

YUSUF KHAN @ DILIP KUMAR
THROUGH POWER OF ATTORNEY

A

v.

PRAJITA DEVELOPERS PVT. LTD. & ANOTHER

(Civil Appeal No.11093 of 2017)

B

AUGUST 30, 2017

[J. CHELAMESWAR AND S. ABDUL NAZEER, JJ.]

Specific Performance :

Grant of development rights of property in question – By appellant vide agreement dated 23.6.2006 – Jointly to predecessor-in-interest of respondent No. 1 and to respondent No. 2 – As per terms of the agreement, if developers failed to complete the construction within stipulated period, the appellant was entitled to get the construction completed at the cost of developers and on developers' failure to deposit such cost, appellant was further entitled to terminate the agreement – Application u/s. 9 of Arbitration and Conciliation Act by respondent No. 1 (for restraining the appellant from dispossessing respondent No. 1 and for restraining the appellant from creating third party right in the property) dismissed upto Supreme Court – Application u/s. 11 of Arbitration Act before High Court withdrawn by respondent No. 1 with liberty to file a suit – In the meantime agreement dated 23.06.2006 terminated by the appellant – Suit by respondent No. 1 seeking specific performance of the agreement dismissed by High Court – On appeal, held: There is no justification for the demand of specific performance of the agreement – In the ends of justice appellant is directed to deposit an amount of Rs. 20 crores with the Supreme Court to be collected by respondent No. 1 – Respondent No. 1 is directed to hand-over the possession of the property to appellant – The question as to whether respondent No. 1 was entitled to any damages over and above Rs. 20 crores to be resolved in arbitration proceedings – Arbitration and Conciliation Act, 1996 – ss. 9 and 11.

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Disposing of the appeal and miscellaneous application, the Court

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- A **HELD: 1. There is no justification for the demand of respondent No. 1 for the specific performance of the agreement dated 23.6.2006. In the circumstances of the case, permitting the continuance of the suit for specific performance of the agreement which is more than a decade old against a person from whom respondent No. 1 secured the development rights of the property in dispute which ultimately would enable respondent No. 1 to 25 per cent of the monetary value of the development potential as against the right of the appellant who is entitled for 75 per cent of the monetary value of the development potential would be unjust. [Para 21] [697-D-E]**
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- C **2. Having regard to the totality of the circumstances, the ends of justice would be met in this case by directing that the appellant shall deposit an amount of Rs. 20 crores by demand draft to the Registry of this Court within a period of four weeks from today and intimate the same to respondent No. 1. Upon the receipt of such intimation, respondent No. 1 shall withdraw all the security personnel deployed by it and hand over possession of the property in question within a period of seven days from the date of the receipt of the above-mentioned intimation to the appellant. [Para 20] [696-G-H; 697-A]**
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- E **3. In the background of the facts and circumstances of the case whether respondent No. 1 would be entitled for any damages apart from receiving the above-mentioned amount of Rs. 20 crores from the appellant, is a matter which requires some examination. Therefore, the said question is rejected for resolution by arbitration between the appellant and respondent No. 1. The parties are directed to submit the above-mentioned dispute for arbitration in accordance with law. [Para 22] [697-E-F]**
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CIVIL APPELLATE JURISDICTION : Civil Appeal No.11093 of 2017.

- G From the impugned Final Judgment and Order dated 25.07.2016 and modified Judgment and Order dated 05.08.2016 of the High Court of Judicature at Bombay in Arbitration Application No.292 of 2015

WITH

- H M.A. No.629/2017 in S.L.P(C) Nos.7483-7484 of 2016.

Mukul Rohtagi, P. Chidambaram, Shyam Divan, Sr. Advs., Rahul A
Chitnis, Shashibhushan P. Adgaonkar, Chirag Shah, Rana Sandeep Bussa,
Aurupdas Gupta, Ms. Vandana Sehgal, Hardeep Singh Anand, Anand
Daga, Muhammad Ali Khan, Gaurav Gupta, Divyam Agarwal, Akhil
Bhardwaj, Omar Honda, Ms. Sakshi Kotiyal, Vikram Aditya Singh,
Hardeep Singh Anand, R.N. Karanjawala, Ms. Ruby Singh Ahuja, Utsav B
Trivedi, Anupam Prakash, Arvind Chari, Shubham Saigal, Ms. Manik
Karanjawala, M/s Karanjawala & Co., Mahesh Agarwal, Abhinav
Agrawal, Aaditya Pande, E. C. Agrawala, Advs. for the appearing parties.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted in Special Leave C
Petition (Civil) No. 18912 of 2017.

