

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 43 OF 2022
WITH
INTERIM APPLICATION NO.214 OF 2022
IN
APPEAL FROM ORDER NO.43 OF 2022

QED Properties Private Limited,
a Company registered under the
Companies Act, 1956, and having
its office at Sea Face House,
99A, Walkeshwar Road,
Mumbai 400 006.

..Appellant
(Original Plaintiff)

v/s.

1. Maharashtra State Road Development
Corporation Limited. (A Government of
Maharashtra Undertaking), having its
address at N.S.Road,
Opposite Dena Bank, Priyadarshini Park,
Mumbai 400 036.

2. Vice Chairman & Managing Director,
Maharashtra State Road Development
Corporation Limited. (A Government of
Maharashtra Undertaking), having its
address at N.S.Road,
Opposite Dena Bank, Priyadarshini Park,
Mumbai 400 036.

3. State of Maharashtra
through Principal Secretary,
Road Department, having its address at
Mantralaya, Mumbai 400 032.

..Respondents

WITH
APPEAL FROM ORDER NO. 68 OF 2022
WITH
INTERIM APPLICATION NO.274 OF 2022
IN
APPEAL FROM ORDER NO.68 OF 2022

M/s. Regent Bhairavi Corporation.
A Registered Partnership firm
represented by its partners :
1. Ramdas Kondiram Shende
Aged – 60, Occu. Business
2) Kuldeepak Ramdas Shende
Aged – 38, Occu. Business
Both having its office at
Food Mall Mumbai – Pune Expressway,
Near Khalapur Toll Naka,
1000 Mtr. Ahead,
Khalapur, Dist. Raigad

..... Appellant
(Orig. Plaintiff)

v/s.

1. Maharashtra State Road Development
Corporation
And
2. The Chairman of Maharashtra State
Road Development Corporation
both No.1&2 having its office at Bandra
Reclamation Bus depot,
Next to Lilavati Hospital,
K.C. Marg, Bandra (East),
Mumbai – 400 050.

..... Respondents
(Org. Deft in the suit)

Mr. Mayur Khandeparkar a/w. Ankit Lohia a/w. Zulfiqar Jariwala
a/w. Shabbir Jariwala, a/w. Ganesh Ambekar i/b.
MDP & Partners for the Appellants in AO/43/2022.

Mr. Ruchir L. Tolat i/b. L.C. Tolat for the Appellants in AO/68/2022.

Mr. Milind Sathe, Sr. Advocate a/w. Prashant Chawan with
Arun Siwach with Ms. Priyanka Mitra with Karan Gandhi
i/b. Cyril Amarchand Mangaldas for the Respondents in AO/68/2022.

Mr. Milind Sathe, Sr. Advocate a/w. Prashant Chawan a/w.
Rajmani Varma a/w. Ms. Tejashree Savratkar i/b.
Navdeep Vora & Associates for the Respondent Nos.1 and 2
in AO/43/2022.

Ms. Tanaya Goswami, AGP for the Respondent No.3 in AO/43/2022.

CORAM : ANUJA PRABHUDESSAI, J.
DATED : 18th NOVEMBER, 2022.

JUDGMENT :-

1. These appeals under Section 96 of the Civil Procedure Code are filed against the Order dated 22.12.2021 passed by the learned Civil Judge, Senior Division, Panvel in Special Suit No. 493 of 2017. By the impugned order, the learned Judge dismissed the application for temporary injunction (Exhibit 5) filed by the aforesaid Appellants seeking to restrain the Respondents-Defendant from selling, transferring, conveying, assigning, alienating or creating third party right or encumbrance in respect of Plot A and Plot C (hereinafter referred to as ‘the suit plots’) or any part thereof and or from handing over possession and carrying out any constructions or development activity in the suit plots in any manner, and further from acting upon the letter dated 15.06.2015 pending hearing and final disposal of the suit.

