No. 97, MIDC, Marol Andheri (E),
Mumbai 400 093.
4. Niranjan Hiranandani
An adult
Add at Olympia Central Avenue,
Hiranandani Business Park, Powai,
Mumbai 400 076.
5. Surendra Hiranandani
An adult
Add at Olympia Central Avenue,
Hiranandani Business Park, Powai,
Mumbai 400 076.

6. Mumbai Metropolitan Region Development Authority
Bandra Kurla Complex, Bandra (E), Mumbai 400 051.

7. Union Bank of India
Kalbadevi, Mumbai.

8. The Municipal Corporation of Greater Bombay
D.N. Road, Chatrapati Shivaji Terminus,
Mumbai 400 001.

...Defendants

And

M/s. Pandya Poonawala
Advocates, Solicitors & Notary
A Partnership firm at
102-104, Bhagyoday, 1st Floor, 79,
Nagindas Master Road, Fort,
Mumbai 400 023.

...Respondent

Mr. Rohaan Cama, Prakash Shinde, Ms. Niyati Merchant, i/b. MDP and Partners
for Plaintiff.

Mr. Ashish Kamath, a/w Anil Mishra, i/b. Abhijiit Singh, for Defendant Nos.1 to 3.

Mr. Anukul Seth, i/b. Pooja V. Thorat, for Defendant Nos. 4 & 5.

Mr. D.S. Shingade, a/w Mr. Sagar Patil, for Defendant No.18-MCGM.

CORAM : N. J. JAMADAR, J.

JUDGMENT RESERVED ON : 7th February 2020

JUDGMENT PRONOUNCED ON : 12th June 2020

JUDGMENT

1. This Notice of Motion is taken out by the Plaintiff for composite reliefs in respect of the decree passed by this Court in accordance with the consent terms executed by and between the parties in Suit No. 567 of 2005 in terms of the orders dated 7th July, 2005 and 11th July, 2005. The Plaintiff

Applicant *inter alia* seeks modification in the undertaking given by the Plaintiff contained in clause 6 of the aforesaid consent terms to facilitate the Plaintiff to handover the amenity land and additional recreation area to Defendant No. 6 and/or Defendant No. 8 (instead of Defendant No. 6 as originally provided); extend the time to handover the possession of the said premises to Defendant No. 6 and/or Defendant No. 8, and in the alternative, order and direct the Defendant No. 6 to handover to the Plaintiff the aforesaid premises and thereafter extend the time for handing over the possession of the said premises to Defendant No. 8; declare that the decree for the amount of Rs. 2 Crore contained in clause 4 of the consent terms does not stand cancelled and in the event it is found that the term providing for the cancellation of the decree for Rs. 2 Crore has become operative then, it being in the nature of penalty, the Plaintiff be relieved from the said forfeiture clause contained in clause 7 of the consent terms.

2. The background facts leading to this Notice of Motion can be stated in brief as under:

(a) The Plaintiff was the owner of the land bearing CTS No.2B of Mankhurd Division and CTS No.4D of Deonar Division admeasuring approximately 64, 211.25 sq.mtr situated at 150, Agarwadi Road, Mankhurd, Mumbai (hereinafter referred to as “the

suit land”). Pursuant to the negotiations between the Plaintiff and Defendant Nos. 1 to 3 the Plaintiff offered the said land to Defendant No. 6, Mumbai Metropolitan Region Development Authority (the special planning authority) for construction of additional rehabilitation tenements for housing project affected persons and/or slum dwellers under slum rehabilitation scheme. In lieu thereof TDR was to be obtained by Defendant No.1. The Defendant No.1 would also enter into a contract with Defendant No. 6 for construction of tenements on the said land and obtain DRCs (Development Right Certificate). The consideration for the agreement was 15% of the TDR in lieu of land, to be allotted in favour of Defendant No. 1. In pursuance of the said contract number of instruments including a power of attorney and memorandums of understanding were executed between the parties. However, as disputes arose between the parties the Plaintiff instituted Suit No. 567 of 2005 for declaration that the contract entered into between the Plaintiff and Defendant No. 1 as evidenced by the power of attorney, memorandums of understanding and the subsequent instruments were valid, subsisting and binding upon the Defendants including Defendant Nos. 1 to 5, and also for a decree for specific performance of the said contract.

(b) In the said Suit, the Plaintiff had taken out Notice of Motion No. 650 of 2005 for certain interim reliefs. During the pendency of the said Notice of Motion, the dispute between the Plaintiff and Defendant Nos. 1 to 3 was amicably resolved. On 7th July, 2005, the Plaintiff and Defendant Nos. 1 to 3 tendered the consent terms. After recording the terms of the consent as at "X" and the undertaking therein the Court ordered that a decree be passed in accordance with the consent terms at "X". Since compliance of certain terms thereof warranted action on the part of Defendant No. 6, the matter was adjourned to 11th July, 2005. On that day, the learned counsel for Defendant No. 6, on instructions, made a statement before the Court that Defendant No. 6 will handover to the Plaintiff the possession of the area out of the larger property described in the possession receipt dated 11th August, 2004, which was in excess of the land conveyed to Defendant No. 6 under conveyance dated 28th July, 2004. Thereupon, the Court directed that the possession be handed over within a period of two weeks therefrom.

