

SUPREME COURT OF INDIA

Bharat Karsondas Thakkar

Vs.

Kiran Construction Co.

C.A.No.2573 of 2008

(Altamas Kabir J.)

15.05.2009

JUDGEMENT

Altamas Kabir, J.

1. Leave granted in Special Leave Petition (Civil) Nos.28267-28268 of 2008 and 28270-28271 of 2008.

“All the Appeals were taken up together for disposal as they arise out of the same set of facts and common questions of law are involved. Five interlocutory applications, being I.A.Nos.4,5,6,7 and 8, filed in connection with the Special Leave Petition, for clarification of the judgment dated 9th April, 2008, passed in Civil Appeal No.2573 of 2008 and for deletion of the names of some of the parties and for filing additional documents, were also taken up for disposal along with the Appeals.

While SLP(C)Nos.28267-28268 of 2008 have been filed by the Official Receiver against the order dated 17th November, 2006, passed by the Division Bench of the Bombay High Court in Appeal No.748/2001 challenging the order dated 21st June, 2001, passed by the learned Single Judge and restoring Notice of Motion No.140/99 for fresh hearing before the learned Single Judge and SLP(C)Nos.28270-28271 of 2008 have been filed by the Vaitys against the same order in Appeal No.747/2001 in Notice of Motion No.2700/99, claiming the self-same reliefs. As indicated hereinabove, three of the interlocutory applications have been filed in Civil Appeal No.2573/2008, for clarification of the Judgment dated 9th April, 2008, passed in Civil Appeal No.2573/2008, disposing of Appeal No.741 of 2001.

Applications have also been filed by the petitioners in both the set of Special Leave Petitions (now appeals) for condonation of delay in filing the same on account of the fact that the subject matter of the said Special Leave Petitions was also the subject matter of SLP(C)No.2328/2007, which was subsequently renumbered as Civil Appeal No.2573/2008, but had remained undisposed of when the appeal against the order dated 16th November, 2006, was finally disposed of by the judgment and order dated

9th April, 2008. There being substance in explanation given for condonation of delay in filing the Special Leave Petition, such delay is condoned.”

2. On 27th May, 1949, the Collector of Thane recorded a grant in favour of Mr. Sowar Ramji Vaity entitling him to lease of lands relating to Survey Nos.83 to 91 in Village Mulund for a term of 999 years. Mr. Sowar Ramji Vaity died in the year 1965, leaving behind him surviving Jagannath, Babu, Vishnu and Bhaskar (hereinafter referred to as 'the Vaitys') as his legal representatives to succeed to his estate. On 1st October, 1973, the Vaitys entered into an agreement to sell their rights and interests in the aforesaid lands to one Mr. K.L. Danani (the Respondent No.44 herein) for a total consideration of Rs.2 lakhs. Under the Agreement, Mr. Danani was required to obtain lease of the suit lands from the Collector in favour of the Vaitys within a period of two years. During the months of April and June, 1974, Mr. Danani constituted a partnership firm with Mr. K.V. Thakkar and Mr. S.S. Thakkar under the name of M/s Swas Construction Company. The Appellant herein, who was then a minor, was admitted to the benefits of the partnership firm. The time for completion of the sale under the agreement dated 1st October, 1973, was extended by two months till after the land was converted to non-agricultural use or the Vaitys made a clear and marketable title to the suit land, whichever was later. It was recorded that M/s Swas Construction Company had been put in possession of the suit lands in part performance of the agreement dated 1.10.1973.

3. In the meantime, the *Urban Land (Ceiling and Regulation) Act, 1976*, was enacted and Mr. K.L. Danani claiming possession under the said Agreement filed a statement with the Urban Land Ceiling Authorities in terms of Section 6(1) of the Act.

“On 12th June, 1979, pursuant to a decision arrived at in April, 1978 the Government of Maharashtra executed a lease in favour of the Vaitys for a period of 60 years. Immediately thereafter, on 18th June, 1979, the Vaitys entered into an Agreement with M/s Modern Development Corporation, the Respondent No.24 herein, granting them development rights in respect of the suit lands. On 24th August, 1979, M/s Modern Development Corporation is alleged to have entered into an agreement with the Respondent No.1, M/s Kiran Construction Company, to transfer its beneficial interests in the suit lands, except for Serial No.91, in favour of the Respondent No.1. Clause 12 of the Agreement specifically required M/s Modern Development Corporation to obtain confirmation from M/s Thakkar & Associates that there was no subsisting agreement for sale in their favour in respect of the property agreed to be sold.”