2. The Appellants and the Respondents shall be hereinafter referred to as the Plaintiffs and the Defendants respectively. The Defendant No.1 is a Government of Maharashtra undertaking, constituted inter alia for construction, development and maintenance of roads, bridges, flyovers etc. The State of

Maharashtra (Defendant No.2) had acquired land for construction of Pune Mumbai Expressway and handed over the land to the Defendant No.1 for initial period of 30 years, which was extendable to 99 years. The Defendant No.1 constructed the Express Highway and decided to sublease the surplus land along the expressway at Sanigaon for development. Accordingly, Defendant No.1 floated tender for a long lease of 80 years in respect of six plots described as Plot A to Plot F. The Plaintiffs were successful bidders in respect of the suit plots. The Plaintiffs gave their consent for extension of bid till registration of the lease agreement, which was to be executed with approval of the State Government. As mandated by Defendant No.1, the Plaintiffs confirmed their final offer of Net Present Value (NPV) for total contractual period of 80 years. Eventually, Defendant No.1 issued letter of acceptance accepting the final offer of total NPV of commitment fees, as offered by the Plaintiffs.

3. The Plaintiffs complied with the conditions stipulated in the Letter of Acceptance (LOA). In abidance with the demand of Defendant No.1, the Plaintiffs also paid money towards service tax. The Defendant No.1 called upon the Plaintiffs to pay the balance 2/3rd upfront amount, though as per the LOA, the same was

payable in two equal installments upon execution of lease agreement. In response, the Plaintiffs informed the Defendant No.1 that the demand was contrary to the terms and conditions of the tender/LOA, nevertheless expressed their willingness to pay the same and requested the Defendant No.1 to provide draft lease agreement.

4. The Plaintiffs filed Writ Petitions in view of the delay in executing the lease deed. During the pendency of the said petitions, the Defendant No.1 revoked the LOA. As a consequence thereof, the Plaintiffs withdrew the said petitions and filed separate Petitions challenging cancellation of LOA. The Division Bench of this Court held that grant of writ of mandamus would amount to decree of specific performance, and considering the limited scope of interference in contractual matters, dismissed the petitions without going into the justification given by the Respondent for cancellation of LOA.

5. Upon dismissal of the said Petitions, the Plaintiffs filed suits inter alia seeking a declaration that there is a valid agreement between the Plaintiffs and the Defendants, and challenged validity of the notice dated 15.6.2015. The Plaintiffs also sought to direct

the Defendant No.1 to execute a lease deed and hand over possession of the suit plots in their favour. In the alternative, Plaintiffs claimed damages in view of breach of contract. Pending the final hearing and disposal of the suit, the Plaintiffs sought to restrain the Defendant No.1 from acting upon the notice dated 15.06.2015 and from alienating, transferring or creating third party interest in respect of the suit plot.

6. The contention of the Plaintiffs is that the issuance of LOA constitutes concluded contract and the deed of lease contemplated by the tender was a mere formality. The Plaintiffs averred that it was not permissible for the Defendant No.1 to unilaterally revoke the LOA and deprive them of the valuable rights in the suit plots. The Plaintiffs invoked the doctrine of promissory estoppel to contend that the Defendant is estopped from committing breach of contract and is in fact bound to execute lease agreement in their favour. It is stated that notice of cancellation of LOA is illegal, malafide and arbitrary. It is alleged that failure to comply with the obligation under the tender and LOA will cause irreparable harm, loss and injury to the plaintiffs, which cannot be measured in terms of money.

7. The Defendant No.1 has justified revocation of LOA on the grounds that there was no concluded contract between the parties. It is stated that the LOA was conditional, in as much as the lease was to be executed only after approval of the model lease agreement by the Government. It is stated that there were some technical glitches which went unnoticed while floating the tender. Subsequent to issuance of LOA, it was noticed that there was a pocket of private land admeasuring 7000 sq. meters within Plot D, the bid received in respect of which was higher than the other plots. The proposal to adjust the area of Plot D from existing lay out was discussed with the Plaintiffs and the other successful bidders, but the Defendant No.1 did not received any response. A legal issue relating to the competency/authority of Defendant No.1 to sublease the surplus land cropped up when the draft lease agreements to be executed between the Defendant No.1 and successful bidders were placed before the Board of Directors of MSRDC for its approval. Opinion in this regard was sought from the Revenue Department, however the proposal was returned with instructions to submit the same before the Public Works Department. The Defendant No.1 sought opinion of the learned Advocate General and the learned Advocate General opined that the Defendant No.1 was authorized to develop

the surplus land after obtaining permission of the Revenue Department. Apart from the above contingencies, it was also noticed that the Defendant No.1 tendered the plots for 80 years while the lease in favour of the Defendant No.1 was only for 30 years, though extendable upto 99 years. The Chief Secretary of the Government of Maharashtra held a meeting to take permission from Public Works Department and Revenue Department, but no sanction was received from both the departments. Hence, in a meeting of the Board of Directors of Defendant No.1 held on 27.3.2015, a resolution was passed to cancel the LOA and accordingly, vide letter dated 15.06.2015, the LOA was revoked.