(c) The clauses 4 to 8 of the consent terms, with which we are primarily concerned, read as under :

4. *Defendant No. 1 is ordered and decreed to pay to the Plaintiff an amount of Rs.2,00,00,000/- in full and final settlement of its claim in the Suit.*

5. Defendant No. 1 undertakes to deposit the said decretal amount of Rs. 2,00,00,000/- on or before 20th July, 2005 with M/s. Pandya & Poonawala Associates. In the event Defendant No. 1 does not deposit the amount on or before 20th July, 2005 then Defendant Nos.2 and 3 undertake to this Court to deposit the amount of Rs. 2,00,00,000/- with M/s. Pandya & Poonawala on or before 27th July, 2005 M/s. Pandya & Poonawala Advocates will hold the amount as Escrow agent to be disbursed in the manner set out hereunder. In the event of the Defendant Nos. 1 to 3 failing to deposit the sum of Rs. 2,00,00,000/- on or before 27th July, 2005, the decretal amount of Rs. 2,00,00,000/- shall carry interest at the rate of 15% per annum on and from 28th July, 2005 which interest will be the entitlement of the Plaintiff.

6. The Plaintiff and its Directors Mr. Paresh Shah and Mr. Sunil Shah undertake to this Court to surrender and/or handover the amenity and additional recreation ground area to Defendant No. 8 as contemplated under condition no.5 of the Letter of Intent dated 10th September, 2003 issued by Defendant No. 6 and to furnish proof on or before 31st December, 2005 on having handed over possession thereof to Defendant No. 8. This undertaking shall come into effect upon compliance by Defendant Nos. 1 to 3 of the deposit required under clause 5.

7. In the event, the Plaintiff commits default in producing receipt of Defendant No. 8 having received possession of amenities space and additional recreational ground to M/s. Pandya & Poonawala then M/s. Pandya & Poonawala Advocates will refund the amount of Rs. 2,00,00,000/- to Defendant No., 1 after expiry of a period of 4 weeks from the

time stipulated for performance under clause No. 6 or within the extended time as set out hereunder and the decree for the amount of Rs. 2,00,00,000/- shall stand cancelled. However, all the other clauses of these consent terms shall continue to apply and bind the parties. The Plaintiff shall be at liberty to apply to the Court for extension of time by making out an appropriate case and in that event the time for performance of the obligation will be as stipulated by this Court. It is clarified that Defendants Nos. 1 to 3 will be entitled to oppose such application for extension of time.

8. In the event the Plaintiff produces for inspection the original possession receipt of the Defendant No. 8 having received possession of amenities space and additional recreational ground to M/s. Pandya & Poonawala, then M/s. Pandya & Poonawala Advocates will pay the amount of Rs. 2,00,00,000/- to the Plaintiff and interest accrued thereon to Defendant No. 1 forthwith and on such compliance the decree for Rs. 2,00,00,000/- shall stand marked satisfied and all other clauses of these terms will continue to apply and bind the parties.

(d) A conjoint reading of the aforesaid clauses would indicate that the decree for the sum of Rs. 2 Crore, which the Defendant No. 1 was to deposit with the Escrow agent M/s. Pandya and Punawala- the Respondent herein, was subject to the Plaintiff surrendering and/or handing over the amenity land and the additional recreation ground area to Defendant No. 8, the Mumbai Municipal Corporation, as contemplated under condition No. 5

of the Letter of Intent dated 10th September, 2003 and upon furnishing proof of handing over the possession to Defendant No. 8 on or before 31st December, 2005. In the event of default in furnishing receipt of delivery of possession to Defendant No. 8 the said money decree for Rs. 2 Crore would stand cancelled.

(e) It is the claim of the Plaintiff that the Plaintiff called upon the Defendant No. 6 to hand over the possession of the amenity land and additional recreation area. However, the Defendant No. 6 did not handover the possession of the said area pointing out certain issues. In the meanwhile, there were negotiations between the Plaintiff and Defendant Nos. 1 to 3. It was agreed between the parties to the consent decree that there shall be modification in clause 6 of the consent terms to the effect that the Plaintiff may surrender the amenity land and additional recreation area either to Defendant No. 6 or Defendant No. 8 and that such surrender may be effected on or before 25th February, 2006. The Defendant No. 6 continued to be in possession of the aforesaid area which the Defendant No. 6 had undertaken before the Court that it would hand over to the Plaintiff.

(f) In the meanwhile, vide letter dated 20th December, 2005, the Defendant No. 6 instead of handing over the aforesaid area to the Plaintiff, forwarded a proposal to the Principal Secretary to the Government in Urban Development Department for acquiring the amenity land and recreation area. Vide letter dated 30th December, 2005 the Defendant No. 6 informed the Plaintiff that Defendant No. 6 intends to take over the amenity land and recreation area against TDR and a proposal in that regard was submitted to the Government. In view of these subsequent developments, wherein the Defendant Nos. 1 to 3 conceded for the modification of the consent terms to the effect that the aforesaid land could be surrendered either to the Defendant No. 8 Municipal Corporation or Defendant No. 6 MMRDA and the later, in turn, proposed to acquire the land, the obligation on the part of the Plaintiff to surrender the aforesaid land stood complied with. The Plaintiff thus called upon the Respondent Escrow agent to pay the said amount of Rs. 2 Crore, which was deposited by Defendant No. 1. The Defendant Nos. 1 to 3 however resisted the said legitimate request of the Plaintiff by taking an unreasonable stand that the said amount could be released in favour of the Plaintiff only upon furnishing the proof of conveyance of the amenity land and

recreation area in favour of Defendant No.8 and/or Defendant No.

6. No such condition was stipulated in the consent terms. The only obligation upon the Plaintiff was to furnish proof of delivery of possession of the said land to Defendant No. 8.

