SUPREME COURT OF INDIA

Ambalal Sarabhai Enterprise Limited

Vs.

K.S.Infraspace LLP Limited

C.A.No.9346 of 2019

(Ashok Bhushan and Navin Sinha,JJ.,)

06.01.2020

JUDGMENT

Navin Sinha,J.,

SLP (Civil) No.23194 of 2019

1. The present appeals arise from a common order dated 30.08.2019, passed in three separate miscellaneous appeals filed by the appellants before the High Court affirming an order of injunction. K.S. Infraspace LLP Ltd., respondent no.1, filed Special Civil Suit Nos.322 of 2018 and 323 of 2018 before the Court of Principal Civil Judge at Vadodara against the appellants in Civil Appeal No.9346 of 2019 (Ambalal Sarabhai Enterprise) and Civil Appeal No.9347 of 2019 (Haryana Containers Ltd.) respectively, which are sister concerns. The appellant in Civil Appeal No.9348 of 2019 (Neptune Infraspace Private Ltd.) was impleaded as defendant no.2 in the latter suit. The parties shall be referred to by their respective position in the Civil Suit, for the sake of convenience.

2. The plaintiff filed the two suits for declaration and specific performance against the defendant sister concerns with regard to a total area of 19,685 square meters of lands situated in Village Wadiwadi, Subhanpura, District Vadodara in Gujarat. The plaintiff contended that there existed a concluded contract with the defendants after negotiations for sale of the suit lands for a total sum of Rs.31,81,73,076/- and 58,26,86,984/- respectively. The plaintiff had duly communicated its acceptance of the final draft memorandum of understanding (MoU) dated 30.03.2018. Only the formal execution of contract documents remained as a formality. A sum of Rs.2.16 crores had also been paid as advance. The plaintiff was ready and willing with the balance amount. Alternately, it was claimed that there existed a concluded oral contract between the parties. The Defendants had surreptitiously entered into a registered agreement for sale with defendant no.2 on 31.03.2018 and thus the suit and prayer for injunction.

3. The Principal Civil Judge by order dated 18.02.2019 held that by inference the terms and conditions for sale stood finalised by the e-mail dated 29.03.2018 and 30.03.2018. A token

amount of Rs.2.16 crores had already been paid and the plaintiff was ready and willing with the balance amount. Creation of third party rights would lead to further litigation. Thus by an order of temporary injunction the defendants were restrained from executing any further documents including a sale deed or creating further charge, interest or deal with the suit lands in any manner.

4. The High Court by its order dated 30.08.2019 affirmed the order of injunction holding that the communication of acceptance to the draft MoU sent by e-mail dated 30.03.2018 coupled with the exchange of WhatsApp correspondences between the parties amounted to a concluded contract.

5. We have heard learned senior counsel Shri Kapil Sibal, Shri C.U. Singh and Shri Huzefa Ahmadi, appearing on behalf of defendant nos. 1 and 2, who are the appellants before us. Shri Sibal, making the lead arguments on behalf of the defendant sister concerns submitted that they had decided to sell the lands in view of financial stringency and their inability to meet financial commitments inter-alia leading to attachment of immovable properties by the Income Tax Department for dues of Rs.48,74,45,929/- apart from other statutory liabilities, employee related liabilities and business liabilities. The negotiations with the plaintiff did not attain finality but remained at the stage of discussions only. The wavering conduct of the plaintiff to meet the Income Tax liability of the defendants as part of the consideration amount to facilitate sale by lifting of the attachment, left the defendants with no other choice but to negotiate afresh with defendant no.2. The contention that execution of the agreement remained a formality was disputed. This is evident from the alternative contention in the suit that there existed an oral contract.

