

(2014) 04 BOM CK 0173

In the Bombay High Court

Case No : Notice of Motion No. 1594 of 2013 in Suit No. 874 of 2013

Ashadeep Co-operative Housing Society Ltd.

APPELLANT

Vs

M/s. Paresh Associates and Others

RESPONDENT

Date of Decision : 17-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6

Contract Act, 1872 — Section 23

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 11

Citation : (2014) 4 BomCR 858

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Vinod L. Desai, Advocate for the Appellant; Simil Purohit, Mr. Vishal Kanade, Mr. M.P. Vora i/b Pramodkumar and Co for Defendant No. 2 and Ms. Smita Vora i/b. Pravin Doshi, Partner of Defendant No. 3, Advocate for the Respondent

Judgement

Roshan Dalvi, J.—The building of the suit property upon which the building of the plaintiff society has been constructed by defendant No. 3 initially belonged to defendant No. 1. Under a development agreement the plot of land of defendant No. 1 came to be developed and the plaintiff's building came to be constructed. A small part of the development/construction remained. The parties had agreed to develop it later. Defendant No. 1, the initial owner was to convey the entire property to the plaintiff society as per the statutory mandate. That has not been done and a litigation in that behalf is pending before the property authority. Defendant No. 1 has instead sought to convey the property to defendant No. 2. The defendant No. 2 seeks to construct upon the old remaining structures which were not demolished or constructed upon utilising the FSI of the entire plot of land including of that of the plaintiff society building upon the conveyance in its favour. Defendant Nos. 1 and 2 are essentially the same firm. However the partnership firm of defendant No. 1 stood dissolved and it is represented by another partner.

2. The plaintiff has sued for declaration that the conveyance deed of defendant No. 1 in favour of defendant No. 2 is illegal and void and for its cancellation, for a consequent declaration that a certain lease to be made in favour of defendant No. 1 has stood forfeited, for the execution of the deed of conveyance in favour of the plaintiff society as per the statutory mandate contained in the Maharashtra Ownership Flats Act, 1963 (MOFA) and for an injunction against development and construction by defendant No. 2.

3. The notice of motion is for the prohibitory reliefs of injunction against development and construction.

4. It is the case of the plaintiff that upon the development agreement executed between defendant No. 1 and defendant No. 3. The provisions of MOFA came to be applied to the suit plot of land. The plaintiff's building was constructed. The members of the plaintiff society were the flat purchasers in whose favour the flat purchase agreements were executed. The society has been registered. The entire plot of land had to be conveyed to the plaintiff. The plaintiff was to give lease of a part of the property to defendant No. 1. That was in respect of two structures called outhouses which were tenanted by defendant No. 1 and which was not allowed to be developed by those tenants at the time the other part of the property of defendant No. 1 came to be developed and the plaintiff's society building came to be constructed and the plaintiff came to be registered as a Co-operative Society. Defendant No. 2 contends that defendant No. 1 was given the right to construct upon those outhouses as per law. At the time of such agreement the extent of the FSI available was different and the concept of TDR was absent. Defendant Nos. 1 and 2 would be entitled to the FSI and TDR of the suit plot of land for construction upon the land on the space where the two outhouses stood or as determined by the BMC as the building authority.

5. It is not necessarily the place but the extent of construction which is the question of contest in the suit. Whereas the plaintiff contends that the construction would be of the FSI of the outhouses which is of a specified dimension, defendant No. 2 contends that the extent of construction would be of the FSI of the outhouse and the additional FSI that it is capable of having, additional FSI of the plaintiff's building and additional FSI in respect of the suit structure and the TDR that may be loaded upon the new construction.

6. It would have to be seen from the admitted documents executed by the parties as to which of those diametrically different conditions is correct.

7. On 26th April, 1982 defendant No. 1 and defendant No. 3 entered into an agreement for development of the suit property, Exhibit-C to the plaint as vendors and purchasers respectively. The agreement recites that there were five tenants in the main building and five tenants in the two outhouses in the rear portion of the main building. The suit plot of land was shown to be admeasuring 1310.9 sq. mtrs. & aside from a portion which went in road setback suit property was to be developed by defendant No. 3. The tenants in the main building co-

operated with the construction; the tenants in the outhouses did not.

