

Bombay High Court M/S. Gurudev Developers vs Kurla Konkan Niwas Chs
Ltd on 20 February, 2013 Bench: R. S. Dalvi jsn 1 S No.819_1992

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

SUIT NO.819 OF 1992

M/s. Gurudev Developers	-	Plaintiffs
V/s.		
Kurla Konkan Niwas CHS Ltd.,	-	Defendant

Mr. S.H. Mishra, Adv. for the Plaintiffs.

Mr. V.L. Desai, Adv. for the Defendants.

CORAM : MRS. ROSHAN DALVI, J.

Date of reserving the Judgment	: 7th February, 2013
Date of pronouncing the Judgment	: 20th February, 2013

J U D G M E N T

1. The Plaintiff has sued for specific performance of the agreement between the Plaintiff and the defendant society dated 18 th January, 1985 and for declaration that the termination of the agreement dated 21st January, 1992 is illegal. The Plaintiff has also sued for damages of Rs.1,83,07,410/- in the alternative to the relief of specific performance. The Plaintiff was appointed the builder / contractor to construct the buildings of defendant society under the agreement dated 18th January, 1985. The Plaintiff put up certain plinth work. The Plaintiff has also put up certain pillars. Thereafter no construction has been put up by the Plaintiff. The defendant society terminated the contract. The defendant gave it to another contractor. That contractor has completed the buildings of the defendant society.

2. The agreement between the parties and the correspondence that issued thereafter is admitted. The claim of the Plaintiff that he has put up construction other than the above is denied. Construction to the jsn 2 S No.819_1992 extent of the plinth and 27 pillars is also admitted. The case of specific performance is resisted under the ground that another contractor has constructed the buildings of the society. The case of damages is refuted. It is for the Plaintiff to prove the damages, if any, suffered. Based upon the aforesaid pleadings following issues came to be framed by Justice Ganoo on 13th August, 2008 which are answered as follows: I S S U E S 1 Do the Plaintiffs prove that Plaintiffs is a partnership Yes firm registered under the Indian Partnership Act? 2 If answer, to Issue No.1 is in the negative whether the Not suit is maintainable? required ig to be answered 3 Do the Plaintiffs prove that the termination of the suit No agreement by the defendants through their advocate's letter dated 21st January, 1992 is illegal? 4 Do the Plaintiffs prove that they are entitled to specific No performance of agreement dated 18th January, 1985? 5 Do the Plaintiffs prove that they are entitled to recover No. damages to the tune of Rs.1,83,07,410/- from the except for defendants in the event of the Court coming to the Rs.4 lacs. conclusion that the plaintiffs are not entitled to specific performance of said agreement? 6 Do the Plaintiffs prove that after the termination of the Not suit agreement defendants had awarded the construction required project to M/s. Universal Developers on 17 th September, to be 1994? answered 7 If the answer to the Issue No.6 is in the affirmative Not whether the plaintiffs are entitled to specific required performance of the suit agreement? to be answered 8 Do the defendants prove that the suit is not maintainable No for want of notice under Section 164 of the Maharashtra Co-operative Societies Act, 1961? 9 What order? As per final order.
3. The Plaintiff has examined himself and another witness who jsn 3 S No.819_1992 has sought to corroborate the Plaintiff's evidence. The defendants have not examined any witness. It is for the Plaintiff to prove the case of damages. From the oral and documentary evidence the issues would have to be decided. ISSUE NOS. 1 & 2.
4. The Plaintiff has tendered the certified extract of the Registrar of Firms of the Plaintiff's. It is a public document. It is required to be tendered across the bar. The certification of the plaintiff firm is shown. The defendant contends that there were further partners and the entries in that in respect of were not made. The court is not concerned with all these aspects whilst considering maintainability. The court has to only see that the initial firm is registered or not. That is shown to be registered. Hence Issue No.1 is answered in the affirmative. The suit is maintainable and therefore, Issue No.2 is not required to be answered. ISSUE NOS.3 & 4.
5. The Plaintiff has sued for specific performance. Under the agreement the Plaintiff has to construct five buildings. The Plaintiff has not been able to

construct. The defendants initially delayed the construction because they handed over a wrong plot of land to the Plaintiff. The parties had dealings with MHADA after which a separate plot was allotted and thereafter only the Plaintiff could construct. The initial delay, if any, is, therefore, not on account of the Plaintiff. Under clause 12 of the agreement dated 18th January, 1985 the Plaintiff could commence the work only thereafter when the sanctioned plans were available. The defendants however, have not much dispute about that fact. What they contend is that the Plaintiff did not carry out work thereafter. The work was slow. There has been a lot of correspondence jsn 4 S No.819_1992 between the parties which is relied upon by the Plaintiff itself.