2. The appellant aged about 95 years is also the applicant in
Interlocutory Application No. 75003 of 2017 in Miscellaneous Application
No. 629 of 2017¹ filed in SLP(C) Nos. 7483-7484/2016 filed by the 1st
respondent herein, which stood dismissed by an order of this court dated D
16.03.2016. For the sake of convenience, he is referred to hereafter as
the appellant.

3. The appellant owns landed property admeasuring 2412 sq. yards
in Plot No. 16 of Pali Hill in the village of Dand, Bandra in the city of
Bombay, now called Mumbai. E

¹ Prayer: It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased
to:

- a) That pending the special leave petition, the Respondent No. 1 by themselves,
their servants, agents and/or otherwise howsoever, be ordered and directed to
forthwith remove the security guards posted by them on the said property and
to permit the petitioner to freely enter upon the said property as and when
desired by the Petitioner and Respondent No. 2; F
 - b) That pending the special leave petition, the Respondent No. 1 by themselves,
their servants, agents and/or otherwise howsoever, be permanently restrained
from entering upon or remaining on or using or occupying the said property.
 - c) That pending the special leave petition, the Court Receiver, High Court, Bombay
or some other fit or proper person be appointed receiver in respect of the said
property, with all power under Order XL Rule 1 of the Code of Civil Procedure,
1908, including the power to remove the security guards, agents, servants of the
Respondent No. 1 from the said property, with the help of police, if necessary;
and G
 - d) Pass such further and other orders and/or directions as may be deemed fit and
property by this Hon'ble Court in the facts and circumstances of the case and in
the interest of justice.
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A 4. The appellant entered into an agreement dated 23.6.2006
(hereafter referred to as AGREEMENT) with two companies namely
M/s Sharyans Resources Private Limited (hereinafter referred to as
"SHARYANS") and the 2nd respondent herein, Goldbeam Construction
Private Limited, both companies incorporated under the Companies Act,
B 1956 (hereafter collectively referred to as DEVELOPERS).

5. The substance of the AGREEMENT is that the appellant agreed
to "grant to the DEVELOPERS the right to develop the said property"
and the DEVELOPERS agreed to develop the property on various terms
and conditions specified under the AGREEMENT. It appears from the
C record that there is some single venture partnership agreement between
the two companies (DEVELOPERS). From the huge mass of documents
filed in these appeals, it appears that there are two documents witnessing
such partnership agreement. They are dated 16.6.2006 and 10.12.2008.
The language and content of both the documents is substantially similar
and an interesting fact which is required to be taken note of is that the
D 16th June 2006 document refers to the AGREEMENT dated 23.6.2006.
The complete details of the terms and conditions of the AGREEMENT
are not necessary for the purpose of this appeal.

For the present, it must be noted that under the AGREEMENT,
E the DEVELOPERS agreed to an amount of Rs.10 crores in three
installments as detailed in the AGREEMENT. It is agreed under clause
4 of the AGREEMENT that "the owner shall permit the DEVELOPERS
to enter upon the said property and to commence the development
thereof..." It is agreed under clause 6 that all the necessary permissions/
NOCs/orders which are required to be obtained shall be obtained by the
F DEVELOPERS. The appellant is obliged to cooperate by executing
appropriate documents for the said purpose. Under Clause 17² of the
AGREEMENT, it is stipulated that the "DEVELOPERS shall have the
license to enter upon the said property".

G ² Clause 17. Upon payment of the balance of monetary consideration by the Developers
to the Owners as provided in Clause 3(b) the Owner shall permit and the Developers
shall have the license to enter upon the said Property to develop the said Property to
carry on construction on the said property and for that purpose to do all acts, deeds,
matters and things as may be necessary.