4. On 18th February, 1980, the Appellant and Mr. K.V. Thakkar filed Suit No.252 of 1980 in the Bombay High Court against Mr. K.L. Danani (the Respondent No.44) and Mr. S.S. Thakkar, inter alia, praying for a declaration that a partnership had existed between them and that Mr. K.L. Danani and Mr. S.S. Thakkar had retired from M/s Swas Construction Company.

5. It appears that in February, 1980, in Notice of Motion No.283 of 1980 filed in the said Suit, Mr. K.L. Danani undertook not to part with possession of the suit lands pending

disposal of the Notice of Motion, which was disposed of on 9th October, 1980, by the Bombay High Court by appointing the Court Receiver over the properties.

6. On 15th May, 1981, the Vaitys terminated the Agreement dated 18th June, 1979, entered into with M/s Modern Development Corporation (the Respondent No.24). This prompted the Respondent No.1 to file Suit No.1578 of 1981 against the Vaitys and the partners of M/s Modern Development Corporation on 7th September, 1981, for specific performance of the purported Agreements dated 18th June, 1979 and 24th August, 1979. On 1st July, 1982, the Bombay High Court passed an order restraining the Vaitys and the partners of the Respondent No.4 from selling, transferring, encumbering, alienating or further parting with possession of the suit lands pending disposal of Suit No.1578 of 1981. After the death of Mr. Babu Vaity on 1st May, 1994, all the parties to Suit No.252 of 1980, entered into a comprehensive settlement with the Vaitys, Mr. K.L. Danani (the Respondent No.44) and one Mulchand G. Mehta (the Respondent No.47) and in order to give effect to the settlement, the Vaitys and the Respondent No.47 were joined as defendants in Suit No.252 of 1980. On the very same day, the Bombay High Court decreed the suit on consent terms. Pursuant to the terms and conditions arrived at between the parties, the Respondent No.48 took out Notice of Motion No.140 of 1999 in Suit No.1578 of 1981, praying that the order dated 1st July, 1982, be vacated. The Vaitys also took out Notice of Motion No.2700 of 1999 in the said Suit, praying for the same order. In August, 2000, M/s Kiran Construction Company took out Chamber Summons No.1203 of 2000 in Suit No.1578 of 1981, seeking to amend the plaint so as to join the Respondent Nos.13 to 19 as defendants and also to incorporate a challenge to the decree dated 6.5.1998 passed by the Bombay High Court in Suit No.252 of 1980. The said Chamber Summons was dismissed by the learned Single Judge of the Bombay High Court on 21st June, 2001, and the injunction granted on 1st July, 1982, was vacated. The said order of injunction was also vacated by a common order of even date passed in Notices of Motion No.140 and No.2700 of 1999.

7. Three Appeals were filed by the Respondent No.1 herein before the Division Bench of the Bombay High Court, being Appeal Nos.745, 747 and 748 of 2001, all challenging the order dated 21st June, 2001, passed by the Bombay High Court, vacating the interim order of injunction dated 1st July, 1982.

“The Division Bench of the Bombay High Court allowed all the three Appeals by its orders dated 16th November, 2006 and 17th November, 2006, passed in Appeal No.745 of 2001 in Chamber Summons No.1203/2000 in Suit No.1578/1981 filed by Kiran Construction Company and in Appeal Nos.747 and 748 of 2001 in Notices of Motion Nos.2700 and 140 of 1999 respectively, filed in the said Suit. The amendment of the plaint was allowed and the order of injunction passed on 1st July, 1982, was restored. The present Appeals have been filed against the said orders of the High Court allowing the amendment of the plaint and joining the Respondent Nos.13 to 19 as additional defendants in the suit.”

8. Appearing for the appellants in these appeals, Mr. Mukul Rohtagi, Senior Advocate, submitted that there is no dispute that the lands forming the subject matter of these

proceedings originally belonged to the Vaitys and that on 1st October, 1973, the Vaitys entered into an agreement for sale of the said lands with Mr. K.L. Danani, who later on brought the benefits of the said agreement to M/s Swas Construction Company of which the appellants are partners.