(g) Ultimately the Plaintiff was constrained to file Chamber Summons No. 231 of 2006 seeking the modification of the said consent terms. In the said Chamber Summons the Plaintiff, inter alia, sought the variations/ modification in the consent terms recorded by the Court and execution of the decree so varied/ modified. The said Chamber Summons was allowed by a learned single Judge by the Judgment and order dated 1st February, 2008. The Defendant Nos. 1 to 3 carried the matter in Appeal.

(h) In Appeal No. 166 of 2008 in Chamber Summons No. 231 of 2006 in Suit No. 567 of 2005, the Appeal Bench was persuaded to set aside the order passed by the learned Single Judge, allow the Appeal and dismiss the Chamber Summons No. 231 of 2006. The Appeal Bench was of the view that the consent for modification of the consent terms arrived at between Plaintiff and Defendant Nos. 1 to 3 did not relieve the Plaintiff of its obligation to

hand over the aforesaid land to Defendant No. 8. Moreover since the Plaintiff had not moved the Court for being relieved of its undertaking to handover possession of aforesaid land to Defendant No. 8 Corporation, the Plaintiff was not entitled to receive the decretal amount unless and until the Plaintiff approached the Court and the Court relieved the Plaintiff of the undertaking given by it to the Court.

3. The Plaintiff assailed the order passed by the Appeal Bench by preferring SLP(Civil) No. 12012 of 2011. When the matter was listed before the Supreme Court on 2nd May, 2011 the Petitioner (Plaintiff) sought leave to withdraw the Petition with liberty to move before the appropriate Court for appropriate relief. The SLP thus came to be dismissed as withdrawn.

4. The Plaintiff has now taken out this Notice of Motion seeking the relief of variation/ modification in the consent decree and a declaration that the clause of cancellation of the money decree for the sum of Rs. 2 Crore (clause 7) in the consent terms, is in the nature of penalty and the Plaintiff be granted the relief against the said forfeiture clause. The substance of the claim of the Plaintiff is that the land which was to be handed over to the Defendant No. 8 continues to be in possession of Defendant No. 6

MMRDA, the Special Planning Authority, who has moved the Government for acquiring the said land instead of handing over possession thereof to the Plaintiff. In these circumstances, the Plaintiff could not handover the possession of the said land to Defendant No. 8. The Plaintiff has done all that it could do, in the given circumstances. Thus, the Plaintiff cannot be penalized for no fault on its part. The Plaintiff is, therefore, entitled to relief against forfeiture.

5. The Defendant No. 1 has resisted the prayer in Notice of Motion by filing an affidavit in reply. First and foremost, the Notice of Motion is stated to be misconceived and not tenable. It is contended that the Plaintiff has not approached the Court with clean hands and suppressed material facts which dis-entitle it from claiming any relief. As the decree based on the consent terms was self operative, and in view of indisputable position that the Plaintiff committed default in compliance with the material term thereof, the money decree became inoperative. Thus, the Respondent Escrow agent has returned the amount which was deposited by Defendant No. 1. The claim of the Plaintiff that the fact that possession of the amenity land and recreation ground area remains with Defendant No. 6 amounts to the delivery of possession of the said land to Defendant No. 8 Municipal Corporation, is stated to be incorrect and unsustainable. On the contrary, the Respondent No. 6 has taken a stand that the Defendant No. 1 would

not be entitled to balance construction TDR till the reservation plot (amenity land and recreation ground area) are handed over by the Plaintiff to MCGM. A copy of the letter dated 25th November, 2011 addressed by the Defendant No. 6 to the Plaintiff, wherein the Plaintiff was informed that until the Plaintiff hands over all reservation plots in the layout to MCGM, no further TDR will be recommended to MCGM by the Defendant No. 6 and the present TDR recommendation would not be processed by MCGM Defendant No. 8, is pressed in to service to demonstrate that the non compliance of the material term of delivery of the possession of amenity land and recreation ground area to Defendant No. 8 has entailed prejudicial consequences qua Defendant No. 1. On these, amongst other grounds, the Defendant Nos. 1 to 3 have prayed for dismissal of the Notice of Motion.

6. Defendant Nos. 4 and 5, the consortium partners, have adopted the contentions in the affidavit in reply filed on behalf of Defendant No. 1.

7. In the light of the aforesaid facts and pleadings, I have heard Mr. Rohaan Cama, the learned counsel for the Plaintiff and Mr. Ashish Kamathh, learned counsel for Defendant Nos. 1 to 3 at some length.

8. Mr. Cama, the learned counsel for the Plaintiff would urge that Defendant Nos. 1 to 3, having obtained the benefit under the consent decree, could not have opposed the prayer for extension of time to perform the obligation by the Plaintiff and/or the modification of the decree, especially having consented for the modification of the decree in the nature of the delivery of possession of the aforesaid land to Defendant No. 8 and/or Defendant No. 6 and extension of time therefor. According to Mr. Cama though the decree passed by this Court by order dated 7th July, 2005 and the subsequent order dated 11th July, 2005 was based on the agreement between the parties, it is not an immutable rule of law that the Court is totally precluded from granting extension of time for performance of the obligations under a decree, on consent, especially when the stipulation is in the nature of penalty and causes grave prejudice and injustice to one of the parties without any fault on its part, as is the case with the Plaintiff at hand. He submitted the stand of Defendant No. 6 that it is in possession of the lands of the Plaintiff in excess of the land which was conveyed under the conveyance executed on 28th July, 2004 and Defendant No. 6 proposes to acquire the said lands (amenity land and recreation ground area) instead of delivering the possession thereof to the Plaintiff constitutes a complete performance of the obligation on the part of

the Plaintiff and in such a situation the Defendant Nos. 1 to 3 could not have objected to the payment of the decretal sum of Rs. 2 Crore by the Respondent Escrow agent to the Plaintiff. Mr.Cama canvassed a submission that the Court should lean in favour of an interpretation which advances the cause of execution of the decree rather than stultification thereof.

