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Decided on : 07.11.2015

Duration : Y. M. D.

02 06 08

IN THE COURT OF 2nd ADDL. JUDGE SMALL CAUSES COURT &**JT. CIVIL JUDGE S.D., PUNE, AT : PUNE.****AT : PUNE.****(Presided over by N.G. Shukla)****Spl.Civil Suit No.606/2013****Exh.No.**

PLAINTIFF: **Mr. Gopal Mukund Chandorkar,**
Age – 78 Years, Occu. - Architect,
R/at – Plot No.5, Aparanand Society,
Anand Nagar, Sinhagad Road,
Pune – 411 051.

Versus

DEFENDANT : **Mr. Bapusaheb Dnyaneshwar Paigude,**
Proprietor of Paigude Builders,
Age – 43 years, Occu. -Promoters & Builders,
Add :- Office No.206, Siddharth Towers,
2nd Floor Survey No.12/3B,
Near Sangam Press, Kothrud,
Pune – 411 029.

Shri.R.B.Minde, Advocate for the Plaintiff.

Shri. M.S.Hartalkar, Advocate for the Defendant.

Suit For Declaration, Cancellation of
Documents and Permanent Injunction:

J U D G M E N T**(Delivered on : 07.11.2015)**

1] This suit is filed for declaration, cancellation of the development agreement and power of attorney and permanent injunction.

2] Plaintiff's case briefly stated as below :

Plaintiff is owner and in possession of suit property one Plot of land adm. 632 sq. meters, out of S.No.114/3/2, within the boundaries well mentioned in plaint para no.1 (hereinafter referred as suit property). Defendant is promoter and builder carrying the business by name and style as "Paigude Builders" being proprietor thereof. Father of defendant is close friend of plaintiff. Plaintiff and defendant entered into development agreement and power of attorney for development of the suit property on 3.9.2007 and thereby plaintiff handed over possession of the suit property to the defendant for development purpose. Both the documents are registered at sr.no.5643 and 5644 of 2007 in the office of Sub-Registrar.

3] The main terms and conditions of the development agreement were as under :

- i] In consideration of development rights the defendant has agreed to handover 45% of salable area on each floor of construction work in proposed construction to the plaintiff.
- ii] The defendant has agreed to make construction on the suit property as per rules and at his cost and consequences.
- iii] The defendant has agreed to complete the proposed construction and handover the possession of 45% of salable area on each floor of construction therein, within the period of 18 months from the date of sanction of construction plan.
- iv] The defendant had agreed to pay Rs.17,00,000/- being security deposit to the plaintiff. The defendant had further agreed to pay Rs.11,00,000/- out of the said total security deposit within the period of 4 months from the date of sanctioning of plan.

4] It is further contention of plaintiff that, defendant had got prepared draft copy of the said development agreement and power of

attorney from his lawyer. Plaintiff had full faith on the defendant and in view of that, plaintiff signed the development agreement without reading its contents prior to its execution. Defendant has specifically agreed to develop the suit property within the period of two years from the execution of said document. Defendant failed to complete development of suit property within the period of said two years. In the year 2010 plaintiff met to defendant personally and informed him that he failed to comply the development activity within the period of two years as agreed. At that time, plaintiff was informed by defendant that, the period of development is 18 months from sanction of building plan. Defendant further assured that, he would proceed the development work within short period. Considering the family relations and relying on the assurance given by defendant, plaintiff did not initiate any legal action against the defendant.

5] It is further contended that, defendant failed to get sanctioned the building plan of the proposed building on the suit property within reasonable period as agreed upon. In November 2012, defendant informed to the plaintiff that, the building plan is sanctioned by Pimpri Chinchawad Municipal Corporation on 25.10.2012. It was agreed in between plaintiff and defendant that, defendant would pay remaining amount of security deposit Rs.11,00,000/- on or before 25.2.2013 after sanction of plan. Accordingly, defendant issued three cheques dated 25.2.2013 (two cheques of Rs.4,00,000/- each and one cheque of Rs.3,00,000/-) to the plaintiff. At the time of issuing cheques, defendant had assured the plaintiff that, the cheques would be encashed at any cost. Plaintiff deposited said cheques in his bank account, but the same were returned dishonoured with remark as, "No balance". Thereby, defendant had shown his intention to deceive the plaintiff.

6] It is further contention of plaintiff that, defendant has swindled the plaintiff since beginning and has taken disadvantage of family

relations. In spite of powers being granted to defendant to develop the suit property by executing power of attorney, defendant has not proceeded with the development work of the suit property within time. Building plan ought to have been sanctioned within reasonable period i.e. six months from the date of execution of development agreement. But, defendant took excessive time for getting sanction of building plan and thereby caused heavy losses to the plaintiff. Defendant had no intention to avoid terms and conditions of the development agreement.

7] It is further contention of plaintiff that, municipal corporation imposed BRT Zone in the area where suit property is situated in the year 2010. Thereby, the availability of the FSI is curtailed. Had the defendant started development work by got sanctioning building plan immediately, defendant could have utilized full FSI as per the development control rules. Due to sanction of building plan after imposing BRT zone, it become difficult to consume the entire FSI which is available on the suit property. Thereby plaintiff suffered heavy loss in getting construction as per the FSI which could be got prior to imposing of BRT Zone.

8] It is further contention of plaintiff that, defendant had given draft of supplementary agreement and asked plaintiff to execute the same. However, plaintiff had already orally informed to the defendant that, he had not complied terms and conditions of the development agreement and not complied oral assurance given by him. Hence, plaintiff issued notices dated 18.3.2013 and 9.4.2013 to the defendant and thereby terminated the development agreement and power of attorney dated 3.9.2007. Defendant is failed to comply terms and conditions of the said agreement and therefore, plaintiff is constrained to terminate the development agreement and power of attorney. Plaintiff is entitled to seize a amount of Rs.6,00,000/- received from defendant against the security deposit. The notices issued by plaintiff are returned unserved with remark "insufficient

address". Defendant had not given his true and correct address as per the registered document and thereby tried to avoid service of notices. On all these grounds, plaintiff prayed for declaration that, the development agreement and power of attorney dated 3.9.2007 be declared illegal, null and void and the same may be cancelled. Plaintiff further sought permanent injunction restraining defendant from doing any activity and creating third party interest in respect of suit property on the basis of said development agreement and power of attorney.

9] Defendant filed written statement at Exh.19 and resisted claim and contention in the plaint. He admitted that, the plaintiff is owner of the suit property. He also admitted that, plaintiff has executed development agreement and power of attorney dated 3.9.2007 in his favour for development of suit property. It is also admitted that, in consideration, defendant had agreed to give 45% construction area on each floor to the plaintiff. Defendant denied possession of plaintiff over the suit property. It is contention of defendant that, he received vacant and peaceful possession of the suit property in part performance of the development agreement. Defendant also denied close friendship in between his father and plaintiff. According to him, they are only friends and knows to each others. Defendant further denied that, plaintiff signed the development agreement without reading it's contents. It is contention of defendant that, the draft of development agreement was handed over to the plaintiff and he suggested changes into the draft. Terms and conditions were finalized as per the consensus between the parties. Plaintiff is fully aware about the contents of the development agreement.

