

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

APO/92/2024
WITH
CS/162/2024
IA NO: GA/1/2024
VIDYUT SARAF AND ANR
VS
EDENIC PROBUILD PRIVATE LIMITED AND ORS.

WITH
APOT/241/2024
VIDYUT SARAF AND ANR.
VS
EDENIC PROBUILD PRIVATE LIMITED AND ORS.

BEFORE:

HON'BLE JUSTICE SABYASACHI BHATTACHARYYA
-A N D-
HON'BLE JUSTICE UDAY KUMAR

Date : 21st May, 2025.

Appearance:

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Soumyadeb Sinha, Adv.
Mr. Sayak Mitra, Adv.
Mr. Raunak Bose, Adv.
...for the appellant

Mr. S.N. Mookherjee, Sr. Adv.
Mr. Padam Khaitan, Adv.
Mr. Soumabho Ghose, Adv.
Mr. Naman Chowdhury, Adv.
Mr. Anunoy Basu, Adv.
Ms. Deeptipriya, Adv.
...for the respondent Nos. 2 & 3

The Court:- The two appeals are taken up together for hearing, in view of the identity of the suit from which the two arise. In a suit, primarily for specific performance of a development agreement, filed by the plaintiffs /appellants, vide

Order dated June 6, 2024, the learned Single Judge refused to grant ad interim injunction, being aggrieved by which, the first of the two appeals, being APOT 226 of 2024 (renumbered as APO 92 of 2024), has been preferred. On a subsequent occasion, when the injunction application came up for hearing, directions for affidavits were granted by the learned Single Judge. It is the case of the appellants that by the said order dated June 20, 2024, the learned Single Judge ought to have deemed to refuse the prayer for injunction. Hence, the other appeal has been filed against the said order.

Learned Senior Counsel appearing on behalf of the appellants argues that despite best efforts, the appellants could not obtain the necessary approval from the West Bengal Heritage Commission (WBHC), due to gross inaction on the part of the said Commission.

It is argued that despite the appellants having written several letters and communicated to the WBHC, although virtually approval was granted by the said Commission, subsequently the matter got stuck up in the department of the MIC (Mayor-in-Council) of the Kolkata Municipal Corporation.

It is submitted that further approval is not required as per law. Thus, learned senior counsel submits that on such count, the appellants were prevented from obtaining the said permission within the stipulated time within the ambit of the *Force Majeure* clause in the agreement.

Learned senior counsel further contends that sub clause (f) of clause (xvi) of the definition clause in the agreement (Clause 1) clearly provides that non-functioning of any existing or new appropriate Government authorities due to any reason whatsoever comes within the purview of *Force Majeure*. In the

present case, a complete shutdown of the concerned authority, that is, the Heritage Commission was not necessary to bring the parties within the fold of the said clause. The palpable inaction on the part of the Commission itself should be construed as non-functioning and as such, the same provides a valid defence within the contemplation of the agreement for non-obtaining of the said approvals from the Heritage Commission within time.

Learned senior counsel next argues that insofar as the allegation that the appellants failed to obtain the Urban Land Ceiling approval concerned, the law does not provide for any such further approval. By placing reliance on the Kolkata Municipal Corporation Building Rules, it is contended that Rule 4(4) merely contemplates a ceiling beyond which an approval for development is necessary. It is submitted that in the year 2005, there was already an approval to that effect granted by the Urban Land Ceiling Authorities which would suffice to that extent.

Learned senior counsel next argues that the general provisions of law as laid down by the Supreme Court in respect of development agreements do not apply to the present case in view of there being a specific definition of *Force Majeure* in the agreement, which is attracted herein.

Learned senior counsel next contends that there were several negotiations, discussions and meetings between the parties even after the timeline stipulated in the agreement for obtaining the initial approvals expired.

By placing reliance on the correspondence between the parties in such context, it is submitted that the respondents themselves had extended the timeline on several occasions, as such, giving a go-bye to the mandatory

timeline as stipulated in Clause 19.2 of the agreement. Thus, it is argued that the said stipulated time limit ought not to be taken as mandatory in view of the conduct of the parties themselves. It is argued that the subsequent negotiation between the parties gave a new lease of life to the said period.

Learned senior counsel appearing on behalf of the respondents, on the other hand, contends that a bare perusal of the definition of *Force Majeure* in Clause 1 (xvi) in the agreement shows that the non-functioning of any existing or appropriate Government authority is the criterion, and not delay in functioning of such authority. It is submitted that the said clause could only be attracted if an authority is not in place or is not functioning at all. In the present case, the gamut of the submissions of the appellants is that the authorities, although functioning, were delayed in their action in dealing with the applications of the appellants for granting approvals.

Learned senior counsel appearing for the respondents cites *Vidya and others, reported at (2024) 9 SCC 651*, where the Hon'ble Supreme Court, by relying on *DLF Home Developers Limited versus Capital Greens Flat buyers Assn*, reported at *(2021) 5 SCC 537*, held that in case of development agreements, a delay in sanctioning layout plans could not be a *Force Majeure* defence for the developer.