8. The parties agreed to develop the main part of the property by demolishing the main building and reconstructing a new building and to leave the two outhouses undemolished and undeveloped until the tenants of the outhouses agreed. The parties further agreed in clause 2(j) that if those tenants agreed to pay the cost of construction they would be made members of the proposed co-operative society of the plaintiff and be given premises on ownership basis. They also agreed that the vendors (defendant No. 1) would not have any claim over the said tenants. The parties also agreed that if the outhouses were only to be repaired the vendors (defendant No. 1) who was the original owner would become member of the proposed co-operative society and the two outhouses shall be leased to defendant No. 1 and defendant No. 1 would be entitled to receive rent, compensation and pay outgoings in respect of those outhouses. The parties further agreed in clause 2(n) that the benefit of further FSI, if granted, would go to both the parties equally. Under clause 6 of the agreement the parties agreed that defendant No. 1 as the Vendor shall execute document for effecting proper transfer of the suit property in the name of defendant No. 3 or its nominee. This would be the conveyance deed contemplated in Section 11 of MOFA. The plaintiff society would be the nominee.

9. Such was the unique construction contemplated between the parties. The main part of the property which had a building was to have the plaintiff's society's newly constructed building. The property would be transferred to such society. A small part of the property would remain undeveloped until a future date when the tenants would agree. The contemplation of the parties with regard to the transfer of the entire property to the plaintiff society as the nominee of the developer, defendant No. 3, was not to wait until eternity. So soon as the building would be constructed the transfer would have to be effected. Hence if by then the outhouse was also demolished and reconstructed the tenants would become members. If the outhouses were not demolished and reconstructed, but only repaired the tenants would continue to be the tenants of defendant No. 1 and defendant No. 1 would be the member of the plaintiff society so that the outhouses would be leased to defendant No. 1 who would receive rents and pay outgoings.

10. The agreement with regard to the further FSI as contemplated between the parties would be FSI which was then available in law; the agreement does not contemplate any future FSI which would be shared between the parties. The sharing of the FSI would therefore, be in terms of what component of the constructed premises would be given to defendant No. 1 as the owner and what component would be developed for resale by defendant No. 3. It is justifiably argued on behalf of the plaintiff that the conveyance mandated under the law which was to be effected as per the position prevailing once the society building is constructed and the plaintiff society is registered. That has not been done. That is a statutory breach for which the suit is filed.

11. It has so transpired that much after the plaintiff became entitled to the conveyance upon the construction of the plaintiff society building and its registration, defendant No. 1 did not convey the suit property to the plaintiff society. The tenants of the outhouses later agreed for reconstruction of the outhouses. Defendant No. 2 seeks to put up construction upon utilising the additional FSI and TDR which came to be granted under the law which came to be later enacted.

12. In 1984 upon the construction of the plaintiff society building defendant No. 3 entered into various agreements with flat purchasers. One such agreement is annexed as Exhibit-D to the plaint. The rights of the flat purchasers and later the plaintiff society representing the flat purchasers would be governed by the agreement of the flat purchasers.

13. Under clause 3 of the said agreement the plaintiff society was to grant a lease of the portion of the land of the society to defendant No. 1 or its nominee. That was the land under the outhouses shown as "old structures". The conditions on which the lease would be granted are set out in clauses 3(a) to (h) of the agreement.

14. Under clause 3(c) a portion of the land under the outhouses was to be given to defendant No. 1. Under clause 3(f) it is specified that if the old structures are demolished defendant No. 1 as the lessee would have the right to construct new structures in the same place or as may be permitted by the BMC. It is specified that defendant No. 1, shown as the lessee, would be the owner of the two old structures only. Clause 3(g) which follows immediately thereafter in the agreement specifies that the society shall be the owner of the land underneath the two structures.

The relevant part of clause 3(f) and 3(g) run thus:

3(f) The said Lessee shall be the owners of the said two old structures only.

3(g) The society for all time to come shall be the owners of the land underneath the said two structures.

15. A conjoint reading of clause 3 comprising 3(c), 3(f) and 3(g) shows that the society would naturally be the owner of the entire property, but however in view of the unique position, the lessee (defendant No. 1) would be the owner of the structures and the society would be the owner of the land underneath the two structures.