10] Defendant further denied that, the development work was agreed to be completed within 18 months from the date of sanction of construction plan. There was no such term no.(iii) as pleaded in para no.3 of the plaint. According to defendant, the construction work was agreed to

be completed within 24 months from the date of sanction of the building plan which could further be extended by six months. It was further agreed that, the salable area of 45% to be allotted to plaintiff was to be decided mutually after sanction of the plan. He admitted that, security deposit of Rs.17,00,000/- was agreed to be paid in three installments i.e. Rs.2,00,000/- on execution of development agreement, Rs.4,00,000/- on sanction of plan and Rs.11,00,000/- within four months of the earlier payment in installments. Plaintiff had suppressed the material terms of development agreement. Plaintiff has suppressed payment of Rs.4,00,000/- made by defendant after sanction of plan to him.

11] It is further contention of defendant that, he had issued three cheques of Rs.11,00,000/- to the plaintiff. He denied that, the amount of Rs.11,00,000/- was agreed to paid on or before 25.2.2013. According to him, said three cheques of Rs.11,00,000/- were issued with condition that, plaintiff would encash the same only after execution of supplementary agreement in respect of selecting flats of 45% salable area to be allotted to the plaintiff. It is further contention of defendant that, delay was caused to get sanction the building plan because of dispute in respect of approach road was arise. There was no approach road to the suit property. Therefore, plaintiff and defendant had mutually decided to withhold the project for some time for non availability of proper assess road and the constructed flats shall not fetch good price. In the mean time, correction deed was executed in between plaintiff and defendant on 22.1.2009 for correction of the number of property as some error in respect of number of property was occurred in the development agreement. Plaintiff had not raised any objection of delay in development work at the time of execution of correction deed and accepting the amount of Rs.4,00,000/- after sanctioned plan in November 2012.

12] It is further contention of defendant that, the cheques of

Rs.11,00,000/- were issued subject to disbursement of the loan which was to be borrowed by defendant and to be sanctioned by Bank of Maharashtra after mortgage of the salable area of 55% to which defendant was entitled for the sale. Defendant had informed to the plaintiff that, unless plaintiff identified and fixed 45% area of construction and execute the supplementary agreement in respect of said 45% area, the bank shall not disbursed the loan to the defendant. Defendant has given clear understanding to the plaintiff that, bank was insisting defendant to provide supplementary agreement. The three cheques of Rs.11,00,000/- were issued to the plaintiff with clear understanding that, he will encash said cheques only after execution of supplementary agreement. Defendant had sent draft of supplementary agreement by E-mail dated 1.1.2013. By letter dated 26.1.2013 defendant called upon the plaintiff to execute the supplementary agreement. Defendant again sent draft of supplementary agreement dated 9.2.2013. By letter dated 18.2.2013, defendant reminded to the plaintiff that, he should execute supplementary agreement before depositing the cheques as the bank was not disbursing the loan amount to the defendant unless supplementary agreement is executed.

13] It is further contention of defendant that, he received letter dated 21.2.2013 from plaintiff wherein plaintiff had informed that, defendant had not fulfilled the terms and conditions of the development agreement and plaintiff will execute supplementary agreement only after fulfillment of the terms and conditions of the agreement. Plaintiff has not given any details as to which terms and conditions of the development agreement were not fulfilled by the defendant. According to the defendant, no terms and conditions were remained to be performed by him. Despite repeated request by the defendant, plaintiff had not executed supplementary agreement for the reasons better known to the plaintiff. Plaintiff had deliberately deposited three cheques without executing supplementary agreement. Plaintiff was not entitled to deposit the three

cheques and to receive the security deposit of Rs.11,00,000/- unless he has executed supplementary agreement.

14] It is further contention of defendant that, he had resolved the problem of approach road with Shri. Bhumkar who had created dispute of the approached road. Defendant had obtained demarcation of the suit property. He had got sanctioned the building plan of the proposed building to be constructed on the suit property. He had also obtained no objections of various authorities. Defendant has started development activity by excavating the land of suit property. He had engaged various professional to carry out the development of suit property. It is further contention of defendant that, he has spent huge amount of Rs.40,00,000/-in starting the development work of the suit property. He had no intention to delay the project. The reasons of delaying the project has been narrated which were within the knowledge of plaintiff. Plaintiff has accepted the amount of Rs.4,00,000/- on 11.11.2012 after sanction of building plan and thereby, plaintiff is estopped from raising the objection of delay.

15] It is further contention of defendant that BRT Zone is declared in the year 2009. Instead of plaintiff, defendant is suffering heavy loss due to non co-operation by the plaintiff. Plaintiff has illegally issued notices of termination of the development agreement. The delay was caused by non co-operation in clearing the dispute of road as well as non execution of supplementary agreement by the plaintiff. Therefore, plaintiff has no right to issue notices of termination of the development agreement on the ground of delay and non payment of security deposit. Plaintiff has filed present suit without cause of any action. Hence, on all these grounds, defendant prayed to dismiss the suit and also prayed for compensatory costs from the plaintiff.

16] On the basis of above rival contentions and submissions, I have framed following issues at Exh.24. After appreciation of evidence, my

finding with reasons to the said issues are noted as below.

ISSUES

FINDINGS

- | | |
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| 1] Does plaintiffs prove that, defendant has committed breach of terms and conditions of development agreement ? | .. In the affirmative. |
| 2] Does plaintiff further proves that, he has validly terminated development agreement? | .. In the affirmative. |
| 3] Is plaintiff entitled for reliefs claimed? | .. In the affirmative. |
| 4] What order and decree? | .. Suit is decreed with cost. |

Reasons

17] Plaintiff adduced evidence on affidavit at Exh.29. Plaintiff closed evidence vide pursis Exh.53. Defendant adduced evidence on affidavit at Exh.55. Defendant examined as many as 7 witnesses at Exh.71 to 75, 93 and 109. Defendant closed evidence vide pursis at Exh.116. I have heard learned advocate Shri. Minde for plaintiff and learned advocate Shri. Hartalkar for defendant. I have also perused written notes of argument filed by them at Exh.120 and 122 and rulings relied by them.

18] Before dealing with the issues, I would like to deal with the submission of learned advocate Shri. Minde for plaintiff in respect of framing other additional issues. According to him, two issues are required to be framed. Issues proposed by him are, (a) Does plaintiff proves that, defendant has intention to cheat or deceive the plaintiff in respect of suit transaction, and (b) Does defendant proves his readiness and willingness to perform his part of contract. Learned advocate Shri. Hartalkar for defendant strongly opposed this submission by submitting that, plaintiff proposed to frame the issues suitable to his argument. There is absolutely no pleading in the plaint in respect of alleged intention of defendant to

deceive the plaintiff. There is no pleading regarding readiness and willingness in the plaint. Hence, no such issues are required to be framed.

