

(2011) 05 BOM CK 0009

In the Bombay High Court

Case No : Appeal (L) No. 235 of 2011 in Notice of Motion No. of 2011 in Suit (L) No. 814 of 2011

Lokhandwala Infrastructure Pvt. Ltd.

APPELLANT

Vs

Om Dattaji Rahiwasi Seva Sangh and Others

RESPONDENT

Date of Decision : 07-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : (2011) 4 ALLMR 255 : (2011) 4 BomCR 583 : (2011) 4 MhLj 216

Hon'ble Judges : Mohit S. Shah, C.J.; D.G. Karnik, J

Bench : Division Bench

Advocate : Pravin Samdani, Farid Karachiwala, Bhavik Manek and Pallavi Smriti, instructed by Wadia Ghandy and Co, for the Appellant; S.G. Surana, for Respondent No. 1, S.U. Kamdar Pooja Patil, instructed by Uma Shankar Upadhyaya, for Respondent No. 2, I.M. Chagla Naira Variava, Vivek A. Vashi, Shorger Merchant, instructed by Bharucha and Partners for Respondent No. 23, J.G. Aradwad/Reddy, for Respondent No. 24 and R.Y. Sirsikar, H.C Pimple for BMC Respondent No. 25, for the Respondent

Judgement

D.G. Karnik, J.—These appeals are against two judgments and orders dated 5th April 2011 passed by the learned Single Judge of this Court declining to grant ad-interim relief in the notices of motion taken out by the Appellant in Suit (L) No. 814 and 813 of 2011.

2. The property in question is one single property which consists of a censused slum on the land owned by Municipal Corporation of Greater Mumbai. 753 families (678 residential, 142 commercial, 25 R/C and 8 others) are in occupation of the slums in these two appeals. Out of these occupants, about 500 occupants are held to be eligible for allotment of the premises in the slum rehabilitation scheme by the Competent Authority.

3. The occupiers of huts in the slum are divided into two groups. One group has formed an association which is Respondent No. 1 in the first appeal and the other group has formed an association which is Respondent No. 1 in the other appeal.

They have also proposed to form two different cooperative societies which are Respondent No. 2 in the respective appeals. All other facts in both the appeals are identical. Since common questions of law and fact arise, we are disposing of these appeals by this common judgment.

4. According to the Appellant, on 10th August 2003 the Respondent No. 1 Association and the Respondent No. 2 society (proposed) representing their members entered into an agreement with it for redevelopment of the property in question. More than 70% of the slum occupiers are the members of the Respondent Nos. 1 and 2 and, therefore, the Appellant is entitled to implement the slum rehabilitation scheme in accordance with the provisions of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short "the Slum Rehabilitation Act"). According to the Appellant, from execution of the agreement dated 10th August 2003 the Appellant has been pursuing the matter with the authorities and the list of persons eligible for allotment in the form of Annexure-2 was approved by the Municipal Corporation on 18th September 2009 (Exhibit-S / page 174), on account of continuous efforts of the Appellant. However, soon after the list was approved and all procedural formalities were completed by the Appellant at a greater expanse of time and money and the scheme was about to take off, the Respondent No. 23 - another builder stepped in. Thereafter by two separate notices dated 6th July 2009, the Respondent Nos. 1 and 2 purported to terminate the agreement dated 10th August 2003 and thereafter sought to appoint the Respondent No. 23 (a competing builder) for implementing the slum rehabilitation scheme. The Appellant, therefore, filed a suit for specific performance of the agreement dated 10th August 2003 and in the suit it took out a notice of motion for (i) appointment of a Receiver of the property with a further direction to permit the Appellant to carry out the redevelopment, and (ii) an injunction restraining the Respondents (Respondent Nos. 1 and 2, their members and the new developer) from acting upon the development agreement dated 30th September 2009 entered into with Respondent No. 23 and from creating any other assignment in favour of any third party.

5. Mr. Samdani, learned Senior Advocate appearing on behalf of the Appellant, submitted that the purported termination of the agreement dated 10th August 2003 by two notices dated 6th July 2009 issued by Respondent Nos. 1 and 2 is illegal and therefore the Appellant is entitled to an injunction. He submitted that the Appellant had toiled from the year 2003 to 2009 for getting all approvals for implementation of the scheme and just when all approvals were to be obtained, the Respondent Nos. 1 and 2 sought to terminate the agreement illegally and have entered into an agreement with the Respondent No. 23 illegally. He submitted that on the date of the agreement, i.e. 10th August 2003, more than 70% of the eligible slum dwellers had agreed for the redevelopment work to be carried out through the Appellant and the fact that presently the slum dwellers have changed loyalty and more than 80% of them have agreed for redevelopment through Respondent No. 23, it would not alter the position. The

relevant date for consideration whether more than 70% of the slum dwellers have entered into an agreement is the date of the first agreement with the Appellant, viz. 10th August 2003.