16. It would be material to interpret this clause as the parties could have meant it. The agreement to make defendant No. 1 the owner of any part of the land which had to be conveyed to the society would be contrary to MOFA and a contract of that nature would be void u/s 23 of the Indian Contract Act. The interpretation of a document must be made with a view to avoid voidability of a contract. In a clause which is not as happily worded as it should have been, but reflects the intention of the parties, the only interpretation of the sum total of

clause (c) would be that the society would be the owner of the entire land including the land underneath two structures (outhouses). Defendant No. 1 would be the "owner" of the old structures whilst they remained. Such ownership would be in the nature of lease granted by the society which was the true "owner". However pursuant to such lease defendant No. 1 would be the "owner" or the "landlord" of the tenants of the two outhouses. The agreement would, therefore, contemplate that defendant No. 1 would not divest itself of the suit property entirely; it would be a tenant/member of the society. It may be mentioned that the expression "lease" shows "tenancy" and cannot envisage "ownership". This is made clear in the draft conveyance sent by the plaintiff society to defendant No. 1 which shall be presently seen. Hence under clauses (a) to (e) of clause 3 defendant No. 1 would be entitled to recover rent, carry out repairs have electric cables subject to the right of the occupiers only to have ingress and egress to their tenements.

17. It is contended on behalf of defendant No. 2 that it was agreed between the developer and the flat purchasers that defendant No. 1 would be the owner of the land under the structures and hence is entitled to carry out development work upon demolition of the structures and for which he is entitled to utilise the additional FSI granted as per law which came to be later enacted as also the TDR which he can load on the structures to be developed.

18. It is easy to see that the contention is misconceived. If defendant No. 1 was to be the lessee of any portion of the land being the land under two structures (outhouses) there would be no requirement of defendant No. 1 being granted any lease so that he would be the owner of the structures. The agreement that defendant No. 2 would be the owner of the structures and hence would be entitled to collect rent, put up electric cables etc. and become member of the society shows that the society was the ultimate owner of the land.

19. Clause 3(g) is the key to the intention of the parties. It is in consonance with MOFA. It has to be as per the prevailing law. The society is deemed to be the owner of the entire property which has been developed and upon which the society building has come up including the land underneath the two structures. Consequently defendant No. 1 as the lessee would only be the owner of the structures. The lease would, therefore, be in respect of the structures by the society which is the owner to defendant No. 2, the previous owner.

20. Defendant No. 2 seeks to develop and put up construction on the small portion of the entire land where the outhouses are under clause 3(f) of that agreement. It is contended on his behalf that he is permitted to put up the construction as per BMC rules and regulations. It is contended that the present rules and regulations allow additional FSI as also TDR. It would have to be seen whether such construction was contemplated by the parties in 1984 before the additional FSI and TDR came into being. The extent of the right to construct under clause 3(f) would require to be seen. The relevant part of clause 3(f) runs thus:

3(f) In the event the old structures are destroyed or demolished for any reason, the said Lessee shall have right to construct the new structures in the same place or as may be permitted by the B.M.C. rules and regulations at their own cost....

21. It must be understood that the aforesaid is the part of the single complex sentence. The right to construct is a right to construct new structures in the same place or at any other place as may be permitted by the BMC. The right to construct relates to the construction at the specified place. The permission of the BMC as per its rules and regulations is for construction at a given place. Hence the parties agreed that if defendant No. 1 had to construct it would do it at the same place and if such construction at such place was not permitted by the BMC its rules and regulations defendant No. 1 would construct at any other place as permitted by the building authority.

22. Defendant No. 1 was not a party to the agreements of flat purchasers. It was not also a confirming party. It seeks to enforce the agreement between defendant No. 3 and the flat purchasers who have now formed the plaintiff society. The agreement of flat purchasers cannot grant any right of ownership to any party other than the society under the specific statutory provisions contained in MOFA that has been clearly expressed in clause 3(g). The only concession is the lease of the structure to defendant No. 1, the previous owner, who would then be the member of the society. Only such leeway could be permitted under the MOFA. The ownership rights of defendant No. 1 would then culminate into the membership of the plaintiff society. As such owner/member alone defendant No. 1 could have right to recover rent, carry out repairs, put up electric cables etc. Those rights bare reference to the structure and not the land. Consequently the land would belong to the plaintiff society and none other. Any other interpretation would make the contract/agreement between the parties void as being in contravention of MOFA.

