

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

APPEAL FROM ORDER NO.449 OF 2021

WITH

INTERIM APPLICATION NO.3440 OF 2021

Reliable Space Pvt. Ltd.

& Anr.

...Appellants

Vs

Mr. Ramanlal Harkchand Banthia

& Ors.

... Respondents

...

Mr. Prasad Dani, Senior Advocate i/by Mr. Laxman S. Deshmukh for the Appellants.

Mr. Shardul Singh, Bhavesh Joshi i/by Joshi Law Associates for R.Nos.2 to 5 and Respondent No.7.

Dr. Abhinav Chandrachud with Mr. Idris M. Vohra i/by Legal Affairs for R.Nos.8, 9.1, 9.2, 9.3, 12 and 13.

CORAM : SANDEEP K. SHINDE J.

RESERVED ON : FEBRUARY 16, 2022.

PRONOUNCED ON: MARCH 29, 2022.

P.C. :

Appellants/Plaintiffs, instituted Special Civil Suit No.507 of 2017 in the Court of Civil Judge, Senior Division, Panvel seeking decree of specific performance of the contracts and perpetual prohibitory injunction. Pending suit, application seeking order to

restrain the defendants, from dealing with, selling, and/or creating third party rights of any nature in the suit properties was rejected by the learned trial Court. Feeling aggrieved by that order dated 12th November, 2014, plaintiffs have preferred this Appeal From Order under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908.

2 Heard learned counsel for the parties.

3 Questions fall for consideration in this case are; (i) the suit contracts being of commercial nature, whether time, was essence of the contract. (ii) whether the plaint filed by the plaintiffs state all the facts with sufficient clarity; reason being by asking for specific performance of the contract, plaintiffs are praying for discretionary reliefs and when discretionary remedy is prayed for by a party, such party must go to the Court on proper disclosure of the facts AND (iii) Whether, impugned order calls for interference.

4 In *Chand Rani (1993) 1 SCC 519*, the Constitution Bench formulated propositions that even where parties have expressly

provided time to be of the essence of the contract, such a stipulation will have to be read along with the other terms of the contract. Such other terms, on a proper construction, may exclude the inference that the completion of work by a particular date was meant to be fundamental. Observed thus, that following circumstances, which may indicate a contrary inference; (a) if a contract includes clauses providing for extension of time in certain contingencies, or (b) if there are clauses for payment of fine or penalty for every day or week, the work undertaken remains unfinished after the expiry of time. The Constitution Bench held such clauses would be construed as rendering ineffective the express provision relating to time being essence of contract.

Briefly stated facts of the case are like this;

5 The appellants/plaintiffs, are seeking specific performance of the, two Memorandum of Understandings ('MOU' for short). One, dated 9th February, 2008 between themselves and the defendant nos.1 to 7, vide which the defendant nos.1 to 7 had agreed to sell their 4/5th share in the suit properties for total consideration of

Rs.21,44,00,000/- . Pursuant to which, plaintiffs paid Rs.3,19,99,998/- to the defendants. Execution of the first MOU and payment of part consideration are admitted facts. The second MOU was executed on 9th February, 2008, between the plaintiffs and the defendant nos.8 to 13 by which defendants had agreed to sell their 1/5th share in the suit properties for total consideration of Rs.5,36,00,000/- . Pursuant to which, plaintiffs paid Rs.80,00,000/- to the defendants. Execution of MOUs and receipt of part consideration are not disputed facts. Relevant Clauses, of suit contracts for consideration are;

a. In, terms of Clause (3) of first MOU

(i) 9,12,00,000/- were payable on/or before 6th March, 2018;

(ii) 9,12,00,000/- were payable on/or before 6th April, 2018;

So far as 2nd MOU,

(i) 2,28,00,000/- were payable on/or before 6th March, 2018

(ii) 2,28,00,000/- were payable on/or before 6th April, 2018.