6. The plaintiff's response of acceptance to the final draft MoU dated 30.03.2018 was belated. The plaintiff was well aware all along that the defendants were negotiating with two others also apart from it. The plaintiff knew before 30.03.2018 that the deal with it was not coming through and that the defendant was going ahead with another. The deal with defendant no.2 was finalised by execution of a registered agreement for sale on 31.03.2018 after defendant no.2 had cleared the Income Tax dues of the sister concerns on 30.03.2018 to the extent of Rs.17.69 crores and Rs.2.20 crores respectively enabling lifting of the attachment orders for the lands by the Income Tax department on 26.04.2018 followed by further payments by defendant no.2 aggregating Rs.45.84 crores till 16.01.2019. A sum of Rs. 36.20 crores, from the sale proceeds has already been utilized by the defendants towards payment of other statutory liabilities and employee related liabilities etc. It was therefore a bona fide action. The plaintiff's e-mail of acceptance of the draft MoU dated 30.03.2018 as claimed, was not sent by it on 31.03.2018 at 07.43 AM but was received by the defendant on 31.03.2018 at 01.13 PM.

7. Despite the full awareness and knowledge as far back as 30.03.2018 and refund through RTGS of Rs.2.16 crores on 31.03.2018 itself, the plaintiff published a public notice only on 03.04.2018 advising all concerned not to deal with the property which was duly replied and refuted by another public notice dated 04.04.2018 published by the defendants. The cause of action in the suit is based on the email dated 30.03.2018 coupled with the public

notice dated 03.04.2018. Acknowledging the refund also on 31.03.2018, it admits the signing of a registered agreement for sale with defendant no.2 on 31.03.2018 but does not make even a whisper of a suggestion why the suit was filed more than 7 months later. In commercial dealings with high stake matters delay is vital. This specific objection on behalf of the defendant taken before the High Court relying on K.S. Vidyanadam & ors. vs. Vairavan, 1997 (3) SCC 1, has been noticed at paragraph 37 of the judgment but does not find any consideration.

8. Reliance was also placed on *Mandali Ranganna and ors. vs. T. Ramachandra and ors*[1]., to submit that the grant of the injunction was contrary to the basic principles governing injunction more so in a suit for specific performance relying on *Mayawanti vs. Kaushalya Devi*[2],.

9. Shri Huzefa Ahmadi, learned senior counsel appearing on behalf of defendant no.2, submitted that it was a bona fide purchaser for value. The plaintiff was well aware of the simultaneous negotiations with it. The defendant no.2 had made substantial payments on 30.03.2018 only after obtaining a written confirmation from the defendant dated 26.03.2018 that it had not signed any other agreement or received payment from another with regard to the subject lands. The registered agreement for sale dated 31.03.2018 was followed by delivery of possession much prior to the institution of the suit. A specific objection with regard to delay was taken in the reply to the injunction application which was not considered.

10. Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the plaintiff, submitted that his clients at no stage had declined to meet the Income Tax liabilities of the defendant sister concerns, as part of the consideration amount. The negotiations were widespread over time both by WhatsApp messages and exchange of e-mails. These collectively have correctly been interpreted to hold a prima facie case in favour of the plaintiff. The terms and conditions of payment, were all finalized which prima facie reflect the existence of a concluded contract. The fact that the e-mail dated 30.03.2018 referred to the enclosure as a draft MoU cannot be decisive as it has to be understood on a cumulative assessment of facts. In any event, the plaintiff had communicated its acceptance without delay and also protested the refund of the advance of Rs.2.16 crores the same day followed by a public notice.

11. The hurried manner in which the defendants proceeded to finalise the deal on 30.03.2018 itself, manifests the desire of the defendants to cause harm to the plaintiff. Defendant no.2 cannot claim to be a bona fide purchaser as it was all along aware of the negotiations taking place between the plaintiff and the defendant sister concerns and that it was at a very advanced stage.

12. Dr. Singhvi framed the question, whether concurrent findings of the Special Civil Judge and the High Court by two detailed well considered orders were such as to warrant interference so as to dissipate the substratum of the suit. In support of his submissions, Dr. Singhvi relied on *Wander Ltd. and another vs. Antox India P. Ltd*[3]*., Brij Mohan and others*

vs. Sugra Begum and ors[4]*., Motilal Jain vs. Ramdasi Devi (Smt.) and ors*[5]*. , Moharwal Khewaji Trust (Regd.), Faridkot vs. Baldev Dass*[6]*, and Aloka Bose vs. Parmatma Devi and ors*[7]*.,*

13. On the aspect of the delay in institution of the suit, relying on Mademsetty Satyanarayana vs. G. Yelloji Rao and ors., 1965 (2) SCR 221, it was submitted that the delay did not induce the defendant to do anything further than that already done earlier, to their prejudice. In any event the plaintiff is ready and willing to pay to the defendant no.2 the amount of the Income Tax dues paid by it and proceed with the contract with the defendant sister concerns.