19] After going through pleadings in the plaint, it appears to be me that, there is absolutely no pleading regarding alleged intention of defendant to deceive the plaintiff in got executing development agreement and power of attorney. So also, there is no evidence of plaintiff on this aspect. In absence of pleading, much is argued by advocate for plaintiff on this point. Issues are to be framed on material facts pleaded in the plaint and denied by defendant in written statement. In absence of pleading on the intention of deceiving the plaintiff, no such issue in respect of intention to deceive the plaintiff can be framed. Secondly, the suit is filed for declaring the agreement as illegal, null and void and cancellation thereof. The suit is not filed for enforcement of the agreement by the developer. Issue of readiness and willingness would arise only if the suit is brought for enforcement of the agreement. U/sec.16(c) of Specific Relief Act, the personal bar for enforceability of agreement in absence of averment and proof of readiness and willingness is provided. Aspect of readiness and willingness would be considered only if the suit is filed for enforcement of the agreement. In the present case, suit is not filed for enforcement of agreement, but for cancellation of the agreement which seems to be U/sec.31 of Specific Relief Act. Therefore, second proposed issue in respect of readiness and willingness is also not required to be framed.

As to Issues No.1 to 4:

20] Plaintiff has based his case mainly on the ground of breach of terms and conditions of development agreement Exh. 42. According to him, there is inordinate delay in completing the development work. The development work was to be completed within 18 months from the date of agreement. Defendant has not got sanctioned the building plan within reasonable time. Defendant has committed breach of terms by not

completing the development work. The second breach of term alleged is in respect of non payment of security deposit as per the schedule in the agreement. Defendant come with a case explaining the delay on the basis of not having approach road to the suit property and non execution of supplementary agreement to fix the 45% construction to be allotted to the plaintiff, which was precondition to encash the cheques of security deposit.

21] Learned advocate Shri. Minde for plaintiff argued that, defendant relied on vouchers Exh.46/1 to 46/2 and Exh.57 to establish that, period for completion of construction was extended by the plaintiff by accepting contents of said documents. However, said documents are not admissible in evidence, as they are contradictory to the terms and conditions of the development agreement Exh.42. Said documents are therefore, in admissible in evidence U/sec.91 and 92 of Evidence Act. He also argued that, by relying on the said documents, defendant insisted on the performance of certain conditions which does not form part of the terms of the agreement Exh.42. Thereby, defendant has shown his disability to perform his part of agreement. Hence, according to him, the agreement become voidable. Learned advocate Shri. Minde relied on the ruling in **Tadepalli Kutumba Rama Sastry Vs. Seepalli Dakshina Murthy and others, 1960 Andhra Pradesh 178(V 47C61).**

22] Learned advocate Shri. Hartalkar for defendant argued that, plaintiff has sought to declare the agreement void and not voidable. Case of is not covered by section 24 to 30 of Contract Act. Learned advocate further argued that, Exh.46/1 to 46/3 and 57 relied by defendant are not modifying terms of agreement Exh.42. But, Exh.46/1 to 46/3 are providing the term for encashment of the cheques subject to execution of supplementary agreement. Exh.57 is regarding extension of time in certain circumstances. Therefore, it cannot be said that, these documents are inconsistent with the terms and conditions of Exh.42 and not admissible U/sec. 92 of Evidence Act.

23] It is a matter of record that, plaintiff has not brought his case within the ambit of section 24 to 30 of Contract Act, which provides the circumstances in which the contract become void. The case of plaintiff appears to be within the four corners of section 39 of Contract Act to declare the agreement Exh.42 as voidable. Contracts become void at the instances provided in Section 20, 23, 24, 25 to 30 of Contract Act. Contracts or agreement may become voidable by subsequent default of one party U/sec.39 (refusal of party to perform the promise), Section 53 (impossibility by act of party), and section 55 (failure to perform at time fixed , time being of essence). It appears to me that, even though plaintiff has sought to declare the agreement void, but the pleading regarding breach of terms and conditions and submissions by advocate for plaintiff discloses that, defendant i. e. party to the agreement has refused to perform or disabled himself from performing his promise in its entirety.

24] The ruling relied by plaintiff in case of **Tadepalli's** case is on Section 38 and 39 of Contract Act. Said ruling speaks about imposing the condition by one party of the contract to another party, which does not form part of the contract and which was not in the contemplation of parties or subject matter in between the parties, but unilaterally super imposed, is undoubtedly a naive way of expression by a party of his inability to straightway perform his part of contract or refinedly repudiate the readiness to perform the contract without appearing to do so. I will deal with Exh.46/1 to 46/3 and Exh.57 while discussing the allegation of breach of contract by non encashment of three cheques. At this stage it suffices to say that, relief in respect of agreement appears to be covered within section 39 of Contract Act.

25] It appears that, the contention of period to complete the development work pleaded in the plaint is self contradictory. Term regarding completion period is reproduced as term no.(ii) in para no.3 of

the plaint. It discloses the period of 18 months from the date of sanction of construction plan for completion of construction. In para no.4 of the plaint, the period for development of suit property is shown as two years from the date of execution of document as agreed by the defendant. These two pleadings appears to be self-contradictory and also with the terms of agreement Exh.42. Development agreement Exh.42 shows that, as per term no.3, the period of 24 months from the date of sanction of the plan was fixed to complete the construction. The grace period of further six months is also provided in the said term. Thus, the pleading regarding completion of construction within 18 months from the sanction plan in para no.3 of plaint as well as pleading regarding completion within the period of two years from the date of execution of documents pleaded in para no.4 of the plaint are not supported by the agreement Exh.42.

26] It is contention of plaintiff that, in view of closed relations with plaintiff's father and full faith upon plaintiff, defendant signed the documents without reading it's contents. Plaintiff is an Architect. In the cross-examination he admitted that, terms and conditions of the development were finalized by discussion in between them prior to the development agreement. He also admitted that, as per the said terms and conditions development agreement was prepared. In view of these admissions, it is improbable that, plaintiff would have signed the development agreement without reading its contents because of full faith upon the defendant. An educated person being Architect by profession would not had sign the document like development agreement without readings it's contents even though there be close relations.

27] As per further cross-examination of plaintiff, he had received xerox copy of the development agreement on the same day of registration of the document. He read it after registration as per his evidence. Even if this is admitted, the question arises that, why he had not raised objection

regarding period for completion of construction work mentioned as 24 months in the agreement immediately after reading xerox copy of the development agreement. No any explanation is offered by plaintiff in that regard. Secondly, no case of fraud is made out by contending that, his signature was obtained without reading over contents of the documents to him. Thirdly, this oral evidence of plaintiff is inconsistent with the contents of registered document Exh.42 regarding period of completion of construction work is in admissible as hit by section 92 of Evidence Act. Therefore, contention of plaintiff that, he signed the documents without reading it's contents and despite having agreed period of 18 months, the period of 24 months for completion of construction work was mentioned in the agreement is not believable.