6. The Plaintiff contends that defendant appointed another Architect. That also took time. The Plaintiff thereafter had to contend that Architect. This also not main reason for the termination of the Plaintiff's contract. It is the bills of the Plaintiff submitted by the Plaintiff for which payments have to be made with which the parties have had disputes. The bills have not been passed by the Architect.
7. The letter of termination challenged by the Plaintiff dated 21st January, 1992 shows no progress even in the construction even after seven years of the execution of the agreement. It mentioned that the Plaintiff did not have financial capacity to construct and complete construction. It sets out that after the execution of the agreement dated 18th January, 1985 followed by the Power of Attorney also executed on 18th January, 1985 all the other documents and the writings were also given to the Plaintiff. Yet the construction was not completed seven years after the contract.
8. The Plaintiff has been able to show only the construction of the plinth and 27 pillars. That much construction is admitted by the defendants. In view of the fact that the Plaintiff has not been able to show construction of the completed buildings even seven years after the contract the notice of termination cannot be challenged as illegal.
9. The Plaintiff would not be entitled to get the suit contract specifically performed in a suit filed seven years after the execution of the contract when the contract has been given to another party and the buildings have been constructed. Consequently, Issue Nos.3 and 4 are answered in the negative. ISSUE NO.5
10. It is for the Plaintiff to prove the damages suffered by the Plaintiff. The Plaintiff has absolutely no evidence in the regard. The jsn 5 S No.819_1992 Plaintiff has not shown the expenses incurred by the Plaintiff to the extent of the damages claimed. No evidence of the author of any documents being bills for the expenses incurred by the Plaintiff is led.
11. The Plaintiff has admittedly received Rs.8.33 lacs from the defendant. The initial payment was of Rs.3 lacs. The Plaintiff had to make payment

of Rs.4.25 lacs to MHADA from that amount in view of the discrepancy in the plot allotted to the defendants society. This amount is a part of the expenses incurred by the society so that the Plaintiff could hand over to MHADA. That was paid by the defendant. The remaining amount of Rs.3.08 lacs is the amount thus part paid to the Plaintiff for the plinth work and the 27 pillars put by the Plaintiff.

12. The Plaintiff has not shown precisely how much amount has been sanctioned by the Architect. The Plaintiff has not shown further expenses incurred by the Plaintiff which are stated to have been incurred. The Plaintiff has received Rs.3 lacs and later Rs.3.08 lacs towards the construction put up by the Plaintiff. The Plaintiff would be entitled to a reasonable amount to be paid to the Plaintiff for the work already done.
13. The Plaintiff has admittedly put up the construction up to plinth level on which the remainder of the building was to be constructed. The Commissioner's report relied upon by the Plaintiff shows 27 pillars of cement concrete cast by the Plaintiff aside from the plinth level, which is a fact fairly admitted by the defendant. The Plaintiff also claimed that the Plaintiff has put up boundary wall around plot. That is also a construction which would enure for the benefit of the building of the defendants because it would prevent encroachment. The Commissioner's report, however, shows a stone wall on the north side of the plot.
14. The Plaintiff also claimed to have appointed a watchman. For that no documentary evidence for payment to the watchman is jsn 6 S No.819_1992 produced. But it must be accepted that the Plaintiff would be required to guard the property which has not been encroached.
15. Hence the oral case of the Plaintiff of putting up of the construction wall and appointment of watchman and incurring expenses in that behalf cannot be wholly brushed aside.
16. The Plaintiff would be entitled to receive and the defendant would be bound to pay reasonable expenses on account of that much construction under Section 70 of the Indian Contract Act which runs thus :
17. Obligation of person enjoying benefit of non-gratuitous act.— Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
18. The Plaintiff's case for any damages on account of the delay by the defendants cannot be entertained. Even the Plaintiff's claim of bringing material for further construction cannot be entertained in view of absolutely no evidence in that behalf. The Plaintiff would, therefore, be entitled to further amount, aside from Rs.6.08 lacs already received by the Plaintiff,

in a sum of Rs.4 lacs for the work reasonably done and the expenses reasonably incurred by the Plaintiff. Hence Issue No.5 is, therefore, answered in the negative save and except a further sum of Rs.4 lacs. ISSUE NO.6.

19. It is an admitted position that the contract was awarded to Universal Developers by the defendants. Hence Issue No.6 is not required to be answered. jsn 7 S No.819_1992

ISSUE NO.7

20. The question of specific performance of the contract does not arise as has been answered under Issue No.4. Hence this issue is also not required to be answered. ISSUE NO.8

21. The Plaintiff has not given notice U/s.164 of the Maharashtra Co-operative Societies Act, 1961. The Plaintiff had to construct the society building. The business of the society is not to construct the building. The business of the society is for residential purpose since it is residential co-operative society. Hence notice U/s.164 is not required to be issued. The suit is maintainable without such notice. Hence Issue No.8 is answered in the negative. ISSUE NO.9 O R D E R

22. The Plaintiff's suit for specific performance is dismissed.

23. The Plaintiff's suit for declaration that the termination notice is invalid is also dismissed.

24. The Plaintiff's suit for damages is dismissed except to the extent of Rs.4 lacs as reasonable compensation for the work of construction carried out by the Plaintiff.

25. There shall be no other order in the suit.

26. Order and decree accordingly.

27. Drawn up decree is dispensed with.

28. Plaintiff shall be returned the original documents and the copies produced by the Plaintiff upon production of photocopies thereof. (ROSHAN DALVI, J.)