6. Under Clause 31³ of the AGREEMENT, it is provided that the DEVELOPERS shall commence development of the said property and the construction of the building thereof within 30 days from the date of the final amended building plan and complete the construction within a period of 24 months from the date of issue of the commencement certificate. A

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7. The various legal consequences that would flow from the failure on the part of the DEVELOPERS to discharge the obligations under the AGREEMENT are provided under Clause 32 of the AGREEMENT. The crux of the Clause 32⁴ is that in the event of the DEVELOPERS not performing their part of the obligations of completing the construction within the period stipulated in the AGREEMENT, the appellant is entitled to get the construction completed at the cost of the DEVELOPERS. Parties also agreed that such cost be determined by an independent architect of the appellant's choice. Once the cost is determined the appellant is entitled to call upon the DEVELOPERS to deposit such cost with the appellant's advocates and solicitors within a period of three months from the date of receipt of intimation of the cost. If the DEVELOPERS make such a deposit, the appellant is entitled to have the construction completed through "independent contractors" "at the risk and cost of the DEVELOPERS". In the event of the DEVELOPERS failing to make such a deposit, the owner is entitled to terminate the AGREEMENT. C D E

³ Clause 31. The Developers shall commence the development of the said property and construction of buildings thereon within thirty days from the date of sanction of the final amended building plans and complete the development and construction of all buildings in all respects as provided herein and make the buildings fit and ready for occupation and the Developers shall apply for issue of Building Completion Certificate and pending the issue thereof for issue of Occupancy Certificate of each of the buildings within a period of 24 months from the date of issue of commencement certificate of development. F

⁴ Clause 32(A)(a). If the Developers failed to complete within the item stipulated hereinabove the construction of the Owner's lot of premises in any building under construction, the Owner shall be entitled to get the cost of completion of the alliance work of construction of such entire building including the Developer's Lot of premises determined by an independent Architect and thereafter the owner shall intimate to the Developers the estimated cost so determined by such independent Architect for completing the construction of such entire building as aforesaid. G

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A 8. By clause 33⁵ of the AGREEMENT, the parties agreed that any dispute arising out of the breach of any one of the various clauses enumerated thereunder shall be resolved by arbitration. It is further provided that any dispute arising out of the termination of the AGREEMENT invoking Clause 32(A), shall not be the subject matter of any arbitration.

B 9. M/s Prajita Developers Private Limited, the petitioner in the disposed of SLP(C) Nos.7483-7484/2016 and the 1st respondent in the present appeal (hereafter PRAJITA) claims to be the assignee of M/s Sharyans Resources Private Limited. The terms of the assignment are said to be evidenced by the document "Deed of Assignment" dated C 20.4.2010 confirmed by the appellant and the 2nd respondent.

D 10. A number of complicated arrangements were entered into in different combinations at different points of time between the appellant, the DEVELOPERS and some third parties to the AGREEMENT, who are otherwise said to be related to the appellant, the details of which we do not propose to mention in this order.

E 11. The first respondent filed an application (No.829 of 2015) under Section 9 of the Arbitration & Conciliation Act, 1996 (hereafter referred to as ARBITRATION ACT) for an injunction restraining appellant from dispossessing respondent no.1 and also an injunction restraining the appellant from creating any third party right, title or interest in the said property. Initially some ad-interim orders were passed in the said application, but the application itself was eventually dismissed on 14.01.2016.

F 12. PRAJITA carried the matter in an intra-court appeal (No.74/2016) which also came to be dismissed by a judgment dated 04.03.2016. It is recorded therein;

G ⁵ Clause 33. The provisions contained in Clauses 1A, 2, 7, 8, 12, 13(A), 8c(B), 16, 17, 18, 20, 21, 23, 24(a) to (c) 25, 26, 27, 28, 29, 31, 32(A)(B), 34, 35, 35(B), 8c 37 hereof the basic and essential terms of this Agreement and in case of any breach of the same it shall be referred to Arbitration as provided in Clause No.40 before termination of this Agreement on account of such breach. **The termination on account of breach of this Development Agreement as provided under Clause 32(A) above shall not be the subject matter of any arbitration as aforesaid and the parties will be entitled to exercise their respective rights under the said Clause 32(A) above.**