9. It is also not disputed that on 18th June, 1979, the Vaitys entered into a development agreement with M/s Modern Development Corporation which was an unregistered partnership firm. The said partnership firm, in its turn, entered into an agreement with M/s Kiran Construction Company on 24th August, 1979. Mr. Rohtagi submitted that both Modern Development Corporation and Kiran Construction Company had knowledge of the existing agreements entered into by the Vaitys for sale of the lands. It is on account of such knowledge that the Respondent No.1 in its agreement with Modern Development Corporation included a clause that the latter would cause the Vaitys to make out a marketable title to the property, and if they failed to make out a marketable title, all the monies paid to Kiran Construction Company would be returned to it with interest at the rate of 12% per annum. As indicated hereinbefore, the agreement which was entered into between the Vaitys and Modern Development Corporation on 18th June, 1979, was terminated by the Vaitys on 15th May, 1981, prompting Kiran Construction Company to file Suit No.1578 of 1981 in the Bombay High Court in which an interim order was passed by the Bombay High Court restraining the Vaitys and the partners of Modern Development Corporation from selling, transferring or further parting with possession of the suit lands.

10. Mr. Rohtagi submitted that in view of the said order of injunction, on 10th November, 1981, Babu Vaity filed an affidavit in Notice of Motion No.1271 of 1981 indicating that on 15th May, 1981, the Vaitys had terminated the agreement dated 18th June, 1979, with Modern Development Corporation and that a separate agreement had been executed in favour of one Mr. Ashok Kumar Goyal and Mr. Gosalia granting them development rights in respect of the suit lands. Despite the above, on 1st July, 1982, the Bombay High Court passed an order in Notice of Motion No.12671 of 1981 in the suit filed by the Respondent No.1 and restrained the Vaitys and the partners of Modern Development Corporation from selling, transferring, encumbering, alienating or from further parting with possession of the suit lands, pending disposal of the suit filed by the Respondent No.1 herein. Mr. Rohtagi submitted that on 27th March, 1984, the Respondent No.1 was informed by a letter written on behalf of the appellants regarding the claims of the appellants herein, the filing of Suit No.252 of 1980 and the appointment of the Court Receiver who had taken over possession of the suit properties.

11. As indicated hereinbefore, on the death of Babu Vaity, all the parties to Suit No.252 of 1980 arrived at a comprehensive settlement with the Vaitys, the Respondent No.44 and one Mulchand G. Mehta, the Respondent No.47. On the same day, the Bombay High Court passed a decree on the consent terms arrived at between the parties in Suit No.252 of 1980. Mr. Rohtagi submitted that the High Court vide order dated 21st June, 2001, dismissed the Chamber Summons taken out by the Respondent No.1 and also vacated the injunction granted in Suit No.1578 of 1981 on 1st July, 1982. Mr. Rohtagi submitted that the order of

the learned Single Judge was challenged in Appeal and was ultimately set aside and the prayer for amendment of the plaint made by the Respondent No.1 was allowed.

12. Mr. Rohtagi submitted that Kiran Construction Company did not have any privity of contract with the Vaitys. Furthermore, the Vaitys had terminated their agreement with Modern Development Corporation with whom Kiran Construction Company had entered into an agreement and such termination had not been challenged by Modern Development Corporation, particularly since it is an unregistered firm and, therefore, could not sue or be sued under the provisions of Section 64 of the Partnership Act.

“Mr. Rohtagi submitted that when Modern Development Corporation was unable to compel the Vaitys to perform their part of the contract, Kiran Construction Company, whose claim, if any, to the suit properties, was through Modern Development Corporation, could not compel the Vaitys to specifically enforce the contract between the Vaitys and Modern Development Corporation.

Accordingly, the entire exercise undertaken by the Respondent No.1 was but an exercise in futility and the Division Bench while allowing the prayer for impleadment made on behalf of Kiran Construction Company erred in injuncting the Vaitys and also the Thakkars from taking steps to develop the property.”

13. Mr. Rohtagi urged that even the fact that a Receiver had been appointed over the suit properties and the properties were, therefore, in custodia legis had been suppressed, and, in any event, since the properties were in custodia legis, the order of injunction could not have been passed.