28] It is pertinent to note that, there was no period fixed to get sanctioned the building plan. It is evident from documents that, development agreement was executed on 3.2.2007 and building plan was got sanctioned by defendant on 25.10.2012 i.e. after five years. Defendant has pleaded the reason of dispute and non existence of the road at the actual suit site because of which, the plan could not be sanctioned. As per para 5 of the written statement, the suit property had no approach road and there was no access to the suit property, therefore plaintiff and defendant mutually decided to withhold the project. In the evidence affidavit, defendant supported to the said contention. In the cross-examination, defendant denied the suggestion that, he had not seen the suit property prior to execution of development agreement and power of attorney. Even though he had stated that, he did not remember that, whether he gone through the file containing all the documents of suit property before execution of development agreement, but he admitted that, he had given file of all these documents to his advocate. Thereby it becomes clear that, defendant had gone through all the documents and was knowing the factual position of the suit property at suit site. The

description of suit property in development agreement discloses existence of road at north side of the suit property.

29] Similarly, copy of gunethewari certificate annexed to development agreement also discloses existence of road. In the cross-examination plaintiff admitted that, there is road at north side of the suit property since prior to execution of development agreement. He voluntarily stated that, said road is only on the paper, the question arises that, why defendant had not issued any notice in respect of not having access road to the suit property to the plaintiff and remained silent. As per evidence of defendant, plaintiff was having knowledge of the fact of not having access road and therefore, both of them withheld the project. However, it appears from the cross-examination of plaintiff that, no such suggestion regarding non existence of access road to the suit property and with holding the project for some time for that reason are put up in the cross-examination of plaintiff. Defendant is developer and builder by business and having completed 2-3 sites. He is educated person. Hence, it is improbable that, defendant would have taken the suit property for development without inspecting the same at actual site and without observing the fact that, there was no access road. Therefore, contention of defendant that, the suit property was not having access road and this was the reason for delaying to start the project seems improbable.

30] It appears from cross-examination of defendant that, the dispute was regarding the access road created by original owner Shri. Bhumkar. Defendant has stated that, he has settled the said dispute with Shri. Bhumkar by paying him certain amount. It appears that, defendant is come with a evidence of settlement of dispute with Shri.Bhumkar which is not pleaded in the written statement. If, there is dispute regarding the road, defendant has no reason to avoid to plead said fact instead of pleading the fact of non existence of access road. Evidence of defendant

regarding settlement of dispute with Shri. Bhumkar is also not acceptable for want of sufficient details in that regard. In the cross-examination, number of questions were asked regarding settlement of dispute of road with Shri.Bhumkar, but defendant failed to state that, when he settled the dispute and how much amount paid to Shri.Bhumkar for settlement of said dispute. Defendant has placed certain bills and receipts of minor amounts spend by him in alleged development of suit property, but he has not produced any documentary evidence regarding payment of the amount to Shri. Bhumkar for settlement of dispute of the road. For want of such documentary evidence and for want of details regarding settlement of dispute with Shri. Bhumkar, contention of defendant that, because of dispute of road with Shri. Bhumkar and non existence of access road to the suit property, he could not start development work is not acceptable.

31] On the point of delay, learned advocate Shri. Minde argued that, defendant had prepared building plan dated 17.4.2008 which was confronted to D.W.8 Amol Waghmare in the cross-examination. This witness has admitted that, this plan was prepared by his company, but not submitted for sanction to P.C.M.C. He argued that, despite preparing building plan in the year 2008, defendant had not submitted the said plan for sanction. The reason of non existence of access road is not believable as these circumstances goes to show that, there is unexplained delay by defendant in development work. Learned advocate argued that, this plan is though xerox copy, it is confronted to the witness in cross-examination and admissible in evidence as it was not required to be produced in view of provision of Order 7 Rule 14(2) of C.P.C. He also relied on following rulings :

- 1] Salem Advocate Bar Association T.N. Vs. Union of India, (2005)6 SCC 344
- 2] Upper India Couper Paper Mills Co.Ltd., Vs. M/s Mangaldas and Sons, 2004(4) Mh.L.J.992.

3] Zarina Siddiqui Vs. A. Ramalingam @ R. Amarnathan, 2015 SAR (Civ.) 106.

32] Learned advocate Shri. Hartalkar for defendant argued that, the plan dated 17.4.2008 confronted to defendant's witness is not admissible in evidence and cannot be relied upon. According to him, it is xerox copy and right under Order 7 Rule 14(2) of C.P.C. to confront the document in the cross-examination to the witness can be exercised only to contradict the witness. Hence, said provision cannot be used to prove the case of party confronting the said document to the witness of opposing side.

33] I have gone through above rulings and provision U/O 7 Rule 14f(2) of C.P.C. It is a matter of record that, plaintiff is not relying on the xerox copy of plan dated 17.4.2008 to prove his case. On the contrary, plaintiff has tried to bring on record that, defendant had prepared building plan in the year 2008 and despite of that, it was not produced for sanction and thereby plaintiff is trying to prove the case of delay. Therefore, in my view, plaintiff's advocate has rightly relied on the provision of Order 7 Rule 14(2) of C.P.C., to confront the document to the witness in cross-examination which is not required to be produced. The document is confronted for cross-examination of the witness and not to contradict the witness. The provision of Order 7 Rule 14(2) of C.P.C. to confront the document which was not produced earlier, cannot be restricted to be used for contradicting the witness. Therefore, submission of learned advocate Shri. Hartalkar for defendant is not acceptable. The xerox copy of the plan dated 17.4.2008 is admitted by the witness and therefore, it is admissible in evidence. By bringing on record the said copy of plan dated 17.4.2008, plaintiff has proved one of the circumstance that, despite preparing plan in the year 2008, defendant had not submitted the same for sanction to P.C.M.C. As noted above, the reason of non existence of access road is not believable. Therefore, there is no believable explanation for non

production of the plan dated 17.4.2008 for sanction to the local authority.

34] Admittedly, there is delay of approximate five years by the defendant in got sanctioning the building plan and not completing the construction work even not starting the development work within five years. However, it appears that, plaintiff has not raised any objection regarding delay, despite he was having number of opportunities at various instances. The first instance was the execution of correction deed dated 22.1.2009. If as per the case of plaintiff, development work was to be completed within 18 or 24 months from the date of execution of documents. The development agreement was executed on 3.9.2007 and copy thereof was received to him immediately. Correction deed was executed for correction of error of number of property occurred in the development agreement. Said correction deed was executed on 22.1.2009 i.e. approximately after one year and three months, but no any objection was raised at that time. The another instance was the information received to plaintiff in the year 2010. As per case of plaintiff, he came to know in the year 2010 about the period of 18 months from sanction of building plan. If this contention is to be accepted, then the question arises that, why plaintiff has not raised any objection about mentioning the period of 24 months instead of 18 months in the agreement and not starting development work within the period of 18 months from the date of execution of documents. Even objection was not raised for not got sanctioning building plan within reasonable period from execution of documents.