14. We have been addressed by the counsel for the parties at length, as also have been taken through the several WhatsApp messages and e-mails exchanged. We have also considered the respective submissions. Litigation at the initial stage of injunction, where the claims of the parties are still at a nebulous stage, has stalled the progress of the suit. We are of the considered opinion that at this stage we ought to refrain from returning findings of facts or express any opinion on the merits of the suit, except to the extent necessary for purposes of the present order, so as not to prejudice either party in the suit.

15. Chapter VII, Section 36 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') provides for grant of preventive relief. Section 37 provides that temporary injunction in a suit shall be regulated by the Code of Civil Procedure. The grant of relief in a suit for specific performance is itself a discretionary remedy. A plaintiff seeking temporary injunction in a suit for specific performance will therefore have to establish a strong prima-facie case on basis of undisputed facts. The conduct of the plaintiff will also be a very relevant consideration for purposes of injunction. The discretion at this stage has to be exercised judiciously and not arbitrarily.

16. The cardinal principles for grant of temporary injunction were considered in *Dalpat Kumar vs. Prahlad Singh*[8]*,* observing as follows :

> "5...Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court

considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

17. The negotiations between the plaintiff and the defendant is reflected in approximately 17 e-mails exchanged between them commencing from December 2017 to 31.03.2018. The file size of the attachment to the mails has varied from 48-50-52-48-57-56 KBs indicating suggestions and corrections from time to time. The WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidence-in-chief and cross examination. The e-mails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not. The use of the words 'final draft' in the e-mail dated 30.03.2018 cannot be determinative by itself. The e-mail dated 26.02.2018 sent by the defendant at 11:46 AM had also used the same phraseology. The plaintiff was well aware from the very inception that the defendant was negotiating for sale of the lands simultaneously with two others. The plaintiff was further aware on 30.03.2018 itself that the deal with it had virtually fallen through as informed to the escrow agent. The fact that a draft MoU christened as 'final-for discussion' was sent the same day cannot lead to the inference in isolation, of a concluded contract. There is no evidence at this stage that the acceptance was communicated to the defendant before the latter entered into a deal with defendant no.2 on 30.03.2018 and executed a registered agreement for sale on 31.03.2018. Defendant no.2 paid Rs.17.69 crores and Rs.2.20 crores towards the income tax dues of the defendant the same day, as part of the consideration amount. It is only thereafter the plaintiff purports to have communicated its acceptance to the defendant on 31.03.2018 at 01.13 PM. The prolonged negotiations between the parties reflect that matters were still at the 'embryo stage' as observed in Agriculture Produce Market Committee, *Gondal and ors. vs. Girdharbhai Ramjibhai Chhaniyara and ors*[9]., The plaintiff at this stage has failed to establish that there was a mutuality between the parties much less that they were ad-idem.

18. The pleadings in the suit acknowledge the awareness of the plaintiff of the ongoing negotiations with defendant no.2. The advance of Rs.2.16 crores was refunded to the plaintiff in the evening on 31.03.2018 by RTGS. No effort was made by the plaintiff to again remit the sum by RTGS immediately or the next day. Only a public notice was published on 03.04.2018 refuted by the defendant on 04.03.2018. The suit was then filed seven months later on 01.10.2018. The explanation that the plaintiff waited hopefully for a solution outside litigation as a prudent businessman before finally instituting the suit is too lame an excuse to merit any consideration.

19. In a matter concerning grant of injunction, apart from the existence of a prima facie case, balance of convenience, irreparable injury, the conduct of the party seeking the equitable relief of injunction is also very essential to be considered as observed in Motilal Jain (supra) holding as follows :

> "6. The first ground which the High Court took note of is the delay in filing the suit. It may be apt to bear in mind the following aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property:
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> (i) delay running beyond the period prescribed under the Limitation Act;
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> (ii) delay in cases where though the suit is within the period of limitation, yet:
> (a) due to delay the third parties have acquired rights in the subject-matter of the suit;
>
> (b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief."