(b) Clause 4 in both MOUs provided, that in the event of purchaser committing default in payment of installments, vendors shall be entitled to receive interest @ 18% from date of default till realisation; however, later part of clause provided, that period could

be extended upto three months, from due date, failing which MOU, shall get automatically cancelled and terminated.

(c) Clause five of both the MOUs, cast, obligations on purchasers to carry out survey of the properties. Whereafter, consideration amount, shall be paid as per actual area, which would be measured and ascertained in survey.

(d) Clause six, provided for and cast obligation on purchaser to publish advertisement in new-paper and further, except the property in respect of which objection would be received, purchaser shall complete the transaction concerning other properties, as per agreed schedule.

(e) Clause seven provided that upon receipt of entire consideration, vendors shall convey the properties.

(f) Clause 8(f) of both the MOUs, cast duty on vendors to update revenue records pertaining to the suit properties prior to execution of the sale deed.

(g) Clause (9) specified that the balance consideration would become due and payable only upon rectification of any defect in title or removal of any encumbrance upon land.

6 Plaintiffs case is that, the defendants all the time and continuously have neglected to perform various obligations cast upon them under the MOUs. Plaintiffs pleaded that soon after the execution of the MOUs, they had published paper notice on 13th February, 2008. However, none had objected to the proposed transaction. Yet, despite, repeated requests and reminders, defendants ignored their contractual obligation by refusing to perform their part of obligation. As such, vide notice dated 26th May, 2015, all the defendants were called upon to execute the conveyance, by making good their obligations under the MOUs. Defendants denied to execute the conveyance, reason being, according to the defendants, MOUs stood terminated on 9th May, 2018. Whereafter, the plaintiffs instituted the suit in December, 2017.

7 Pending suit, defendant nos.2 to 5, 7 to 10, 12 and 13 vide application Exhibit 17 sought rejection of the plaint under Order 7 Rule 11 of the Code of Civil Procedure, 1908. While rejecting the defendants' application, the trial Court held, that in terms of Clause

8(f) of the MOUs, defendants were to make necessary updates in the Revenue Records before execution of the sale deeds. Whether defendants had made necessary updates in the Revenue records or not, is a matter of evidence and since the plaintiffs have averred that the defendants neglected to perform their obligations, defendants could not have sought for rejection of the plaint. This order of rejection was challenged in Civil Revision Application before this Court. However, it was dismissed, as withdrawn.

8 Thus, upon reading the clauses 3,4,5,6,7, 9(f), what could be gathered is, that,

“(i) MOU were executed on 9th February, 2008; Balance consideration was payable on or before 6th April, 2018; After executing the MOUs, purchasers were required to publish advertisements, inviting objections for the transactions proposed to be entered into between them and the vendors and subject to objection to particular property, purchasers were to complete the transaction as per time scheduled; the balance consideration was payable upon vendors’ updating the revenue records before execution of the sale deed, as per actual area ascertained upon carrying out survey of the property; The purchasers were under obligations to carry out the survey; and time to pay balance consideration could be extended by three months from due date (Clause 4), with interest @ 18% p.a.”

9 Although, plaintiffs would claim that paper notice was published on 13th February, 2008 (para 3 of the Plaint) neither copy of notice was produced, nor pleaded, whether, they had received objections for the transactions proposed to be entered into with the vendors. Even supposing they had issued paper notice in February, 2008, but thereafter in support of their assertions in para six of the plaint, that since inception of negotiations, they acted with best of their intentions and in good faith, and have always been ready and willing to perform their obligations under MOUs, plaintiffs have not pleaded particulars relating to discharge of their obligations created under MOUs. It is apparent from record that since after February, 2008, in May, 2015 they issued notice to vendors. To put it differently, plaintiffs remained silent over a period of seven years and three months, and there is no explanation, as to why the plaintiffs did not take steps to seek performance of the contracts, after publishing notice in the news-paper. Additionally, even after, issuing notice on 26th May, 2015 and although the defendants vide their reply dated 17th June, 2015, had denied to execute the sale deed;

suit was instituted in January, 2021, as is evident from Clause (19) of the plaint. It reads under ;

“19. The cause of action firstly arose in the month of June, 2015, when the Defendants denied to perform their obligations by their Reply dated 17/06/2015 and the Defendants have not complied their obligations as per MOU dated 09/02/2008 with the Plaintiffs and the cause of action is continued till filing of the present suit.”