9. In opposition to this, Mr. Kamath, learned counsel for Defendant Nos. 1 to 3 stoutly submitted that the Notice of Motion does not deserve countenance as the very same prayers were made in the Chamber Summons which came to be dismissed by the Appeal Bench in Appeal No. 166 of 2008. The withdrawal of SLP with liberty to take out an appropriate proceeding for appropriate relief before appropriate Court does not give a license to the Plaintiff to reopen the very issues which stand conclusively decided against the Plaintiff by the Appeal Bench in Appeal No. 166 of 2008. According to Mr. Kamath the instant application, therefore, deserves to be summarily dismissed on the said ground.

10. Secondly, the Plaintiff can not be permitted to approbate and reprobate. It was clearly agreed and understood between the parties that the delivery of the possession of the aforesaid land to Defendant No. 8

MCGM and furnishing of the possession receipt to Escrow agent would be the condition precedent for the enforcement of the money decree. Admittedly, the Plaintiff has not delivered the possession of the aforesaid land to Defendant No. 8 MCGM. Under the express stipulation of the consent decree, the money decree stood cancelled. In the circumstances, the Plaintiff cannot seek even the relief of relieving the Plaintiff from the performance of the said obligation as the same constituted the foundation of the money decree. Lastly, the consent decree having been passed on the basis of the agreement arrived at between the parties the Court cannot exercise the jurisdiction to extend the time to perform the obligation thereunder under section 148 of the Code of Civil Procedure, 1908 unless the other party to the consent decree accords its consent for such extension of time or modification of the terms of the decree.

11. To start with, it may be advantageous to cull out the principal terms of the consent arrived at between the parties, which bear upon the controversy at hand. They can be summarized as under:

- 1] In full and final settlement of the Plaintiffs' claim the Defendant No. 1 was ordered and decreed to pay to the Plaintiff an amount of Rs. 2 Crores.

2] The Defendant No. 1 undertook to deposit the said decretal amount on or before 20th July, 2005 with the Respondent-Escrow agent. In the event of default, the Defendant Nos. 2 and 3 undertook to deposit the said amount with the Escrow agent on or before 27th July, 2005.

3] In the event of default, on the part of Defendant Nos. 2 and 3 the said decretal amount was to carry interest at the rate of 15% p.a. on and from 28th July, 2005, payable to the Plaintiff.

4] The Plaintiff and its Directors undertook to surrender and or handover the amenity land and additional recreation ground area to Defendant No. 8 in conformity with condition 5 of Letter of Intent dated 10th September, 2003.

5] The Plaintiff further undertook to furnish proof of delivery of possession of the said land to Defendant No. 8 to Escrow agent on or before 31st December, 2005.

6] In the event of default on the part of the Plaintiff to furnish the possession receipt, as above, the Escrow agent was to return the said amount of Rs. 2 Crore to Defendant No. 1, after expiry of a period of four weeks from the time stipulated for performance of the obligation by the Plaintiff under clause 6 or within the extended time, and the money decree would stand cancelled.

7] All other clauses of the consent terms however were to operate and bind the parties.

8] The Plaintiff was at liberty to apply to Court for extension of time and simultaneously the Defendant Nos. 1 to 3 were entitled to oppose such application for extension of time.

9] On the Plaintiff complying with the term of furnishing the proof of delivery of possession of the aforesaid land to Defendant No. 8 the Escrow agent was to pay the amount of Rs. 2 Crore to the Plaintiff and the interest accrued thereon to Defendant No. 1 and thereupon the money decree would stand marked satisfied and rest of the clauses of the consent terms would continue to operate and bind the parties.

12. It would be contextually relevant to note the condition in the Letter of Intent dated 10th September, 2003 whereby the Defendant No. 6 had informed the Plaintiff and Defendant No. 1 that the proposal of slum rehabilitation scheme on the suit land was considered and approved, in principle, subject to certain terms and conditions. Condition No. 5 thereof read as under:

"That the Developer shall hand over 7.5% amenity plot and 10% additional R.G. Plot as per layout to MCGM".

13. If the Letter of Intent is read in juxtaposition with the aforesaid stipulation in the consent terms it becomes abundantly clear that there was an obligation on the part of the developer to hand over 7.5% amenity plot and 10% additional R.G. plot as per layout, to MCGM i.e. Defendant No. 8 under the governing D.C. rule. There is not much controversy over the fact that the Defendant No. 6 had taken possession of the suit land under the possession receipt dated 11th August, 2004. It is incontrovertible that the Defendant No. 6 MMRDA had taken possession of the land in excess of the land which was conveyed to it under the conveyance executed by the Plaintiff on 28th July, 2004. The Defendant No. 6 never professed to contest the claim of the Plaintiff that the said land namely amenity land and additional recreation ground area and service area was in excess of the land which was to be conveyed to the Defendant No. 6 and the later was under an obligation to deliver possession of the said lands to the Plaintiff.

14. In the backdrop of the aforesaid uncontroverted facts, the rational behind making the money decree contingent upon the Plaintiff delivering the possession of the said amenity land and additional recreation ground to Defendant No. 8 MCGM is required to be appreciated. For execution of the project in conformity with the development control rules, the developers i.e.