20. The defendant no.2, in addition to the dues of the Income Tax department as aforesaid, made further payments to the defendant of Rs.25,44,57,769/- by 16.01.2019 aggregating to a total payment of Rs.45,84,71,869/-. The defendants had also proceeded to utilize a sum of Rs.36.20 crores also and had therefore materially altered their position evidently by the inaction of the plaintiff to institute the suit in time and having allowed third party rights to accrue by making substantial investments. In Madamsetty (supra) it was observed:

> "12 It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

Similar view has been expressed in Mandali Ranganna (supra).

21. We are therefore of the considered opinion that in the facts and circumstances of the present case, and the nature of the materials placed before us at this stage, whether there existed a concluded contract between the parties or not, is itself a matter for trial to be decided on basis of the evidence that may be led. If the plaintiff contended a concluded contract and/or an oral contract by inference, leaving an executed document as a mere formality, the onus lay on the plaintiff to demonstrate that the parties were ad- idem having discharged their obligations as observed in Brij Mohan (supra). The plaintiff failed to do show the same on admitted facts. The draft MoU dated 30.03.2018 in Clause C contemplated payment of the income tax dues of Rs.18.64 crores as part of the consideration amount only whereafter the agreement was to be signed relating back to the date 29.03.2008. Had this amount been already paid or remitted by the plaintiff, entirely different considerations would have arisen with regard to the requirement for execution of a written agreement remaining a mere formality. Needless to state the balance of convenience is in favour of the defendants on account of the intervening developments, without furthermore, inter-a\ia by reason of the plaintiff having waited for seven months to institute the suit. The question of irreparable harm to a party complaining of a breach of contract does not arise if other remedies are available to the party complaining of the

breach. The High Court has itself observed that from the negotiations between the parties that "some rough weather was being reflected between the plaintiff and the defendant ".
The Special Civil Judge failed to address the issue of delay. The High Court noticed the arguments of the defendants with regard to delay in the institution of the suit but failed to deal with it.

22. In *M.P. Mathur vs. DTC*[10], this Court observed:

> "14. The present suit is based on equity.In the present case, the plaintiffs have sought a remedy which is discretionary. They have instituted the suit under Section 34 of the 1963 Act. The discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well-settled principles. Therefore, the court has to consider—the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of the parties and the effect of the court granting the decree. In such cases, the court has to look at the contract. The court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the court will not exercise discretion in favour of the plaintiffs. Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the court has to consider the entire conduct of the parties in relation to the subject-matter and in case of any disqualifying circumstances the court will not grant the relief prayed for (Snell's Equity, 31st Edn., p. 366)...."

23. Wander Ltd. (supra) prescribes a rule of prudence only. Much will depend on the facts of a case. It fell for consideration again in *Gujarat Bottling Co. Ltd. vs. Coca Cola Co*[11]., observing as follows:

> "47....Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest...."

24. The aforesaid discussion leaves us satisfied to conclude that in the facts and circumstances of the present case, the grant of injunction to the plaintiff is unsustainable. Resultantly the orders of injunction are set aside. Nothing in the present order shall be deemed or construed as any expression of opinion or observation by us at the final hearing of the suit which naturally will have to be decided on its own merits. The High Court has already given directions to expedite the hearing of the suit and we reiterate the same.

25. The appeals are allowed.

Judgment Referred.

[1]*(2008)11 SCC 0001*
[2]*(1990)3 SCC 0001*
[3]*(1990) Suppl. SCC 0727*
[4]*(1990) 4 SCC 0147*
[5]*(2000) 6 SCC 0420*
[6]*(2004) 8 SCC 0488*
[7]*(2009) 2 SCC 0582*
[8]*(1992) 1 SCC 0719*
[9]*(1997) 5 SCC 0468*
[10]*(2006) 13 SCC 0706*
[11]*(1995) 5 SCC 0545*