8. The learned Judge, upon considering the terms of LOA negated the contention that the LOA constitutes a concluded contract. The learned Judge held that there were justifiable reasons to revoke the LOA and accordingly held that the Plaintiffs had failed to prove prima facie case and the other two pre-requisites viz. balance of convenience and irreparable loss. Based on these findings, the learned Judge dismissed the applications for injunction (Exhibit 5) filed by the aforesaid Plaintiffs. Being aggrieved by this order, the Plaintiffs have filed these Appeals.

9. Mr. Khandeparkar and Mr. Ruchir Tolat, learned Counsel for the Plaintiffs submit that the LOA constitutes a concluded contract which has been acted upon by the parties considering the same to be a concluded contract. The Plaintiffs had fulfilled all the obligations and execution of the lease deed was only a formality. Relying upon the decision of the Apex Court in ***Mrs. Chandnee Widya Vati Madden vs. Dr. C.L.Katial & Ors., (1962) 2 SCR 495; Vishwa Nath Sharma vs. Sham Shankar Goela & Anr. (2007) 10 SCC 595; Kollipara Srirammulu (dead) by his legal representatives vs. T. Aswatha Narayana (dead) by his legal representatives & Ors., AIR 1968 SC 1028;*** and the decision of the Division Bench of this Court (Nagpur Bench) in ***GMR Airports Ltd. & Anrs. vs. Mihan India Ltd. & Anr (Writ Petition No. 173 of 2020)***, they submit that the tender cannot be canceled and the Plaintiffs cannot be non suited for non execution of lease deed or want of Government approval. Learned counsel for the Plaintiffs submit that no reasons have been given for terminating the LOA and that the termination is arbitrary and illegal. Relying upon the decision of the Division Bench of this Court in ***Proactive In and Out Advertising Pvt. Ltd. vs. Pune Mahanager Parivahan Mahamandal Ltd. & Ors. (2018) 6 Mh.L.J. 561*** it is contended that judicial review is permissible

when the decision making process qua the contractual matters is flawed by arbitrariness.

10. Per contra, Dr. Sathe, learned Sr. Counsel for the Defendant submits that there was no concluded contract between the Plaintiffs and the Defendants. He submits that the LOA was conditional as it stipulates that agreement would be executed only after approval of model lease agreement by the Government. He further submits that the suit plots were proposed to be sub-leased for a period of 80 years, while the lease in favour of the Defendant No.1 was only for 30 years. While refuting the contention that the decision to cancel the LOA is arbitrary, Dr. Sathe, learned Sr. Counsel has emphasized that part of plot D which was also proposed to be sub-leased is a private land and that the entire layout would have changed if plot D were to be severed. It was in these circumstances and in view of several technical glitches, opinion was taken from the learned Advocate General and attempts were made to obtain permission of the Revenue Department. Having realized that no concluded contract could be executed in favour of the Plaintiffs, the Board of Directors took a decision to cancel the LOA. The said decision was taken in public interest. He submits that the letter of cancellation refers to the letter of Board of Directors of MSRDC.

He further submits that the reasons for cancellation are also mentioned in the decision of the Board of Directors. He has relied upon the decision of the Hon'ble Supreme Court in ***Rishi Kiran Logistics Pvt. Ltd. vs. Board of Trustees of Kandla Port Trust and ors, (2015) 13 SCC 233*** and ***Pediar Timber Company Pvt. Ltd. vs. Board of Trustees of Vishakapatnam Port Trust (2021) 3 SCC 24***;

11. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties. The short point for consideration is whether LOA issued in favour of the Plaintiffs was a concluded contract and whether the action of the Defendants in canceling the LOA is arbitrary and illegal.