Learned senior counsel also places before us paragraph 7 of *DLF* (supra), where it was categorically held that it is evident that a delay in the approval of building plans is a normal incident of a construction project and a developer in the position of the appellant therein would be conscious of these delays and cannot set this up as a defence to a claim for compensation where a delay has

been occasioned beyond the contractually agreed period for handing over possession.

It is next contended by learned senior counsel that it will be evident from the conduct of the parties that the parties themselves construed the timeline stipulated for obtaining initial approvals to be mandatory and not coming within the *Force Majeure* clause. It is such perception of the parties, it is argued, which prompted the appellant themselves to apply for extension of the timeline on several occasions. Although initially such timelines were extended, the last extension was up to February 11, 2024, beyond which the same was refused. As such, subsequently the agreement itself was formally terminated.

It is pointed out from the several correspondence between the parties that on all occasions after the expiry of the timeline in question, the respondents made their stand specific to the effect that the discussions which would be held and were being held after the expiry of the timeline were without prejudice to the rights and contentions of the parties. As such, it is argued that the so-called subsequent negotiations were not 'negotiations' in the true sense at all, but merely a consideration by the respondent of the further requests for extension made by the appellants.

Learned senior counsel further argues that the reliance of the appellants on the 2005 Urban Land Ceiling permission cannot be relied on, for the simple reason that the same was granted for the limited purpose of development of the portion of the property in question where the club itself is situated and cannot extend to subsequent development of a residential building on a different portion of the property.

The said stand is further sought to be strengthened by senior counsel for the respondents by relying on the portion of the agreement where the appellants, knowing fully well about the previous permission of 2005, agreed afresh to obtain clearances, including Urban Land Ceiling clearances as well.

Thus, it is argued that the learned Trial Judge, in any event, was justified in refusing ad interim injunction.

Learned senior counsel further argues that the appeal which has been preferred against the order dated June 20, 2024 is not maintainable at all, since there was no occasion of even any deemed refusal, as no prayer for ad interim injunction was made at all on the said date by the plaintiffs /appellants. As such, the appeal preferred before this Court is not maintainable since merely affidavits were directed and there was no judgment passed on the said date.

Insofar as the first challenge to the initial refusal of ad interim injunction is concerned, the appeal against the same is also not maintainable according to the appellants, since at the said instance, the ad interim injunction prayer had been refused ex parte. Subsequently, on June 20, 2024, the matter having come up in the presence of the defendants/respondents, the ex parte character of the order / prayer was lost. As such, the initial order having merged into the subsequent orders and in view of the pendency of the injunction application itself for being heard now, which application has been fixed for hearing and affidavits directed to be exchanged, nothing remains in the challenge against the initial refusal of the ex parte ad interim injunction.

Heard learned counsel for the parties.

Taking first thing first, we deal with the objection as to maintainability at the outset.

Insofar as the challenge against the order dated June 20, 2024 is concerned, we find substance in the contention of learned senior counsel for the respondents inasmuch as we do not find any prayer for ad interim injunction having either made or renewed on the said date. The appellants had merely sought for adjournment and the Court had granted leave to file affidavits.

Moreover, in view of the prior refusal of ad interim injunction vide order dated June 6, 2024, there was no occasion for making the self-same prayer afresh, since the principle of res judicata operates at the same level. Although the ad interim refusal would not be binding at the final hearing of the injunction application, at the same stage, the self-same prayer could not have been made on June 20, 2024, before the injunction application was finally heard out. As such, we do not find that any rights of the parties were decided by the order dated June 20, 2024, to prompt us to entertain an intra-court appeal against the said order.

Thus, **APOT No. 241 of 2024 is dismissed as not maintainable without any order as to costs.**

However, insofar as the challenge against the initial ex parte ad interim refusal of injunction is concerned, we find that the same is maintainable, since, as the injunction application has not yet been heard out, the ad interim stage of the matter has not yet culminated in a final order of grant/refusal of temporary injunction.

While construing the agreement, which is the genesis of the issue between the parties, we find certain important definitions being given there.

The most important of those is the definition of *Force Majeure* as provided in Clause 1 (xvi) of the said agreement. The relevant portions of the definition is that *Force Majeure* shall mean any event or combination of events or circumstances which are “beyond the control of a party, which cannot be prevented or caused to be prevented and which materially and adversely affect a party's ability to perform obligations under the agreement”.

Certain instances have been given there. Two of such instances are germane in the present context. In sub-clause (f), non-functioning of any existing or new appropriate Government authorities due to any reason whatsoever has been mentioned one of the instances of a *Force Majeure* situation. Again, sub-clause (h), which is a residuary provision, stipulates that any other event or circumstance which is beyond the control of the parties shall also be construed as *Force Majeure*.