35] The main instances for raising objections were appears to be happened in the year 2012 when plaintiff received amount of Rs.4,00,000/- in the year 2012 and received three cheques of Rs.11,00,000/- in January 2013. It is pertinent to note that, plaintiff has not pleaded that, he received amount of Rs.4,00,000/-by cheque on

sanction of building plan as per schedule of payment mentioned in agreement Exh.42. As per his cross-examination, he received cheque of Rs.4,00,000/- as second installment of the security deposit on 11.11.2012 which is encashed by him. Plaintiff had opportunity to raise objection regarding delay in starting and completion of construction work within the period of 24 months from date of execution of document at the time of receiving the amount of Rs.4,00,000/-. But no such objection is raised by him. The next instance was accepting the three cheques of Rs.11,00,000/- on 1.1.2013. When plaintiff had accepted the three cheques, he had not raised any objection regarding delay in sanction of building plan or completion of construction work within the period of 18 months from date of execution of document. As per cross-examination of plaintiff, while accepting amount of Rs.4,00,000/-, he had knowledge of sanction of building plan on 25.10.2012 as the said payment was made to him subsequently on 11.11.2012.

36] There is delay of 5 years in got sanctioning the plan and the reason for said delay given by defendant that of non existence of access road is not found probable. It appears that, plaintiff has accepted cheque of Rs.4,00,000/- on 11.12.2012 and three cheques of Rs.11,00,000/- irrespective of the fact that, said three cheques were dishonoured. The conduct of plaintiff accepting the cheque of Rs.4,00,000/- and three cheques of Rs.11,00,000/- without raising any objection on the point of delay, itself discloses that, plaintiff being promisee of the agreement had thereby signified his acquiescence in continuation of the agreement. Therefore, the contention of plaintiff that, defendant caused unexplained delay of five years in got sanctioning the building plan and not completed development work within 18 months from execution of documents is not acceptable. Hence, it cannot be hold that, there is breach of terms of agreement by the defendant by not completing the project within 18 months. For these reasons the development agreement cannot be hold

voidable U/sec.39 of the Contract Act.

37] The another allegation is regarding breach of terms in respect of non payment of Rs.11,00,000/- by dishonouring the three cheques. Even though it is pleaded in plaint that, the amount of Rs.11,00,000/- was agreed to be given on 25.2.2013, but it is not the term in the agreement. As per schedule of payment given in the agreement Exh.42, amount of Rs.2,00,000/- was to be given on execution of development agreement, amount of Rs.4,00,000/- was to be given on sanction of plan and amount of Rs.11,00,000/- was to be given within four months of above two installments i.e. within four months from last installment. As per the terms of agreement, the amount of Rs.17,00,000/- was agreed to be paid by defendant to the plaintiff as security deposit and upon receiving the 45% constructed area in the building being constructed on the suit property, plaintiff has to return the same amount to the defendant.

38] After going through all the terms of agreement Exh.42, I do not find any link in between payment of security deposit and selection of 45% constructed area by the defendant. As per case of defendant, he had issued cheques of Rs.11,00,000/- as per payment schedule, but said cheques were issued subject to condition that, plaintiff would encash the said cheques after execution of supplementary agreement. It is also case of defendant that, as per meeting held between plaintiff and defendant on 29.4.2011, the period for development work was extended for three years from 1.6.2011. To support these contentions, defendant relied on vouchers of cheque Exh.46/1 to 46/3 and Exh.57 minutes of meeting.

39] To consider the aspect of payment of installments of Rs.11,00,000/- and execution of supplementary agreement, the correspondence in between plaintiff and defendant needs to be noted. It appears from documentary evidence on record, that the three cheques

were issued on 1.1.2013. Thereafter, plaintiff issued letter dated 25.1.2013 Exh.47/1 informing defendant about requirement to execute supplementary agreement for selecting 45% salable area. By that letter defendant also informed to the plaintiff that, defendant made proposal to Bank of Maharashtra to secure the loan for project. Unless the supplementary agreement is executed by defendant and it is produced by the bank, the bank will not disbursed loan amount. By that letter defendant had shown necessity of execution of supplementary agreement. Thereafter, defendant again issued letter dated 18.2.2013 Exh.48 informing plaintiff to not deposit the three cheques for encashment, unless plaintiff execute the supplementary agreement for identification of the flats to be allotted to the plaintiff as 45% constructed area. Thereafter, plaintiff issued letter dated 21.2.2013 Exh.49 to the defendant informing that, he would execute supplementary agreement only after defendant complete the terms and conditions of agreement Exh.42. Thereby, plaintiff had made it clear that, he was not ready to execute supplementary agreement. Defendant also relied on letters and copy of supplementary agreement sent by E-mail to the son-in-law of plaintiff. Hard copies of said E-mails are Exh.52 and 53 and Exh.68. There is no dispute regarding above mentioned correspondence in between plaintiff and defendant as both of them had admitted the same in their respective cross examination.

40] After going through this correspondence it becomes clear that, defendant was insisting to the plaintiff to execute supplementary agreement for which draft was sent by E-mail to the plaintiff through his son-in-law. As per submission of advocate for defendant, unless the bank had sanctioned and disbursed the loan, defendant could not encash the three cheques of Rs.11,00,000/-. According to him, bank was insisting upon production of supplementary agreement for mortgaging the 55% salable area after selecting the 45% area by the plaintiff. Therefore execution of supplementary agreement was necessary for encashment of

amount of Rs.11,00,000/-. According to learned advocate for defendant, plaintiff had agreed by signing Exh.46/1 to 46/3 to encash the cheques only after execution of supplementary agreement. Even though draft of supplementary agreement was given as per selection of two flats on second floor by plaintiff, he had not executed supplementary agreement and directly issued notice of termination of the development agreement Exh.42. Thus, according to him, because of non co-operation by the plaintiff in not executing supplementary agreement selecting the 45% area of construction, plaintiff has committed breach and defendant has not committed breach of terms of agreement regarding payment of Rs.11,00,000/- as security deposit.

41] As noted above, amount of Rs.11,00,000/- was remained to be paid as security deposit as per terms of agreement Exh.42. Payment of security deposit was not depend upon selection of 45% area and execution of supplementary agreement as per agreement Exh. 42. Terms of agreement Exh.42 nowhere discloses dependency of payment of security deposit on execution of supplementary agreement. In fact, there is no specific term regarding execution of supplementary agreement for selecting construction of 45% area. Though, the terms of selecting 45% area and payment of security deposit are appearing in agreement Exh.42, but both these terms are independent terms and have no dependency upon each others.

42] Learned advocate Shri. Minde for plaintiff argued that, Exh.46/1 to 46/3 and Exh.57 are disclosing the terms in consistent with the terms in the registered agreement and therefore, these documents are hit by section 92 of Evidence Act. Hence, these documents Exh.46/1 to Exh.46/3 and Exh.57 are not admissible to prove the term of encashing the cheques after execution of supplementary agreement and extension of period of three years. Learned advocate Shri.Hartalkar for defendant

argued that, Exh.46/1 to 46/3 and Exh.57 is not modifying the terms of original agreement, but it provides the term for encashment of the cheques of security deposits. So also Exh.57 is also regarding extension of time by mutual understanding between plaintiff and defendant.