“Para 7 ... Admittedly, as per the agreement, the development was supposed to commence within 30 days and should be completed within a time period of 12 months from the date of IOD/Commencement Certificate. **The plans were approved on 2 January 2008 and CC was obtained 22 September 2008. No steps to initiate even construction were taken.** Admittedly the development of the remaining was not completed before September 2011 – even the foundation was not laid, except some piling work with two columns. **The position remained same till the year 2013-2014.** The said position of 2013 and 2014 still **remained same till this date.** In the background, such construction/development contract so entered into by Respondent No.1/owner to develop his property as a owner within his lifetime considering his age. The agreement clause itself shows that time was an essence of the contract to complete the development so that all the parties including the **Appellants/Petitioners would get his 25% share after completion of the construction at this costs.** The Appellants/Petitioners entitlement was only after completion of the development. The remaining 25% was admittedly of Gold Beam. In the remaining 50% area, the Appellants and/or Gold Beam and/or Sharyans had no right whatsoever. Their rights/interest/entitlement was also subject to the development and construction for the development potential area. The Developers could not even obtain permission, NOC, though obtain re-validation of CC till the year 2013. **The Sharyans and his assignee/Petitioner/Prajita, therefore, failed to develop the property further as per the agreement.”⁶**

Aggrieved thereby, PRAJITA carried the matter in SLP (No.7483-7484 of 2016) to this Court which was dismissed on 16.03.2016.

13. During the pendency of the abovementioned proceedings, on 14.09.2015, PRAJITA filed an application (No.292 of 2015) **under Section 11** of the ARBITRATION ACT praying that the dispute between the parties be referred to a Sole Arbitrator to be appointed by the High Court.

⁶ Para 7 of the judgment of the High Court in Arbitration Appeal (L) No.74 of 2016 at page 208 of the Special Leave Petition (Civil) No.18912 of 2017.

A 14. The Arbitration Application No.292 of 2015 was disposed of as withdrawn by an order of the Bombay High Court dated 25th July, 2016. Subsequently, another order dated 5th August, 2016 came to be passed in the said matter. The relevant portion of the order reads as follows:

B “The learned Advocate appearing for the Applicant on instructions seeks to withdraw the above Arbitration Application as the Applicant is desirous of filing a Suit. The Arbitration Application is disposed of as withdrawn with liberty as sought. However, it is clarified that if the Applicant files a Suit, the same shall be decided on its own merits and all contentions of the Respondents including their contention that the Suit would not be maintainable, are kept open”.

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Aggrieved by the order, the instant Civil Appeal (arising out of SLP (Civil) No.18912 of 2017) is filed.

D 15. On 8.10.2015, the appellant terminated the AGREEMENT and informed the same to PRAJITA by issuing a notice through his lawyer. Relevant part of the notice is as follows:

E “In view of the above, we hereby terminate the development agreement dated 23rd June 2006. And we call upon you to remove yourself from the said property, with immediate effect, otherwise, our client will be taking appropriate action against you.

F Our client reserves his right to claim damages for not carrying out the activity of the construction on the said property and/or completing the work of construction within the stipulated time and causing severe hardship to our client.”

We are informed that subsequently PRAJITA filed a Suit bearing No.295 of 2016 on 28th September 2016 in the Bombay High Court on its Ordinary Original Civil Jurisdiction praying *inter alia*:-

G “a) That this Hon’ble Court be pleased to declare that the Development Agreement dated 23rd June 2006 (being Exhibit “C” hereto) is valid subsisting and binding upon the Defendant No.1;

b) That this Hon’ble Court be pleased to declare that the purported termination notice dated 8th October 2015 issued

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by the Defendant No.1 (being Exhibit “HH” hereto) is bad in law and contrary to and precluded by the specific terms of the Development Agreement dated 23rd June 2006; A

- c) That this Hon’ble Court be pleased to pass a Decree directing the Defendant No.1 to specifically perform his obligations under the Development Agreement dated 23rd June 2006.: B

It is not necessary to mention the various other prayers made in this Suit except to note that there are some more prayers.