“Mr. Rohtagi submitted that since Kiran Construction Company had no privity of contract with the Vaitys and Modern Development Corporation being an unregistered partnership, there was no possibility whatsoever of the suit filed by Kiran Construction Company ever being decreed. For such reason also, the order of injunction passed by the Division Bench was liable to be vacated.”

14. Mr. Rohtagi submitted that from the orders passed by the Division Bench of the Bombay High Court on 17th November, 2006, disposing of Appeal Nos. 747 and 748 of 2001 arising out of the orders passed by the learned Single Judge in Notices of Motion No.2700 and 140 of 1999, it would be evident that the said appeals were allowed merely as a consequence of the order passed earlier on 16th November, 2006, in Appeal No.745/2001 in connection with the Chamber Summons No.1203/2000 taken out by Kiran Construction Company. Mr. Rohtagi submitted that no reasons, other than what has been indicated hereinabove, were given for allowing the said appeals and accordingly, while Civil Appeal No.2573/2008 was disposed of, consequential orders were passed whereby the other appeals were also disposed of.

15. Mr. Rohtagi submitted that since this Court had earlier on 9th April, 2008, affirmed the order of the learned Single Judge and had rejected the Chamber Summons for impleadment,

consequential orders were required to be passed for setting aside the order dated 17th November, 2006, passed by the Division Bench of the Bombay High Court in Appeal Nos.747 and 748 of 2001 and also to vacate the interim order dated 1st July, 1982, passed in Suit No.1578 of 1981 filed by the Respondent No.1 herein.

16. While adopting Mr. Rohtagi's submissions, Mr. Ranjit Kumar, learned Senior Advocate appearing for Respondent Nos.2A to 2E, 3 to 16, 18, 19 and 31 in IA No.6 of 2008, prayed for clarification of the judgment and order passed by this Court on 9th April, 2008, in Civil Appeal No.2573 of 2008 to the extent that as a consequence of the order dated 16th November, 2006, passed in Appeal no.745 of 2001 being set aside, the order dated 17th November, 2006, passed by the Division Bench in Appeal No.747 of 2001 and Appeal no.748 of 2001 were also set aside.

17. Mr. Ranjit Kumar submitted that after the prayer for amendment of the plaint was disallowed by this Court, it was only through inadvertence that consequential orders were not recorded as far as the two appeals are concerned and that when the Vaitys were not before the Court in the suit filed by it, the Respondent No.1 could have no justification for submitting that the interim order passed by the Division Bench of the High Court should be allowed to remain. He also reiterated Mr. Rohtagi's submissions that when there was no privity of contract between the Respondent No.1, Kiran Construction Company, and the Vaitys and its suit was for relief only against Modern Development Corporation, the agreement entered into between Modern Development Corporation and the Vaitys could not be specifically enforced by the said Respondent and the Division Bench of the High Court had committed an error in allowing the interim order of injunction to continue against the appeals.

18. On the other hand, Mr. Buddy A. Ranganadhan, learned Advocate appearing for Kiran Construction Company, urged that the rejection of the prayer made on behalf of the Respondent No.1 for leave to amend the plaint did not mean that the orders prayed for in these appeals would follow as a matter of consequence. It was urged that the judgment delivered by this Court on 9th April, 2008, was only concerned with the challenge to the amendment and that the scope of the appeal was limited to the amendment of the plaint. According to learned counsel, the prayer for injunction was made on account of the decision of the Respondent No.1 to file a separate suit and it was in that context that the prayer for injunction to continue till the hearing of the new suit could be taken up.

“Mr. Ranganadhan submitted that, in any event, at no point of time was any indication given that any argument was to be advanced on the question of remand to the Division Bench.”

19. Mr. Ranganadhan also urged that the prayer for vacating the interim order that had lasted for 16 years should not have been entertained. He submitted that the appeals were misconceived and were liable to be dismissed.