In the present context, we find that in clause 19.2 of the agreement, it is stipulated that in the event the Initial Approvals are not obtained within a period of 18 months from the Effective Date or the owners do not receive the security deposit and the annual payments as per the timelines stated in the agreement, *subject to delays attributable to any Force Majeure events*, the owners shall have the right to terminate the agreement.

In the case at hand, although subsequent extensions have been given by the respondents at their discretion, ipso facto, grant of such extensions does not

extend the period of 18 months otherwise than at the discretion of the respondents and/or render the same to be merely directory.

To constitute a valid defence against not meeting the timeline, the applicants are required to be armed with an attribution of the delay to any *Force Majeure* event, which in turn is defined in Clause 1(xvi) of the agreement.

As discussed above, the relevant portion of the said provision would be sub-clause (f). However, in our considered opinion, contrary to the arguments of the appellants, non-functioning of a Government authority cannot be construed to include partial functioning or laches on the part of the Government authorities. It is nobody's case here that the West Bengal Heritage Commission is not functioning or was not functioning during the relevant period. The appellants contend that despite having applied to the commission, it sat tight upon the matter and although virtual approval was obtained, the matter got stuck up at the office of the Mayor-in-Council of the Kolkata Municipal Corporation. Be that as it may, we cannot read non-functioning of the authority into such inaction of the authority, at least on a prima facie footing.

Since a specific instance in respect of non-functioning of an authority has been given as an example within the *Force Majeure* definition, while dealing with the present defence which pertains to the functioning of an authority itself, we cannot go beyond the said sub-clause, that is sub-clause (f), and resort to the residuary provision in clause (h) and look in a blanket fashion to fish out any other event beyond the circumstance of the parties as a *Force Majeure* event.

Even in clause 19.2 of the agreement, the delays, to constitute a valid defence, have to be attributable to the *Force Majeure* events as provided in the

relevant definition clause. Thus, we do not find that delay simpliciter on the part of the authority, without being related to total non-functioning of the concerned Government authorities, would bring the appellants within the ambit of the defence of *Force Majeure*.

The ratio laid down in *DLF Home Developers Limited (supra)* and *Vidya's* case is also squarely applicable, since the present dispute arises out of a development agreement which was entered into by the appellants/developers with their eyes fully open and they took a calculated business risk, taking the responsibility of obtaining the necessary initial approvals despite being fully aware of the procedural wrangles involved in obtaining permissions and approvals from the Government and quasi-Governmental authorities.

Hence, prima facie, we do not find much force in the *Force Majeure* defence of the appellants.

In so far as the non-compliances are concerned, we give this much to the appellants that in so far as the Urban Land Ceiling compliance is concerned, an arguable case has been made out by the plaintiffs as to whether the 2005 permission could extend to or be read as a permission for the purpose of the present development agreement. Although strong arguments have been made on both sides on the said issue, such position undoubtedly lends the character of a triable issue to the said question.

However, in so far as the Heritage Commission part of the compliances is concerned, it is an admitted position that no such approval has yet come forth, for whatever reason.

The other bone of contention is the subsequent “negotiations” between the parties. However, from the correspondence between the parties throughout the subsequent period after the expiry of the stipulated 18 months as per Clause 19.2, we find that the respondents, at each stage, categorically mentioned that they were ready to discuss the matter but without prejudice to their rights and contentions. In fact, in the letters as annexed at pages 357 and 372 of the present stay application, we find that the respondents minced no words in expressing their intention that they were not extending the timeline beyond February 11, 2024 and as such, we cannot say that after the said period, there was any further possibility of compliance within the contemplation of Clause 19.2.

That apart, the agreement was also formally terminated subsequently in pursuance of Clause 19.2.

Hence, merely by virtue of subsequent correspondence, the colour of a ‘negotiation’, which would dilute the rigour of Clause 19.2 insofar as the non-compliance of the timeline for obtaining initial approvals is concerned, cannot be attributed to the conduct of the respondent.

Thus, on a prima facie basis, we find that even otherwise, although the order dated June 6, 2024 was somewhat wanting in detailed reasons, the conclusion arrived at by the learned Single Judge was justified in law and in facts even at the ex parte ad interim stage.

Hence, we do not find any need or scope of interfering with the impugned order dated June 6, 2024, particularly within the limited window of an intra-court Letters Patent appeal.

Accordingly, **APO 92 of 2024 is also dismissed.** The connected application being GA 1 of 2024 also stands disposed of accordingly.

Needless to say, we make it abundantly clear that we have not entered conclusively into the merits of the contentions of the parties insofar as the final hearing of the injunction application and any further stage of the suit is concerned. All the observations rendered above are only tentative, arrived at for the limited purpose of adjudicating on appeals at the ad interim stage of the injunction application, and shall not be considered as binding at any further stage of the injunction application or the suit.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)

(UDAY KUMAR, J.)