12. It is not in dispute that the Defendant No.1, a Government of Maharashtra undertaking, had floated tender calling for bids in respect of long lease of 80 years of six distinct plots at village Sanjgaon, Raigad. The Plaintiffs being the highest bidders for plot A and C, the Defendant issued LOA in their favour. The question is whether the LOA can be construed as a concluded contract. In this regard, it would be relevant to refer to the tender document which defines LOA to mean- "the letter issued by MSRDC to the successful bidder stating that the later has been short listed as the

successful bidder and can sign the lease agreement”. A plain reading of the definition indicates that the LOA as per the tender document is only an intimation to the successful bidder that he has been shortlisted and is competent to sign a lease agreement. As per the tender document lease agreement is an agreement to be entered between MSRDC and the successful bidder on the subject matter of leasing of the land parcel by MSRDC to the successful bidder. The term ‘contract’ as defined in tender document means and includes terms and conditions of RFT, letter of acceptance, the offer/bid, the agreement and mutually accepted conditions in authorized correspondence exchanged with the bidder by the Corporation and any other document forming part of the contract. A conjoint reading of the definition of LOA, lease agreement and contract clearly indicates that tender document itself contemplates execution of a lease agreement.

13. It would also be relevant to refer to Section 7 of the Contract Act which provides that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. In the instant case, Clause 3 of the LOA stipulates that - “Lease agreement will be done only after Government approval of model lease.” The LOA itself provides for execution of lease agreement as well as

approval of the Government of model lease. This fact prima facie negates contractual intention and suggests that the LOA was only an expression of intention to enter into a contract. In this factual matrix, prima facie, LOA cannot be construed as a concluded contract.

14. In *Chandnee Widya Vati Madden and Vishwanath Sharma* (supra), the parties had entered into an agreement for sale. The issue was whether lack of permission from the Government Authority would act as absolute bar on a decree for specific performance. The Hon'ble Supreme Court followed the judgment of the Privy Council in ***Motilal vs. Nanhelal AIR 1930 PC 287*** wherein it was held that if the vendor had agreed to sell the property which can be transferred only with the sanction of some Government Authority, the Court has jurisdiction to order the vendor to apply to the Authority within a specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time. It was held that when the agreement was a completed contract between the parties, the condition in the agreement to obtain permission or sanction would not render the agreement incomplete and does not operate as an absolute bar to grant the relief of specific performance. It was held that if the sanction is ultimately refused,

the Plaintiff may not be able to enforce the decree for specific performance of the contract.

15. In *Kollipara Srirammullu (supra)*, one of the questions was whether the oral agreement was ineffective because the parties contemplated execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was held that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a formal shape does not prevent the existence of a binding contract. It was observed that there are however cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. It was held that the question depends upon the intention of the parties and the special circumstances of each particular case. It was reiterated that it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the instant case, as noted above, LOA was not a concluded contract but was only an expression of the

desire of the parties to enter into an agreement.

16. In GMR Airports Ltd. (supra), in response to the revised offer given by the Petitioner No.1, letter of acceptance was issued subject to further approval of Government of India for alienation of land in favour of Petitioner No.1 and formation of Special Purpose Vehicle (SPV) for the project. On facts of the case it was held that the LOI was a binding contract in terms of Section 7 of the Contract Act. It was further held that when clause 3.1 of the agreement itself had the approval of Government of India, the condition of obtaining approval was a mere formality.

17. The aforesaid decisions are totally distinguishable as in these cases there was concluded contract between the parties and the condition to obtain permission did not render the contract incomplete or unenforceable. At this juncture, it would be advantageous to refer to the decision of the Hon'ble Supreme Court in Rishikiran Logistics (supra), wherein the Appellant was allotted the Letter of Intent, but subsequently the entire tender process was canceled in view of delay in clearance by the Central Government and non compliance of other procedural requirements. While upholding the action, the Hon'ble Supreme Court referred to several

clauses of 'Rules and Procedures for Allotment of Plots' and other factual aspects of the case and following the observations in the case of ***Dresser Rand S.A. vs. M/s. Bindal Agro Chem. Ltd. & Anr.*** ***AIR 2006 SC 871***; held that that '*a letter of intent merely indicates parties intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into a contract. It is no doubtful that a letter of intent may be construed as letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent it may amount to acceptance of the offer resulting in concluded contract between the parties. But the question whether the letter of intent is merely an expression to place an order in future or whether there is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter. When the LOI is itself hedged with the condition that the final allotment would be made later, after obtaining CRZ and other*

clearances, it may depict an intention to enter into contract at a later stage. Thus we find that on the facts of this case, it appears that a letter with intention to enter into a contract which could take place after all other formalities are completed. However, where the completion of these formalities had taken undue long time, and the prices of land, in the interregnum, shot up sharply, the respondent had a right to cancel the process which had not resulted into a concluded contract.'