23. Clause 38 of the said agreement further shows that the conveyance was to be of the land hereditaments and premises together with the building and other structures standing, but subject to clause 3 of the agreement. The exceptions would be in relation to the two structures (outhouses) which would be leased by the society to defendant No. 1 and of which defendant No. 1 would become owner and collect rents etc.

24. The plaintiff society sought conveyance of the entire property since 2008-2009. It prepared and sent a draft deed of conveyance to the partners of defendant No. 1 for execution of its letter dated 7th January, 2009. It called upon defendant No. 1 to approve the draft deed and execute the conveyance as per its statutory right u/s 11 of MOFA. Defendant No. 3 was obliged to have such deed of conveyance executed in favour of the society as its nominee. It appears that in the place of defendant No. 3 the plaintiff itself had to exert to get its title. There has been a lis between the parties in the competent forum in that behalf.

25. The draft deed of conveyance shows the specific area of the two old structures (outhouses) in which defendant No. 1 as the vendor would continue to be the tenant with a bare licence to the occupants to have ingress and egress to the structures. The right of defendant No. 1 to continue to be the tenant would be in terms of the lease contemplated in the agreements with flat purchasers of 1984. Consequently the plaintiff society covenanted to execute a deed of lease in respect of the land admeasuring 150 sq. mtrs beneath the two old structures occupied by the tenants. This was in terms of clause 3 of the agreements of the flat purchasers. Annexure E shown in the draft deed of conveyance showed the terms of the lease to be granted by the plaintiff society to defendant No. 1 which are in consonance with clause 3(a) to (h) of the agreements of flat purchasers with the only specification of the right to construct of a specified extent being the FSI of the two structures at the same place or as may be permitted by the BMC under its rules and regulations.

26. Consequently the plaintiff society would be the owner of the entire land. After it is conveyed such land as per the statutory mandate it would execute a lease of a portion of that land underneath the two old structures (outhouses) to defendant No. 1. Defendant No. 1 would be the owner of the two structures. Defendant No. 1 would be entitled to collect rents etc. Defendant No. 1 would be the member of the plaintiff's society. The tenants/occupants would only have right to ingress and egress. The two structures admeasure 324.64 sq. mtrs carpet area. Hence defendant No. 1 would have right to construct a structure of that size at the same place or at the place permitted by the BMC. The lands does not give development rights to defendant No. 1.

27. Rather than conveying the land to the society, the defendant No. 1 has executed an indenture with defendant No. 2 being the same firm with another partner on 11th May, 2013, part of Exhibit-B to the plaint which the plaintiff has challenged. The indenture is for development of the remaining part of the suit property upon demolition of the two old structures (outhouses) and utilising the additional FSI of the entire plot of the society as also loading TDR thereon excluding FSI of 998.22 sq. mtrs already consumed for the newly constructed building of the plaintiff society.

28. This agreement would set at naught the entire initial agreement between defendant No. 1 and 3 and the consequent agreements of flat purchasers between defendant No. 3 and the flat purchasers as also the conveyance which would have to be executed in favour of the plaintiff society. The schedules to the said indenture show the entire suit plot of land in the first schedule, the portion of the property admeasuring 324.74 sq. mtrs with the two outhouses constructed thereon in the second schedule and the area of the two outhouses with all benefits attached thereto and entitlement of further FSI, permissible TDR, potential FSI or balance FSI available in respect of the entire property in the third schedule.

29. The schedules to the indenture show that the only extent of the constructed

portion of the two outhouses which remained to be demolished at the time the main building of defendant No. 1 on the suit plot of land was demolished for reconstruction. The land under the two outhouses only was agreed to be leased to defendant No. 1. The plaintiff had agreed to execute such lease. Defendant No. 1 on the other hand whilst describing the entire property in the first schedule sought the two old structures of the measurements mentioned therein along with FSI, TDR etc. in respect of the entire property shown in the first schedule as the property to be constructed as per the third schedule to the indenture.