Defendant Nos. 1 to 3 were under an obligation to deliver the possession of the aforesaid land to Defendant No. 8 MCGM. In fact, when the consent terms were executed the said land was indubitably in possession of the Defendant No. 6. Until the condition No. 5 of the Letter of Intent, of delivery of possession of the said land to Defendant No. 8 MCGM, was complied with, the developer would not be entitled to the full benefit of the contract between the Defendant No. 1 and Defendant No. 6. For this purpose, an obligation was cast on the Plaintiff to deliver possession of the said land to Defendant No. 8. It implied that the Plaintiff was required to take back the possession of the said land from the Defendant No. 6 and deliver the same to Defendant No. 8.

15. It is imperative to note that Defendant No. 6 was not a party to the consent terms. That was the precise reason why the matter was again listed on 11th July, 2005. Indisputably action was warranted on the part of Defendant No. 6 to facilitate the Plaintiff to fully comply with the terms of the consent decree. Thus, on 11th July, 2005 the learned counsel for Defendant No. 6, on instructions, made a statement that the Defendant No. 6 would hand over to the Plaintiff possession of the area out of the larger property described in the possession receipt dated 11th August, 2004 save

and except the property which was conveyed to Defendant No.6 under the conveyance dated 28th July, 2004. The possession of the excess land, including the aforesaid area of additional amenities land and additional recreation ground, was to be handed over to the Plaintiff within a period of two weeks therefrom. The Court thus ensured that the Defendant No. 6 who was in possession of the suit land, undertook to deliver the possession of the excess portion so that the Plaintiff would be in a position to perform its obligation under the consent decree.

16. With the aforesaid clarity as regards the co-relation between the consent decree dated 7th July, 2011 and the order dated 11th July, 2005, I would revert to the consideration of the submissions on behalf of the learned counsels for the parties.

17. The submission of Mr. Kamath that the order passed by the Supreme Court in SLP No. 12012 of 2011 dated 2nd May, 2011 does not give liberty to the Plaintiff to reopen the entire matter, cannot be said to be unfounded. The Appeal Bench in Appeal had recorded categorical reasons for dismissal of the Chamber Summons. It was in terms observed that the consent given by Defendant Nos. 1 to 3 for the modification of the decree

to the effect that the possession of the aforesaid land could be given to Defendant No. 6 in addition to or in lieu of Defendant No.8 MCGM (as originally agreed) did not relieve the Plaintiff of its obligation to deliver the possession of the said land to Defendant No. 8 MCGM. The withdrawal of the SLP, under these circumstances, with liberty to approach the appropriate Court for an appropriate relief does not give a *carte blanche* to the Plaintiff to reopen the issues which stood concluded by the order passed by the Appeal Bench. I find it rather difficult to accede to the submission on behalf of the Plaintiff that in this Notice of Motion this Court can delve into the aspects which were considered by the Appeal Bench and findings were recorded against the Plaintiff.

18. It would be advantageous to reproduce the relevant part of the observations in the judgment and order of the Division Bench in Appeal No. 166 of 2008, to retain emphasis.

"In our opinion condition no.6 of the consent terms and the order dated 11th July, 2005 have to be read together because they are in one scheme. By order dated 11th July, 2005 the MMRDA is obliged to hand over possession of the land to the Plaintiff and by condition no. 6, the Plaintiff is obliged to hand over possession of that land to the Corporation. The undertaking given by the MMRDA and the Plaintiff have been accepted by the Court. Admittedly, to this date the MMRDA has neither handed over possession of the land to the Plaintiff nor the MMRDA moved the Court at any point of time for

relieving it of the undertaking given by it to the Court, which has been accepted by the Court. Similarly, the Plaintiff has also not moved the Court till this date for being relieved of its undertaking to hand over possession of the land to the Corporation. Even accepting the arguments made on behalf of the Plaintiff that Defendant Nos. 1 to 3 had agreed that the Plaintiff can allow MMRDA to be in possession of the land, in our opinion that argument will not relieve the Plaintiff from its undertaking given to the Court and despite the alleged agreement the Plaintiff would not be entitled to receive decretal amount unless and until the Plaintiff approaches the Court and the Court relieves the Plaintiff of the undertaking given by it to the Court.....”

19. From the aforesaid observations, in my view, the only issue which can be legitimately agitated by the Plaintiff is whether the Plaintiff has made out a case for relieving it from the performance of the obligation under the consent terms i.e. delivery of the possession of the aforesaid land to Defendant No. 8.

20. Mr.Kamath, the learned counsel for Defendant Nos. 1 to 3 would urge that this Court would not be justified even in considering the question of relieving the Plaintiff of the obligation expressly undertaken in the consent decree. Laying emphasis on the fact that the substratum of the consent decree is the agreement between the parties, Mr. Kamath urged, with a degree of vehemence, that this Court cannot extend the time for the

performance of the obligation much less relieve the Plaintiff from the said obligation altogether.

21. To bolster up the aforesaid submission, Mr. Kamath placed a strong reliance on the judgments of the Supreme Court in the case of **Shivshankar Gurugar vs. Dilip**¹, and this Court in the case of **State of Goa vs. Placido Braganza**,².

22. In the case of ***Shivshankar Gurugar*** (supra) the Supreme Court inter alia considered the question as to whether in the face of compromise decree the executing Court could have granted time to the Respondent to deposit the balance of the arrears of rent, and answered the said question in the following words:

“13.1. In our opinion, the order of the executing court dated 23.11.2005 is beyond his jurisdiction and a nullity. The only source which confers powers on the civil court to enlarge time is found under Section 148 of the Code of Civil Procedure which reads as follows:-

Enlargement of time – Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may,

1 2014(2) SCC 465

2 2002, Vol. 104(2) Bombay Law Reporter 137

in its discretion, from time to time, enlarge such period not exceeding thirty days in total, even though the period originally fixed or granted may have expired.