16. It appears that another two arbitration petitions are pending before the Bombay High Court. It is stated in Para 17 of the Interlocutory Application No. 75003/2017: C

“As on date, the Petition (under Section 9 of the said Act) filed by the Respondent No.1/Applicant, before the Bombay High Court, being Arbitration Petition No.697 of 2016, and the Application (under Section 11 of the said Act), filed by the Respondent No.1/Applicant, before the Bombay High Court, being Arbitration Application No.234 of 2016, are pending hearing and final disposal.” D

The details of those petitions are not readily available from the record placed before us. E

17. The following undisputed facts emerge:

1. The appellant granted to the DEVELOPERS under the AGREEMENT of 23rd June 2006 the “right to develop” the property in question; F
2. Under the AGREEMENT, the appellant is entitled to 50% of the “Development potential” and the DEVELOPERS jointly are entitled to the balance 50% of the “development potential”.
3. Between the two companies which jointly constituted the DEVELOPERS, each company is entitled to 50% of that portion of the “development potential” which falls to the share of the DEVELOPERS; G

In other words, the share of SHARYANS is only 25% of the “development potential”;

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A 4. It is agreed between the parties that the construction must be completed within 24 months from the date of the issue of the commencement certificate of development, subject to some exceptions;

B 5. M/s PRAJITA is not the original party to the AGREEMENT but stepped into the shoes of M/s SHARYANS on 20.04.2010 under a deed of assignment.

6. As on date, no construction worth mentioning at all is made, not to mention about completing the construction;

C 18. The background of the above-mentioned facts; When these matters were initially listed before us on 31st July, 2017 while adjourning the matter to 21st August, 2017, we called upon the learned senior counsel appearing on either side Shri Mukul Rohatgi, appearing for the appellant and Shri P. Chidambaram, appearing for PRAJITA to explore the possibility of an out of court settlement to give a quietus to the entire litigation. When the matter was listed on 21st August, 2017, on behalf of the appellant, it is stated by Shri Rohatgi that the appellant has in fact received so far an amount of Rs. 8.5 crores approximately from PRAJITA and its predecessor in interest. The appellant is willing to pay an amount of Rs. 20 crores to PRAJITA in order to have an undisturbed possession and peaceful enjoyment of the property in question. According to the appellant, PRAJITA has posted armed guards around the property in question preventing the appellant from entering the property.

F 19. On the other hand, Shri Chidambaram appearing for PRAJITA submitted that PRAJITA is not agreeable for the settlement of the dispute on the terms offered by the appellant and since PRAJITA has rights acquired by the deed of assignment etc. referred to earlier in the property in question, it posted guards to protect the property in question from encroachment but not to prevent the appellant in any manner from visiting the property.

G 20. Having regard to the totality of the circumstances, we are of the opinion that the ends of justice would be met in this case by directing as follows:-

The appellant shall deposit an amount of Rs. 20 crores by demand draft to the Registry of this Court within a period of four weeks from today and intimate the same to PRAJITA. Upon the receipt of such

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intimation, PRAJITA shall withdraw all the security personnel deployed by it and hand over possession of the property in question within a period of seven days from the date of the receipt of the above-mentioned intimation to the appellant in the presence of the Commissioner of Police, Mumbai or any other senior police officer subordinate to the Commissioner of Police, Mumbai to be nominated by the Commissioner of Police.

The Commissioner of Police or his nominee shall draw a Panchnama of the fact of the handing over of the property by PRAJITA to the appellant and file the same in the Registry of this Court within a week from the date of the handing over of the possession.

Upon the filing of the Panchnama with the Registry of this Court, PRAJITA shall be at liberty to withdraw the amount of Rs. 20 crores deposited by the appellant pursuant to this order.

21. We do not also see any justification for the demand of the PRAJITA for the specific performance of the agreement dated 23.6.2006. In the circumstances of the case, we are of the opinion that permitting the continuance of the suit for specific performance of the AGREEMENT which is more than a decade old against a person from whom PRAJITA secured the development rights of the property in dispute which ultimately would enable PRAJITA to 25 per cent of the monetary value of the development potential as against the right of the appellant who is entitled for 75 per cent of the monetary value of the development potential would be unjust.

22. The background of the facts and circumstances of the case whether PRAJITA would be entitled for any damages apart from receiving the above-mentioned amount of Rs. 20 crores from the appellant is a matter which requires some examination. We therefore, deem it appropriate to refer the said question for resolution by arbitration between the appellant and PRAJITA. We, therefore, direct that the parties shall submit the above-mentioned dispute for arbitration by Hon'ble Shri Justice P. Venkatarama Reddy, former Judge of this Court in accordance with law. Registry is directed to communicate this Order to Hon'ble Shri Justice P. Venkatarama Reddy.

Civil Appeal and Miscellaneous Application are disposed of accordingly.