Thus, it appears, the appellants were not keen or desirous to obtain conveyance of Suit Properties.

10 Leaving aside, that the plaintiffs were not diligent in pursuing the remedy since 2008 and assuming cause of action arose in June, 2015, however, material on record, renders their case indefinite, and also, convey that, they had not stated relevant facts, with adequate clarity. Reasons are more than one. Thus;

(i) On 3rd June, 2008, plaintiffs addressed a letter to the defendants, yet, neither that letter has been placed on record nor they pleaded, contents of it in the plaint.

(ii) Defendant nos.1 to 8, 10, 12 and 13 in the affidavit-in-reply have stated, that since the purchasers failed and neglected to pay

balance consideration, vide notice dated 14th June, 2008 they terminated both the MOUs and informed purchasers to take back their earnest amount.

(iii) though the termination notice dated 14th June, 2008 was received by the purchasers but it was not replied by them.

(iv) Suit, does refer to termination notice.

. A copy of the notice dated 14th June, 2008 is placed on record along with the certificate of posting. I have perused it. This notice/letter was addressed by the defendants to plaintiffs, in response to the plaintiffs' letter dated 3rd June, 2008. The termination notice reveals following facts:

(i) after executing the MOUs, signature of one of vendors, Virendra Banthia was taken on application by the plaintiffs, as was required for surveying the suit lands;

(ii) Purchasers had agreed to seek permission for surveying the lands, as per Clause No.(5) of the MOUs;

(iii) The purchasers did not apply permission in time for conducting the survey.

(iv) Paragraph 2 of the Termination Notice dated 14th June,

2008 reads as under;

“(2) As per the Terms No.4 and the page no.8 of the MOU, the MOU has got immediately cancelled on 8th May, 2008 so we request you to take your amount from us and hand us over the copy of the MOU dated 9th February, 2008.”

11 Even, though Termination Notice dated 14th June, 2008 is not entirely readable, Clauses 3 and 4 of it suggest, that the purchasers filed an application in City Survey Office, after a lapse of one month from the date of MOU and that survey could not be conducted, due to opposition from the local villagers. Clauses (5) and (6) of the termination notice read as under;

“(5) As the MOU dated 9/2/2008 is automatically cancelled, we are not obliged now to act as per your notice dated 3/6/2008; which is false and concocted to your knowledge; (letter dated 3rd June, 2008 is suppressed by the Plaintiffs) (emphasis supplied)

(6) We once again request you to take your Rs.4,00,00,000/- from us by giving the copy of the

MOU dated 9th February, 2008 to us at your earliest.”

At this juncture, it may be stated that in paragraph 5.4 of the reply to the Exhibit 5, defendants have affirmed, termination of suit MOU on 14th June, 2008. Yet, plaintiffs have not been denied that fact, even before this Court. It, therefore, constitutes admission of the facts stated therein.

12 The facts afore-stated, makes it abundantly clear that soon after the execution of the MOUs, plaintiffs had addressed letter to the defendants on 3rd June, 2008; however, that letter has not been placed on record. Whereafter, on 14th June, 2008, defendants terminated the suit MOUs. Yet, plaintiffs did not plead these facts, which were relevant facts. It amounts to suppression of material facts. Thus, I hold that plaintiffs have not stated all the facts with sufficient clarity and, therefore, not entitled to seek discretionary relief.

13 So far as, ‘Whether time was essence of contract or not, in the facts and circumstances of the case, since I have declined to exercise discretionary jurisdiction, for all reasons stated above, let this point be kept open, for decision at appropriate stage. In effect appeal is dismissed and disposed of accordingly.

14 As the appeal itself is dismissed, nothing survives in the interim application therein and same is also disposed of.

(SANDEEP K. SHINDE, J.)