*It is obvious from the language of the Section, such a power can be exercised only in a case where a period is fixed or granted by the court for doing of any act prescribed by this Court. In a compromise decree such as the one on hand, the stipulation that the judgment debtor is required to make the payment of the money within a specified period is a stipulation by agreement between the parties and it is not a period fixed by the court. Therefore, Section 148 CPC has no application to such a situation. We are fortified by the decision of this court in *Hukumchand v. Bansilal and others* AIR 1968 SC 86”*

23. In the case of ***Placido Braganza*** (supra) this Court considered the question whether the Court can pass any order which would have the effect of modifying /substituting /altering the consent decree unless the parties agree for the same. Answering the said question in the negative, a learned single Judge of this Court observed as under:

“11. On the omer hand, Shri Sonak has rightly placed reliance on a decision of the Apex Court in the matter of [Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd. and Anr.](#) and more particularly para 6 thereof wherein the Apex Court has observed that as principle of law, the High Court was obviously wrong in interfering with and modifying the consent decree unless parties agree for the same. In other words, the Apex Court has observed that the Court has no jurisdiction to deal in any manner with the consent decree, unless the party agree therefor. This principle has been reiterated by the Apex Court in a decision in [Suvaran Rajaram Bandekar and Ors. v. Narayan R. Bandekar and Ors.](#) where the Apex Court has

observed that in a consent decree the High Court would be loath to interfere with the terms thereof by way of modification unless both parties give consent thereto.

12. In the present case, since the respondents have resisted the present applications on the ground that the Court has no jurisdiction to interfere with or modify with the consent decree, it is not possible for this Court to entertain the prayer of the applicants for direction against the respondents to pay interest on the principal amount."

24. Per contra, Mr. Cama urged with tenacity that it is not an inviolable rule of law that in no case the Court can grant time to perform obligations under a decree on consent. The Court is empowered to relieve a party of an obligation which operates as a forfeiture clause to avoid manifest injustice, urged Mr. Cama. To lend support to this submission Mr. Cama placed a strong reliance upon a judgment of the Supreme Court in the case of **Smt. Periyakkal and Others Vs. Smt. Dakshyani**³, wherein the Supreme Court considered the import of the pronouncement in the case of ***Hukumchand vs. Bansilal*** (relied upon in the case of ***Shivshankar Gurugar*** (supra)) and further explained the proposition expounded in the case of ***Hukumchand***, in the following words:

4] "In the case before us, the situation is totally different. Unlike the case of *Hukam Chand v. Bansilal* where there was a statutory compulsion to confirm the sale on the dismissal OF the application under order XXI Rule 90 and, therefore, postponement and further postponement of the confirmation of the sale could only be by the consent of the parties in the

³ (1983) 2 SCC 127

case before us, there was no statutory compulsion to dismiss the application under order XXI, Rule 90 in the absence of an agreement between the parties. The court would have then decided the appeal arising out of the application on the merits. The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed. Nothing said in Hukamchand's case militates against this view".

(emphasis supplied)

25. Mr. Cama would further urge that the Court should adopt an approach which advances the cause of execution of the decree. In a given situation, if two interpretations are possible, according to Mr. Cama the Court is enjoined to adopt that view which promotes the execution of the decree rather than rendering it a paper decree. To buttress the aforesaid submission Mr. Cama banked upon the observations of the Supreme Court in the case of **Deepchand and Ors. Vs. Mohanlan**⁴ wherein dealing with the provisions contained in Article 136 of the Limitation Act prescribing the period of limitation for execution of decree, the Supreme Court delineated the approach expected to be adopted by the Courts :

⁴ (2000) 6 Supreme Court Cases 259

“ 5It must, however be remembered that the purpose of an execution proceeding is to enable the decree holder to obtain the fruits of his decree. In case where the language of a decree is capable of two interpretations, one of which assist the decree holder to obtain the fruits of the decree and the other prevents him from taking the benefits of the decree, the interpretation which assist the decree holder, should be accepted. The execution of the decree should not be made futile on mere technicalities which does not, however mean that where a decree is incapable of being executed under any provision of law it should, in all cases, be executed notwithstanding such bar or prohibition. A rational approach is necessity keeping in view the prolonged factor of litigation resulting in passing of a decree in favor of a litigant. The policy of law is to give a fair and liberal and not a technical construction enabling the decree holder to reap the fruits of his decree.

(emphasis supplied)

26. A decree passed on the basis of compromise arrived at between the parties essentially retains the character of a contract with the seal of approval of the Court superimposed thereon. Ordinarily the Court would be loath to rewrite the contract between the parties. However, the said proposition can not be stretched to such an extreme that the Court would be denuded of the power to relieve the party from a clause in the consent terms which results in grave injustice. In such circumstances, the power of the Court to act ex-debito justice and relieve a party from a forfeiture clause may be exercised in deserving cases. Two factors weigh with the Court in such situation. First, the clause ought to be in the nature of forfeiture

clause. Second, the consequences of not relieving a party from the performance of the said obligation would result in manifest injustice.

27. In the backdrop of the aforesaid legal position, reverting to the facts of the case, it is pertinent to note that the edifice of the submission on behalf of the Plaintiff is based on two communications. First, emanating from Defendant Nos. 1 to 3 on 20th December, 2005 whereby the Defendant Nos. 1 to 3 conveyed their consent for modification in terms of the decree. The second is the communication dated 30th December, 2005 emanating from the Defendant No. 6 MMRDA evincing the intent to take over the aforesaid land against the TDR, in lieu of delivering possession thereof to the Plaintiff.