20. From the submissions made on behalf of the respective parties and the materials on record, it is quite apparent that the Chamber Summons No.1203 of 2000 taken out by Kiran Construction Company for leave to amend its suit to incorporate a challenge to the consent decree passed in Suit No.252 of 1980 and also to implead the appellants herein, Mr. K.L. Danani and Mr. Mulchand G. Mehta as defendants in the suit, was heard along with and Notice of Motion No.140 of 1999 filed by the Receiver and Notice of Motion No.2700 of 1999 filed by Vaitys for vacating the order of injunction dated 1st July, 1982, were taken up for hearing together. While Chamber Summons filed by Kiran Construction Company was dismissed, the Notices of Motion filed by the Receiver and the Vaitys were allowed and the order of injunction dated 1st July, 1982, was vacated.

21. Since the three appeals before the High Court were filed by Kiran Construction Company against the orders passed by the learned Single judge on the Chamber Summons and the two Notices of Motion, the Division Bench of the High Court, while considering the said appeals, allowed the prayer for amendment of the plaint and as a consequence reversed the learned Single Judge's order on the two Notices of Motion and remanded the Notice of Motion for fresh hearing.

22. In the Civil Appeal filed by the appellants herein against the three orders passed by the Division Bench, although, by order dated 9th April, 2008, the Appeal was allowed and the order of the Division Bench allowing the amendment prayed for by the Respondent No.1 was set aside, through inadvertence, no orders were passed in respect of the appeals against the orders passed on the two Notices of Motion for vacating the interim order dated 1st July, 1982. It is for clarification of the said order that the interim applications have been filed which are under consideration.

23. Once the prayer for amendment of the plaint to include the challenge to the consent decree passed in Suit No.252 of 1980 was disallowed by this Court, the question of restraining them from dealing with the suit properties over which the Respondent No.1 has no established claim would be completely unreasonable and merely because the same had been in force for a long time, would be no ground to allow the same to continue.

24. Admittedly, as pointed out by Mr. Mukul Rohtagi and Mr. Ranjit Kumar, learned Senior Advocates, there is no privity of contract between Kiran Construction Company and the Vaitys, its claim is, therefore, restricted to Modern Development Corporation alone and is also dependent upon the right of Modern Development Corporation to specific performance of its agreement with the Vaitys. In other words, until and unless Modern Development Corporation is able to establish a right over the suit properties, Kiran Construction Company can have no claim in respect thereof. Furthermore, since the Receiver continues to be in possession of the suit properties and the properties continue to be in custodia legis, Kiran Construction Company cannot ask for possession of the said properties.

25. In our view, the claim attempted to be set up by Kiran Construction Company is highly tenuous and is entirely dependent upon the claim of Modern Development Corporation

which has so far not attempted to establish such claim. In such circumstances it would be wholly inequitable to allow the interim order to continue. The same is accordingly vacated.

26. Accordingly, the appeals filed by the Official Receiver and the Vaitys must succeed and are allowed. Simultaneously, Interlocutory Application Nos.4, 6 and 7 for clarification of the judgment and order dated 9th April, 2008, passed in Civil Appeal No.2573/2008 and Interlocutory Application No.8 for filing additional documents are also disposed of by virtue of this judgment. Further more, the following clerical mistakes have been pointed out in paragraph 7 of the I.A.No. 4 with regard to the judgment dated 9.4.2008 passed in Civil Appeal No. 2573 of 2008:

- a. "In paragraph 2, page 1, line 3, the word "Serial" ought to be "Survey".
- b. The reference to "K.B. Thakkar" in paragraph 2, paragraph 4 and paragraph 11 ought to be "K.V.Thakkar";
- c. The submission at paragraph 21 was in fact the submission made on behalf of the Petitioner and not on behalf of Respondent No.1.; and d. In paragraph 16, page 15, line 1 the word "respondent" is to be read as "Respondent No.1."

Let a Corrigendum be issued with regard to the errors indicated above. As far as Interlocutory Application No.5 for deletion of the names of the Respondent Nos.17, 20, 22, 25(a), 25(b), 25(c), 25(d) and 27, is concerned, the same is allowed at the risk of the appellant.

27. Inasmuch as, these appeals have been taken from interlocutory orders and the suit of the Respondent No.1 is still pending, we make it clear that the observations made in this order are only for the purpose of disposal of the applications for vacating the interim orders and such observations should not influence the learned Trial Court from disposing of the pending suits, in accordance with law.

28. There will, however, be no order as to costs.