43] Even though plaintiff has signed the vouchers Exh.46/1 to 46/3, and thereby agreed to encash the cheques after execution of supplementary agreement, but such term allegedly agreed in between the parties is appears to be inconsistent with the original term regarding payment of security deposit as per schedule provided in the agreement Exh.42. So also defendant strongly relied on Exh.57 to show that, period for development was extended for three years. After going through development agreement Exh.42, vouchers Exh.46/1 to 46/3 and minutes of meeting Exh.57 it appears to me that, there is clear modification of terms regarding payment of installment of the security deposit and period for completion of construction work. Defendant has only given three cheques of Rs.11,00,000/- but did not fulfill his liability to encash the cheques. The reason given by him about requirement to execute supplementary agreement before encashment of cheques is not found place in the terms of agreement Exh.42. Imposing such condition of executing supplementary agreement before encashment of cheques of security deposit is nothing but modification of the term regarding payment of security deposit. Thus, in my view, Exh.46/1 to 46/3 and Exh.57 are modifying the terms of the development agreement Exh.42 which is not allowed by proviso 4 of Section 92 of Evidence Act. Therefore, these documents are cannot be accepted to prove that, three cheques of security deposit were agreed to be encashed after execution of supplementary agreement and the period for development work was agreed to be extended by three years from 1.6.2011.

44] Merely giving cheques within the period of four moths as per

schedule of payment, does not mean that, defendant has discharged his liability of payment of security deposit. There is no relevance regarding payment of installment and execution of supplementary agreement selecting 45% area. In view of independent terms regarding both these aspects, it was the duty of defendant to encash the cheques without waiting for execution for supplementary agreement. Insisting to execute supplementary agreement before encashment of cheques itself shows that, defendant was not financially sound to encash the cheques. Defendant tried to link the term of payment of installment of security deposit with selection of 45% constructed area by execution of supplementary agreement only because his weak financial condition. Non payment of security deposit by dishonouring the three cheques of Rs.11,00,000/- is only because of financial disability of defendant. Thereby defendant has shown his disability or incapability in performing his promise to fulfill the terms of agreement Exh.42. Thus, U/sec.39 of Contract Act, plaintiff being promisee of the agreement, has right to put to an end the agreement Exh.42. Thereby defendant has committed breach of the term regarding payment of security deposit as per schedule of payment in the agreement Exh.42.

45] The next issue is about termination of the agreement. Plaintiff had issued notices dated 18.3.2013 and 9.4.2013 and thereby terminated development agreement and power of attorney. Plaintiff is not stopped by only issuing termination notices, but filed the present suit seeking cancellation of the agreement which is registered under Registration Act. When the agreement is registered, there cannot be unilateral termination and cancellation of said agreement by one party. Cancellation of the said agreement can be only by way of decree of the court. Plaintiff has therefore, rightly filed the suit for seeking cancellation of the agreement on the ground of breach of terms.

46] Notices were returned unserved on defendant for the reason of insufficient address. As per the evidence of plaintiff, notices were issued on the address given in the development agreement. The second notice was issued on the same and detailed address. Both the notices returned unserved for the reason stated above. In the cross-examination defendant has admitted that, his address on both the envelopes of notices Exh.41/1 and 41/2 is his address mentioned in the development agreement. He did not inform in writing to the plaintiff about change of his address. Even though, he has further stated that, he had given letter in writing informing change of address to the plaintiff. But, no copy of such letter is placed on record. Thus, it can be inferred that, notices were rightly issued by the plaintiff for termination of development agreement and power of attorney to the defendant. Thus, the termination notices are valid.

47] Learned advocate Shri. Minde for plaintiff much argued on reduction of available FSI for development of suit property because of delay caused by defendant. However, it appears to me that, no damages has been claimed by the plaintiff for alleged losses suffered by him because of reduction of FSI. Secondly, contention of FSI is not a ground for termination of the agreement. Even if contention of plaintiff of availability of the less constructed area because of reduction of FSI is accepted, it appears that, defendant would also equally suffer loss in respect of available less area by reduction of FSI because of imposing BRT Zone. When plaintiff has signified his acquiescence to continue the impact of agreement by accepting amount of Rs.4,00,000/- and cheques of Rs.11,00,000/-, the ground of delay resulting in reduction of FSI due to imposing BRT Zone is not acceptable. It is also argued by learned advocate for plaintiff that, defendant have dishonest intention of deceiving and cheating the plaintiff in using less FSI than the permissible FSI. Learned advocate tried to show the calculation of available constructed area because of using less FSI than the permissible FSI. However, there is no

pleading regarding dishonest intention of defendant to cheat the plaintiff in the suit transaction. In absence of said pleading and specific evidence in that regard, said submissions cannot be accepted.

48] It is case of defendant that, he started excavation work and engaged various agencies to start development work after sanction of building plan. According to defendant, he spent approximately Rs.40,00,000/- in the development work carried out in the suit property. Defendant has examined witnesses no.2 to 7 at Exh.71 to 75, 93 and 109 to prove the alleged expenses incurred by him. After going through evidence of these witnesses and various bills and receipts, said contention of plaintiff is not found believable. It revealed from cross-examination of D.W.2 Champat Waghmare at Exh.71 that, he started PCC and Line out work on the suit property in the year 2012 and maximum work was carried out in the year 2013. According to him, his work was completed in summer season of 2013. He had issued bills Exh.79 dated 5.11.2012 and Exh.80 dated 25.11.2012. These two bills were issued in November 2012 when the work was completed in April or May 2013. Issuance of bills prior to completion of work itself shows improbability of the work carried out by this witness. It is improbable that, the builder had paid the bills prior to 5 to 6 months of completion of work. Thus, evidence of this witness and Exh.79 and 80 are not believable.

49] D.W.3 Dnyanoba Sonowane deposed on Exh.72 that, he carried out plinth work and issued bills Exh.77 and 78. According to him, he carried out centering works and issued the bills the bill Exh.77 and 78 in April and May 2013. In the cross-examination he admitted that, the work of centering and plinth cannot be carried out before PCC and line work carried out by D.W.2 Waghmare. In view of bills issued by him on 2.4.2013 and 4.5.2013, his work would have been completed prior to May 2013. If the PCC and line work of D.W.2 was continued in the month of

May 2013, it is improbable that, centering and wrap work and footing work was carried out by this witness before 4.5.2013. Thus, evience of this witness and documents Exh.77 and 78 are not believable.

50] Another witness Vitthal Jadhav deposed on Exh.73 that, he supplied material of construction like sand, cement etc. at the suit site. He issued various bills at Exh.82 to 90 and Exh.91/1 to 91/30. He had supplied construction material since November 2012 as revealed from the said bills. According to his evidence, he visited to the suit site during supply of material. He was unable to state exact date, month and year of his visit to the suit site. He further deposed that, when he visited to the suit site, work of excavation and PCC work was going on at there. The excavation and PCC work was completed in summer season i.e. May 2013 as per evidence of D.W.2 Waghmare. Definitely this witness D.W.4 Jadhav would have visited to the site during supply of material since November 2012 and prior to May 2013. Hence, it is improbable that, he would have seen the PCC and excavation work on the suit site. It is pertinent to note that, even after issuance of termination of notice, defendant was collecting construction material in July 2013 as revealed from bills Exh.88 to 90. It is improbable that, defendant would have collected construction material in spite plaintiff was not executing supplementary agreement and issued letter dated 21.2.2013 refusing to execute supplementary agreement.