28. In the communication dated 20th December, 2005, which was in response to the communication dated 19th December, 2005 addressed on behalf of the Plaintiff, the counsel for Defendant Nos. 1 to 3 conveyed that the Defendant Nos. 1 to 3 had no objection for extension of time to surrender the land to Municipal Corporation Greater Mumbai/ Mumbai Metropolitan Region Development Authority (MCGM/ MMRDA) as required under clause 6 of the consent terms. The Defendant Nos. 1 to 3 further

advised the Plaintiff to seek extension of time by making an application to the Court, and apprise the date and time of the said application being moved before the Court.

29. Mr. Cama, the learned counsel for the Plaintiff would urge that the Defendant Nos. 1 to 3 having given consent in express terms for the delivery of the possession of the said premises to MMRDA, under the said communication dated 20th December, 2005 could not have resiled therefrom and insisted for delivery of possession of the said premises to MCGM Defendant No. 8 alone, and that too evidenced by execution of conveyance in respect of the said land. Undoubtedly, in the said communication dated 20th December, 2005 the Defendant Nos. 1 to 3 gave consent not only for the extension of time for compliance with the stipulation of delivery of possession contained in clause 6 of the consent terms by eight weeks i.e. till 25th February, 2006, but also to the proposal to deliver the possession to Defendant No. 8 MCGM and/or Defendant No. 6 MMRDA. The justifiability of the subsequent stand of the Defendants insisting for conveyance in addition to proof of delivery of possession of the said premises is not required to be inquired into, for the determination of the limited question as indicated above.

30. What is of critical significance is the impact on the rights and obligations on the parties in view of admitted non delivery of possession to Defendant No. 8 MCGM and allowing the Defendant No. 6 MMRDA to retain the possession of the aforesaid land ? In short, whether allowing Defendant No. 6 MMRDA to retain possession of the aforesaid land, is equivalent to delivery of possession thereof to Defendant No. 8 MCGM ?

31. The Defendant No. 6 MMRDA in its proposal dated 20th December, 2005 addressed to the Principal Secretary to the Government in Urban Development Department apprised that the land reserved for amenity will be useful for the PAP's shifted in the adjoining premises. Thus, the Defendant No. 6 intended to acquire the said land and develop the said reservation in lieu of TDR. It was further informed that the land owners Mrs. Lallubhai Amirchand Limited (Plaintiff) had submitted proposal to Defendant No. 6 MMRDA, accordingly. Vide communication dated 30th December, 2005 the Defendant No. 6 informed the Plaintiff that the MMRDA intends to take over the aforesaid land against TDR after due process and in accordance with within mentioned Government order, with the approval of the Government.

32. It would be contextually relevant to note the stand of Defendant No. 8 MCGM, to whom the aforesaid land was to be surrendered. As indicated above, the Plaintiff, as persuaded by the Defendant Nos. 1 to 3, filed a Chamber Summons for extension of time to deliver the possession of the aforesaid land to Defendant No. 8. The Chamber Summons was moved before the vacation Judge on 30th December, 2005. The Court did not find urgency meriting the extension of time ex-parte. What is of salience is the fact that the prayer made in the Chamber Summons was opposed by the learned counsel for Defendant No. 8 Corporation, at that time. It is indisputable that the said Chamber Summons was subsequently dismissed for want of prosecution.

33. These developments are required to be appreciated in the backdrop of the consent terms, wherein the parties had taken care to provide for a possible situation warranting extension of time and the Defendant Nos. 1 to 3's right to oppose such a prayer for extension of time was also expressly preserved. The parties were thus alive to the possible hindrances in compliance of the said term of delivery of possession of the aforesaid land to Defendant No. 8, within the stipulated period. Consequently, not only a

provision for the cancellation of the decree in the event of non compliance but also for seeking extension of time for compliance, albeit after providing a justifiable reason, were made in the consent terms.

34. If the clauses of the consent terms are read in conjunction it becomes evident that the aforesaid clause of cancellation of the money decree for non compliance of the term of delivery of the possession of the aforesaid land to Defendant No. 8 was a conscious and calibrated decision of the parties. The failure on the part of the Plaintiff to comply with the said term of delivery of possession of the aforesaid land to Defendant No. 8 MCGM entailed consequences which affected the rights of the developers as it would in turn constitute a default on the part of Defendant Nos. 1 to 3 to comply with clause 5 of the Letter of Intent. Viewed through this prism, the aforesaid clause of cancellation of the money decree cannot be said to be in the nature of a forfeiture clause. The learned counsel for the Defendant Nos. 1 to 3 was within his rights in placing reliance on clause 15(a) of the consent terms which indicated the purpose for which the amounts specified under the consent decree were agreed to be paid to the Plaintiff. Clause 15(a), inter alia, provides that “the amounts received by the Plaintiff

hereunder shall be towards the Plaintiffs alleged claims towards construction TDRs/ DRCs”.