30. Aside from the fact that that was never the agreement between the parties including defendant No. 1 at all times, such claim would be contrary to law under MOFA.

31. The test of determining this aspect would be to understand what would be the position of those two old structures also if they were allowed to be demolished and reconstructed by the tenants/occupants at the time the main building of defendant No. 1 was agreed to be demolished/reconstructed by the tenants in the main building. If that was so defendant No. 3 as the developer would have had the FSI which was then available for reconstruction of the main building as also the two outhouses. One new building would have been constructed on the suit plot of land. It would be as per the rules with regard to FSI then prevailing. There was no concept of TDR at the relevant time and none could have been claimed by defendant No. 3. The plaintiff society would have had to be conveyed the entire property consisting of the new building and the entire open land of defendant No. 1 which was sought to be developed and the FSI of which was sought to be consumed. There would have been no scope for any entitlement to defendant No. 1 as lessee or otherwise. Defendant No. 1 would be statutorily required and obliged to execute the conveyance in favour of defendant No. 3 or its nominee, the plaintiff society. That would have been the conveyance of the entire plot of land with the new building constructed thereon. It was only because five tenants/occupants of the two outhouses did not co-operate with demolition and reconstruction of the two outhouses then that unique agreement for lease of those outhouses came to be executed between the necessary parties. Defendant No. 1, therefore, would have right only with regard to and to the extent of the two structures which remained on its property when the main building was demolished and reconstructed. If that had not remained the further FSI, TDR or any other benefits with regard to the suit plot of the land would accrue to the plaintiff society and no other. The plaintiff society is deemed to have been conveyed the entire suit property within the statutory period u/s 11 of the MOFA. The fact that a part of the construction of the two outhouses remained would not make a difference to the entitlement of the plaintiff society in law. Hence defendant No. 1 would be entitled to construct upon the demolition of the two outhouses and put up a new construction in that place or at any other place as permitted by the BMC, but to the extent of such construction alone.

32. The area of that construction is specified in the plaintiff's draft deed of

conveyance. The same area of such construction is specified in schedules 2 and 3 to the indenture of defendant No. 1 in favour of defendant No. 2. The lease of the land was to be to that extent. The construction on the land was also to be to that extent. The benefits attached to such land would go only to the owner and not to the lessee. The plaintiff society is the only owner; defendant No. 1 is the lessee. The benefits of ownership cannot, therefore, accrue to defendant No. 1. It cannot, therefore, convey any part of the suit plot of land under any agreement or indenture to defendant No. 2. No construction other than the construction of the specified area of the two outhouses can be put up by defendant No. 1. Even if such construction of that much area is put up defendant No. 1, it would be leased the land under such construction. The plaintiff society would be the owner of the land before the new construction also. Defendant No. 1 would be the owner of the structure so constructed. Defendant No. 1 would be entitled to collect rents etc. Defendant No. 1 would become a member of the plaintiff society in respect of such construction. The plaintiff society alone would be supreme.

33. Defendant Nos. 1 and 2 seek to put up construction far in excess of the area of the two old structures (outhouses). They seek to utilise the FSI of the entire such plot of land which belongs to the plaintiff society. They also seek to load TDR upon the new construction. This they cannot do. The plaintiff has rightly sought to restrain such construction.

34. The reliefs prayed for by the plaintiff in the notice of motion deserve to be granted. Defendant Nos. 1 and 2 shall not take any steps to develop or redevelop or put up any construction on the suit plot of land except a construction of 324 sq. ft at the place where the two outhouses were or at any other place as permitted by the BMC.

35. Defendant Nos. 1 and 2 shall not sell, alienate, transfer, transfer or create any third party rights in any part of the suit property except allow the tenants/occupants of the two outhouses to reside therein and collect rents thereof and be member of the plaintiff society.

36. The aforesaid documents executed by and between the parties are admitted. Only the interpretation of the documents is made by the parties. Consequently the plaintiff has also prayed for a judgment on admission under the provisions of Order 12 Rule 6 of the CPC in terms of prayers (a) to (d) of the plaint. However, since the above interpretation is challenged, at present, a judgment on admission is not passed. Defendant Nos. 1 & 2 shall file their written statement within 30 days. The suit is adjourned to 11th June 2014 for framing issues, if any, upon such written statement.