51] Another witness Ajit Bhosale deposed on Exh.74 about printing the brochures for the project on suit property. He acknowledged payment of Rs.48,000/- by defendant vide bill Exh.81. According to him, he printed the brochures prior to one and half years. This period is found consistent with bill Exh.81. The next witness examined by defendant is Yogesh Pujari on Exh.93. He is serving in Fourth Dimension Architect Pvt. Ltd. He carried out all the work relating to sanction of building plan and payments made to PCMC. Receipts Exh.94 to 106 are tried to be proved in

his evidence. Plaintiff has not disputed about premium paid by defendant in sanction of building plan and document issued by PCMC regarding payments made for sanction of building plan.

52] Next witness examined by defendant is Mahesh Kamthe at Exh.75. He deposed that, he had carried out excavation work which he completed within two months. He issued bill Exh.76. Defendant paid Rs.4,95,000/- to this witness for excavation work. There are number of correction in the bill Exh.76. According to this witness, because of difference in calculations by him and by the defendant, said corrections were occurred. The bill Exh.76 is appears to be given for Hinjewadi Site. The suit property is situated at Wakad. The bill Exh.76 was appears to be issued on 14.10.2013 and thereafter, correction of date also appears to be made in Exh.76. Even if the explanation regarding difference of calculation is accepted, the bill is appears to be issued for Hinjewadi Site and therefore, bill Exh.76 and evidence of D.W.6 Mahesh Kamthe is not believable to prove that, defendnt has spent Rs.4,95,000/- for excavation work.

53] Defendant also examined Amol Waghmare at Exh.109. According to him, he had prepared building plan of the suit property which was submitted for sanction to the PCMC. He tried to prove letter Exh.112 and letter Exh.113. In the cross-examination this witness admitted that, he is not expert in preparation of building plan. His education is in Printing Technology. Thus, it appears that, this witness is not Architect and to have knowledge of preparation of building plan. Therefore, evidence of this witness is not believable. Letter Exh.112 and 113 does not bears signatures of this witness. Hence, these documents regarding expenses on preparation of building plan is not said to be proved.

54] It is pertinent to note that, all these witnesses examined by

defendant have stated that, defendant paid their bills in cash and cheques. None of the witness was able to state that, how much payment was made in cash and cheques. No details of the payment made in cash as well as by cheques is given by defendant or any of the witness examined by him. Thus, after going through evidence of all the witnesses examined by defendant, it seems improbable that, defendant would have spent Rs.40,00,000/- on the work allegedly carried out by these witnesses.

55] Another aspect of the matter is that, when defendant could not encash cheques of Rs.11,00,000/- unless the bank disbursed the amount of loan to him, it seems improbable that, within the same period defendant would have spent amount of Rs.40,00,000/- by paying various bills for the work allegedly carried out by these witnesses. Defendant has not produced his statement of bank accounts to show that, he had spent amount of Rs.40,00,000/- on development work. In view of these circumstances, it is found improbable that, defendant had spent Rs.40,00,000/- on development work.

56] Learned advocate Shri. Minde for plaintiff argued that, the agreement Exh.42 is purely development agreement and not enforceable in view of breach of terms thereof by the defendant. He also argued that, defendant failed to prove his readiness and willingness to perform his part of agreement and therefore, agreement is not enforceable. Being purely development agreement, developer would be only entitled for compensation, but in the present case, there is breach of terms by developer and hence, defendant cannot be entitled for compensation. No such counter claim is made by the defendant. He relied on following rulings :

**1] Gurudev Developers Vs.Kurla Konkan Niwas Co-Op.Hsg.Society,
2000(3) Mh.L.J.131.**

2] Bagadia Builders and Developers Thane Vs. Defense Civilians Co-Op.Hsg. Society Thane and others, 2010(6) Mh.L.J.841.

57] As against this, learned advocate Shri. Hartalkar for defendant argued that, the agreement Exh.42 is an agreement for entrusting the work of development to a party with added rights to sale the constructed portion to flat purchasers who would be forming a Co-Op.Hsg Society to which society the owner of the land is obliged to convey the constructed portion as also the land on account of statutory requirement. Therefore, according to him, the development agreement is enforceable. He relied on ruling in **Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and others, 2007(2) Bom.C.R.587.**

58] I have gone through the rulings and considered the submissions. In my view, the dispute is regarding breach of terms of the agreement and on the basis of that it has to decide that whether the agreement is voidable and required to be cancelled. There is no question of enforceability of the agreement arises in the present suit. Hence, the rulings relied by both the parties are not helpful to address on the issues framed in the present suit. In view of contention regarding claim of compensation, it appears that, there is no counter claim regarding damages by the defendant. As the conclusion drawn by me is that, defendant has committed breach of terms of the agreement, hence defendant is not entitled for enforcement of agreement and also compensation.

59] Plaintiff has sought to declare the GPA as void and to cancel the same. Learned advocate Shri. Hartalkar for defendant argued that, the general power of attorney was executed in pursuant to the development agreement for carrying out development work and also authorising the defendant to sale the 55% construction area and the land beneath to the building being constructed to the third party. Hence, according to him,

interest of the defendant is created U/sec.202 of Contract Act and therefore power of attorney cannot be cancelled.

60] After going through contents of development agreement and power of attorney, it appears to me that, plaintiff has executed agreement Exh.42 purely for development work and defendant was appointed as his agent to carry out the development work and in lieu of that, he was permitted to sale the constructed area and for convenience of the parties, authority was given to sale the land beneath to the construction along with the construction to third party. No independent right of defendant was created. Even though, it is argued that, the agreement Exh.42 is falling under category (b) described in para no.13 in the ruling in Chheda Housing's case, but in view of peculiar facts in the present case that, defendant failed to comply the terms of agreement, the agreement is not enforceable. Defendant has not actually carried out development work and therefore, no interest is created in favour of defendant in the suit property. The power of attorney is not executed independently, but in pursuant of the development agreement. There is clear breach of terms of development agreement which is going to be held voidable U/sec.39 of Contract Act. Therefore, submission of learned advocate for defendant general power of attorney cannot be cancelled, is not acceptable.

61] So far as point of possession is concerned, learned advocate Shri. Minde for plaintiff argued that, plaintiff had appointed defendant as developer for development of the suit property by executing development agreement and power of attorney dated 3.9.2007. Thus, the defendant is mere agent of plaintiff for development of suit property. Suit property was given for development i.e. construction of building thereon, thus the possession of defendant is as a licensee of plaintiff for construction. Hence, defendant cannot claim his independent possession in part performance of agreement, as the said agreement is for the development of

suit property. Therefore, plaintiff is not required to seek relief of recovery of possession of suit property from defendant.