35. The communication dated 25th November, 2011 addressed by Defendant No. 6 MMRDA to the Plaintiff, the copy of which was alleged to have been received by the Defendant No. 1 (as affirmed in the affidavit in reply on behalf of Defendant Nos. 1 to 3) seals the issue. In the said communication dated 25th November, 2011 the Defendant No. 6 MMRDA had asserted that the possession of the amenities plots, additional recreation ground and service industries plots, which had not been conveyed to MMRDA can be delivered back to the Plaintiffs as ownership thereof vests in the Plaintiff. What follows is of decisive significance. The communication further records that MCGM Defendant No. 8 is insisting upon handing over reservation plots to MCGM before the release of final phase of land TDR for the land conveyed to MMRDA for construction of rehabilitation tenements. Balance construction TDR to the developer also would not be released till the reservation plots are handed over to MCGM. It was thus advised that until the Plaintiff hands over all the reservation plots in the layout to MCGM, no further TDR will be recommended to

MCGM by Defendant No. 6 and the present TDR recommendation also would not be processed by MCGM.

36. The aforesaid communication makes it abundantly clear that land TDR and construction TDR were withheld as the possession of the aforesaid land was not handed over to Defendant No. 8 MCGM. The developer was thus visited with prejudicial consequences for non compliance of clause 5 of the Letter of Intent. This communication underscores beyond the pale of controversy that the Respondent No. 8 MCGM insisted upon the compliance of clause 5 of the Letter of Intent and thus the consent of Defendant Nos. 1 to 3, even if taken at par, is of no avail to the Plaintiff.

37. Mr. Cama, learned counsel for the Plaintiff attempted to wriggle out of the situation by canvassing an emotive submission that the Plaintiff had done all it could do. On the one hand, the MMRDA has retained the aforesaid land on the premise that it intends to acquire the said land. On the other hand, the Plaintiff is deprived of the benefit of the money decree for non compliance of the said term despite there being a solemn undertaking by Defendant No. 6 MMRDA to deliver the possession of the

said land to the Plaintiff. In the circumstances, the Plaintiff is made to suffer for no fault on its part.

38. The aforesaid submission appears alluring at the first blush. However, the material on record indicates that the Plaintiff does not acquit itself as innocuous and innocent as is sought to be projected. In Chamber Summons No. 231 of 2006 the estate manager of Defendant No. 6 MMRDA filed an affidavit and affirmed that initially the Plaintiff had sought possession of the aforesaid land from the MMRDA. However, by a subsequent letter dated 3rd January, 2006 the Plaintiff offered to hand over the said land to MMRDA for taking over the reservation. The Defendant No. 6 MMRDA being a planning authority could legally take over the reservations. Thus, vide letter dated 3rd January, 2006 an understanding was recorded between the Plaintiff and Defendant No. 6 MMRDA to the effect that “the possession of the entire land consisting of the land under reservation of amenity land and additional space be retained with MMRDA and it was further agreed that on approval by the Government the land reserved for service industry will be handed over to the Plaintiff.”

39. The affidavit of estate manager thus makes explicit what was the trigger for the proposal dated 28th December, 2005 and the letter dated 30th December, 2005 addressed by Defendant No.6 MMRDA. In the proposal dated 28th December, 2005 itself it is mentioned that the Plaintiff had submitted the proposal to the Defendant No. 6 to take over the entire land. Reference to the said proposal finds mention under the caption of subject as well. Likewise, the letter dated 30th December, 2015 makes reference to the proposal dated 16th December, 2005 addressed by the Plaintiff to Defendant No.6 MMRDA to take over the entire land. The letter dated 3rd January, 2006 addressed by the Plaintiff to the land manager of Defendant No. 6 records an express consent of the Plaintiff to the effect that the possession of the entire land be retained with MMRDA which includes the land under reservation of amenity land and additional recreation space, which was to be handed over to Defendant No.6 MMRDA. It further records that it was agreed between the Plaintiff and Defendant No.6 MMRDA that on approval of the Government and execution of the conveyance of the said land under public reservation, the rest of the land reserved for service industry would be handed over to the Plaintiff.

40. The aforesaid communications and the affidavit of the estate manager of Defendant No.6 MMRDA lead to an inescapable inference that it was the Plaintiff, who, instead of insisting for delivery of possession of the aforesaid land, offered the entire land (including the lands which were to be delivered to Defendant No. 8) for being acquired by Defendant No.6 MMRDA in lieu of TDR. In a sense the Plaintiff by giving an express consent for acquisition of the entire land, including the aforesaid land, in the face of the consent decree, disabled itself from performing the terms of the consent decree. Conversely, on account of the non-compliance of the clause 6 of the consent terms by Plaintiff, which resulted in default in compliance of clause 5 of the Letter of Intent by the developer (Defendant Nos. 1 to 3), the authorities withheld the land TDR and construction TDR which would have been otherwise released in favour of the Developer.

41. In this view of the matter no case much less a justifiable one for relieving the Plaintiff of its obligation under the consent terms is made out. Being a driving factor for the proposal to acquire the subject land including the lands which were to be handed over to Defendant No. 8 the Plaintiff can only have the rights and benefits which would emanate from the said acquisition. The Plaintiff cannot have the benefit of money decree and

simultaneously have the benefits emanating from the acquisition of the land by Defendant No. 6, to the detriment of the Defendant Nos. 1 to 3.

42. The conspectus of the aforesaid consideration that the Plaintiff has failed to make out a case for relieving it from the performance of the obligation under the consent terms. Thus none of the prayers sought in the Notice of Motion deserve countenance. Undoubtedly, the Plaintiff has its remedies against Defendant No. 6 MMRDA and may work out those remedies. The observations in this order may not be construed as an expression of opinion on the interse dispute between the Plaintiff and Defendant No. 6. Hence, the following order.

ORDER

- 1] The Notice of Motion stands dismissed.
- 2] In the circumstances, there shall be no order as to costs.

(N. J. JAMADAR, J.)