18. In the instant case, the tender document contemplates execution of lease agreement, which is not a mere formality. Furthermore, as stipulated in LOA, execution of lease agreement was subject to the approval of model lease by the Government. Undisputedly, the parties have not entered into a lease agreement. The correspondence, negotiations and compliance of condition nos.1 and 2 of the LOA and meeting other demands raised by the Defendant No.1 can at the most be a prelude to a contract but not a concluded contract. In the absence of contractual intent or concluded contract, prima facie, the suit for specific performance would not be maintainable.

19. The Plaintiffs contend that the suit plots is a public property,

the entire transaction has been initiated and implemented for public purpose, that the Plaintiffs have been chosen as successful bidders and that they have performed their obligation under the tender as well as the LOA and as such, Defendants cannot and ought not to act in an illegal and arbitrary manner by seeking to cancel/revoke the LOA.

20. Similar contentions were raised in *Rishi Kiran* (supra). It was contended on behalf of the Petitioners that cancellation of concluded contract between the parties, amounts to arbitrariness. While rejecting such contention, the Supreme Court held that even if it is presumed that there is a concluded contract, mere termination thereof cannot be dubbed as arbitrary. A concluded contract if terminated in a bonafide manner, that may amount to breach of contract and certain consequences may follow thereupon under the law of contract. However, on the touch stone of parameters laid down in the administrative law to adjudge a decision as arbitrary or not, when such a decision is found to be bonafide and not actuated with arbitrariness, such a contention in administrative law is not admissible namely how and why a concluded contract is terminated.

21. In the instant case, the material on record reveals that several

factors led to cancellation of LOA. The tender was floated for allotment of six plots, i.e. Plot Nos. A to F. It was noticed that there was a pocket of private land of 7000 sq. meters within the area of Plot No. D. Moreover, the Sanjgaon plots were tendered for 80 years of lease though the lease in favour of the Defendant No.1 in respect of Sanjgaon plots was only for a period of 30 years, which was extendable upto total 99 years. There also appears to have been some discrepancy in the terms and conditions of the lease between the Government of Maharashtra and MSRDC- Defendant No.1 vis-a-vis the terms and conditions of the lease to be entered into with the successful bidders as detailed in RFT documents. It is also stated that the State Government vide GR dated 05/07/2015, had interalia resolved that Land Disposal Rules shall be framed and approved by the Government and till then no lands mentioned in the said GR be disposed of in any way by MSRDC. It is further stated that the Maharashtra Highways (Disposal of the Maharashtra State Road Development Corporation Lands) Rules, 2018 have been published by the State Government vide notification dated 11/05/2018 and therefore MSRDC will now be in a position to dispose of the land including the suit plot only in the manner prescribed in the said Land Disposal Rules.

22. The records further reveal that due to several technical glitches in executing the lease agreement, Defendant No.1 had sought opinion of Id. Advocate General and one of the queries raised was whether the procedure adopted by MSRDC for exploitation of the surplus land by inviting public tender was in order. Id. Advocate General opined that as per Clause (7), MSRDC is required to obtain prior permission of the Revenue Department of Government of Maharashtra for development of the surplus land. The Revenue Department returned the proposal made by MSRDC without sanctioning the same. The Board of Directors considered all these technical difficulties in a meeting held on 27/03/2015 and decided to cancel the LOA. The reasons which persuaded the Board of Directors to cancel the LOA are recorded in the resolution. Prima facie, the decision making process is not tainted with unreasonableness, arbitrariness or perversity.

23. There is nothing on record to indicate that cancellation of the LOA will adversely affect public interest. On the contrary, it will not be in public interest to allot the plots at the agreed rate considering the prolonged delay in executing the lease agreement and steep rise in price of land during the interregnum period.

Hence, prima facie the decision to cancel the LOA cannot be termed as unreasonable or arbitrary. The Plaintiffs were not put in possession of the suit plots. In the event the Plaintiffs succeed in proving breach of contract, they have remedy of seeking damages, which remedy is already availed of. Hence, the Plaintiffs will not suffer irreparable loss due to cancellation of LOA.

24. Under the circumstances and in view of discussion supra, the impugned order does not suffer from illegality, infirmity or perversity. Hence, the Appeals are dismissed.

25. Pending Applications, if any, stand dismissed in view of dismissal of the Appeals.

PRASANNA P
SALGAONKAR

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by PRASANNA P
SALGAONKAR
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(ANUJA PRABHUDESSAI, J.)