62] Learned advocate Shri.Hartalkar for defendant argued that, plaintiff has received possession of suit property in part performance of agreement Exh.42. Interest of defendant is created in the suit property. Therefore, defendant cannot be licensee of the plaintiff and possession of defendant cannot be a possession of licensee of plaintiff. Consequential relief of possession under proviso of section 34 of Specific Relief Act was not sought, hence suit is liable to be dismissed.

63] As I have already pointed out that, the agreement Exh.42 is purely for development of suit property. There is breach of terms of agreement Exh.42 by the defendant. Interest of defendant is not created in the suit property, as plaintiff had given the suit property only for the purpose of development work. Authority was given to defendant to sale the 55% of area for construction in lieu of development work being carried out by defendant. Defendant is professional builder/contractor and he had entered into agreement Exh.42 with plaintiff only to earn the profit by completing the building and selling the flats therein. Thus, no interest of the defendant is created in the suit property. Defendant is allowed by the plaintiff by giving license to develop the suit property, therefore possession of defendant cannot be hold as an independent possession with any interest. Therefore, in my view, plaintiff is not required to seek relief of recovery of possession of the suit property. Suit would not fail for absence of said relief in the prayer clause of plaint.

64] As noted above, plaintiff has sought to cancel the development agreement and power of attorney on the ground of breach of terms of the agreement. Plaintiff has proved that, defendant failed to pay the amount of Rs.11,00,000/- as a part of security deposit and thereby committed breach

of terms of the agreement. Thereby, plaintiff has proved disability or incapability of defendant to perform the terms of agreement. Hence, the agreement Exh.42 is become voidable U/sec.39 of Contract Act. So as to grant relief U/sec.31 of Specific Relief Act, plaintiff has to establish reasonable apprehension that, the agreement if left outstanding, may cause him serious injury. Learned advocate Shri. Minde for plaintiff argued that, defendant had not completed the construction work within the specified period. He had not paid security deposit as per the payment schedule defined in the agreement Exh.42. Plaintiff is 82 years old, senior citizen. All the life long investment of the plaintiff is involved in the suit property. In such circumstances, if the suit is dismissed and plaintiff would compelled to go with defendant by enforcing the development agreement, it would suffer irreparable loss to the plaintiff. He further argued that, mere reasonable apprehension is sufficient and no actual injury or attempt to injure is necessary. He relied on **Quadricon Pvt. Ltd. Vs. Bajrang Alloys Ltd., AIR 2008 Bombay 88.**

65] As against this learned advocate Shri. Hartalkar for defendant argued that, there is no evidence to prove that, there is apprehension of injury if the agreement is left outstanding. He also argued that, ruling in **Quadricon's** case is obitor dicta and is not useful in this case.

66] The first sub-para of para 52 is regarding the observations in another case. In second sub para of para 52, it is observed that, actual injury or an attempt to injure is not necessary to maintain an action u/sec.31 of Specific Relief Act. A reasonable apprehension of a serious injury is sufficient. The question whether or not there is a reasonable apprehension of serious injury must depend upon the facts of each case. It is further observed that, these observations were contrary to the observations in **N.Acharya's** case(AIR 1923 Madras 109). In para no.51 of the said ruling, the Hon'ble Apex Court has observed that, the likelihood or

apprehension of injury is an important item in the bundle of facts which constitute the cause of action in a suit U/sec.31 of the Specific Relief Act. Thus, in view of observation in para 51, I am of the view that, ruling in **Quadricon's** case is not obitor dicta, but the ratio laid down on the point of likelihood or apprehension of injury if the document is left outstanding U/sec.31 of Specific Relief Act.

67] Plaintiff is admittedly senior citizen, having age of 81 years. Defendant has not brought on record any other property owned by plaintiff. If the suit is dismissed and plaintiff is compelled to go with the defendant by enforcing the agreement, there would be certain complications regarding development work being carried out and FSI, TDR etc. The dispute appears to be arose regarding allotment of 45% construction area which was not resolved in view of offer of two residential flats and not the commercial units in the newly constructed building given by defendant. All these circumstances clearly indicates that, plaintiff would suffer irreparable injury in respect of his right to get reasonable construction by development of the suit property. Therefore, in my view, all these circumstances clearly indicates that, there is reasonable apprehension brought on record by the plaintiff causing injury to him, if the agreement Exh.42 is left outstanding without cancelling it.

68] Learned advocate Shri. Hartalkar for defendant argued that, plaintiff has created illusory ground for termination of development agreement and power of attorney. Because of interim injunction order, defendant has suffered heavy losses as he could not start development work. Court has inherent power of restitution by imposing compensation on the plaintiff while dismissing the suit and the said compensation be payable to the defendant. This argument could be considered in case of dismissal of suit. But, I have already come to conclusion that, the agreement Exh.42 is voidable for breach of terms U/sec.39 of Contract Act.

The notice of termination is also be held valid. Therefore, this submission of learned advocate Shri. Hartalkar for defendant cannot be considered.

69] It is not in dispute that, plaintiff has received Rs.6,00,000/- in two installments as security deposit. Learned advocate Shri. Minde fairly submitted that, plaintiff is ready to refund the said amount without interest. There is also no clause of interest while refund of amount of security deposit. Hence, I am of the view that, plaintiff is entitled for relief of declaration that, the suit agreement Exh.42 and power of attorney dated 3.9.2012 executed in between plaintiff and defendant are voidable and required to be cancelled. Plaintiff is also entitled for permanent injunction restraining defendant from creating third party interest or from doing any act in respect of suit property or any part thereof on the basis of development agreement and power of attorney. Plaintiff is liable to refund and pay Rs.6,00,000/- without interest to the defendant. In view of these reasons, I answer issues no.1 to 3 in the affirmative. Suit deserves to be decreed. Accordingly, I pass following order.

Order

- 1] Suit is decreed with costs.
- 2] It is hereby declared that, the development agreement and power of attorney dated 3.9.2007 at sr.no.5643 and 5644 of 2007 executed by plaintiff in favour of defendant, are voidable documents and they are further declared as cancelled.
- 3] Plaintiff is hereby directed to pay amount of Rs.6,00,000/- without interest to the defendant within two months from today.
- 4] If defendant refused to accept the said amount, plaintiff is at liberty to deposit the said amount in the court within two months from today.

- 5] Defendant is hereby permanently restrained from doing any act in respect of the suit property or any part thereof and further restrained from creating third party interest in the suit property or any part thereof on the basis of development agreement and power of attorney.
- 6] Issue letter along with copy of decree to the office of Sub-Registrar, Haveli No.13 regarding cancellation of both the documents at sr.no.5643 and 5644 of 2007.
- 7]] Decree be drawn up accordingly.

Sd/-x.x.

(N.G.Shukla)

Dated: 07.11.2015.

2nd Add. Judge, S. C. Court
& Jt. Civil Judge S. D. Pune

I affirm that the contents of this PDF file Judgment are same word for word as per original Judgment.

Name of Steno : Mrs. S.K.Sayyed, Steno H.G.
Court Name : Shri. N.G.Shukla,
2nd Addl. Judge, Small Causes Court, Pune.
Date of Judgment : 07.11.2015
Judgment signed by presiding officer on : 16.11.2015
Judgment uploaded on : 16.11.2015