6. Per contra, Mr. Chagla, learned Senior Advocate appearing for Respondent No. 23, submitted that the agreement has been lawfully terminated as the Appellant did not take any steps for number of years (from 2003 to 2009) for getting the scheme sanctioned and the slum dwellers therefore lost total faith in the Appellant. More than 80% of the eligible slum dwellers have entered into an agreement with Respondent No. 23 and want to implement the scheme through Respondent No. 23. Termination of agreement by Respondent Nos. 1 and 2 therefore cannot be termed as illegal. In any event, he submitted that the termination was made by letter dated 6th July 2009 and the present suit filed on 28th March 2011 suffers from delay and that by itself is a ground for refusal of interim relief of injunction. He further submitted that the Appellant was not ready and willing to perform its part of the contract under the agreement dated 10th August 2003 and for six long years it had not taken any concert or material steps for development. This was again a ground for refusal of relief of injunction. Thirdly, Mr. Chagla submitted that the suit in the present form is not maintainable. Under the Slum Rehabilitation Scheme Act, more than 70% of the eligible slum dwellers must consent to the development and approve the developer. All the eligible occupiers, whose consent the Appellant claims to have obtained must, therefore, be joined as parties to the suit for specific performance. The Respondent No. 2 is only a proposed cooperative housing society and is not a legal person and has no authority to bind the prospective members. The Respondent No. 1 is only an association of slum dwellers and has no authority to bind all slum dwellers and therefore no order or decree for specific performance can be passed against Respondent Nos. 1 and 2 without all the eligible slum dwellers or at least 70% of the total slum dwellers who have agreed for the redevelopment are made parties to the suit. He refuted the contention of Mr. Samdani that since leave under Order I Rule 8 of the CPC has been granted on 28th April 2011, all occupiers of slums need not be joined as parties to the suit. He submitted that in a suit for specific performance all the persons (howsoever numerous they may be) against whom the relief for specific performance is claimed, must be joined as parties. Lastly, Mr. Chagla submitted that the development agreement under the Slum Rehabilitation Act must be differentiated from an ordinary agreement of sale/ development with a private owner. In an ordinary agreement, a party seeks to invoke contractual rights, but in a development agreement under the Slum Rehabilitation Act the performance of the agreement consists of not only contractual obligations but also statutory obligations under the Slum Rehabilitation Act. In case of a slum rehabilitation agreement only more than 70% of the eligible slum dwellers need to consent to the development. In other words, even if a minority, (i.e. less than 30% of the slum dwellers) do not consent to the redevelopment, the slum rehabilitation scheme can be enforced statutorily without their consent. In that sense the slum

redevelopment is binding even on the non-consenting minority (less than 30% of the slum dwellers) who have not given their consent and have not entered into any agreement. He further submitted that the Competent Authority under the Slum Rehabilitation Act has approved the name of Respondent No. 23 as the developer for the purpose of implementation of an scheme of redevelopment of the slum. A decree for specific performance of the scheme cannot therefore be granted in favour of the Appellant whose name has not been approved for implementation of the slum rehabilitation scheme by the Competent Authority. Admittedly, all the slum dwellers have not entered into (and even in the past had not entered into) an agreement with the Appellant. The Appellant therefore cannot enforce the agreement of development against non-consenting occupiers in the absence of a sanction of the scheme by the Competent Authority under the Slum Rehabilitation Act. He also cannot claim specific performance in part (i.e. only against the consenting occupiers because the scheme is one and indivisible) And since the Appellant has not been approved as a developer by the Competent Authority under the Slum Rehabilitation Act, the Appellant cannot claim specific performance at all.

7. Lastly, Mr. Chagla urged that in view of Section 42 of the Slum Rehabilitation Act, the Civil Court has no jurisdiction to entertain and try the present suit and/or to grant injunction restraining the construction. The learned Single Judge in paragraphs 7 to 9 of his order has considered the argument and ruled upon the bar of jurisdiction u/s 42 of the Slum Rehabilitation Act. We are in agreement of the view expressed in paragraphs 7 to 9 of the impugned order and, therefore, no further elaboration is needed.

8. In our view, it is also not necessary to rule upon the other contentions urged by the parties as mentioned above because of law of jurisdiction u/s 42 of the Slum Rehabilitation Act and also in the light of the view that we are inclined to take on the balance of convenience. A scheme for redevelopment of the slum is essentially for the benefit of the slum dwellers and for their rehabilitation. They are entitled to a free accommodation in the redeveloped buildings. Of course, the developer is entitled to recover the cost incurred by him for the redevelopment by sale of flats available in the free sale component. Yet the main object and focus of the scheme is the occupiers of the slums and not the developers who pursues a venture for profit through sale of flats in the free sale components. The main object is rehabilitation of the slum dwellers, though in the process invariably the developer would earn good deal of profit by sale of flats in the free sale components of the scheme. In fact, the good part of the arguments in the present case revolved around the profit of the developer and Mr. Samdani fairly submitted that the Appellant was not pursuing the scheme of redevelopment as a gesture of charity or goodwill for the slum occupiers but for profit which the Appellant would earn by sale of flats in the free sale component. Keeping in mind that the principal object of the slum rehabilitation scheme is rehabilitation of the slum dwellers as also the inevitable consequence, any injunction granted viz. delay in the redevelopment of the slum rehabilitation scheme, we decline to

grant any injunction. Nearly 500 eligible slum dwellers who have been waiting since August 2003 when the Appellant entered into the contract would not get accommodation by way of rehabilitation for quite a few years. The very persons for whom the slum rehabilitation scheme is intended would be deprived of the benefits for a number of years. In this connection, we may quote the observations of the Supreme Court in Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, .

31. Under the changed circumstance with so many cases pending in Courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the Plaintiffs from suffering the alleged injury, more serious injury has been caused to the Defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extent its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.

(Underlining supplied)

These observations aptly apply to the facts of the present case. In our view, protecting the interest of 500 slum dwellers in getting accommodation in the slum rehabilitation scheme within a reasonable time far outweighs the loss, if any, which the Appellant would suffer by refusal of an injunction. In any event, the Appellant is not interested in retaining the property for himself but he is only a professional developer in making quick money. His interests are purely monetary. He would have adequate remedy in damages if at all he succeeds in the suit. His monetary interest can be protected by the order that we propose to pass hereafter.

9. On our query, Mr. Samdani, learned Counsel for the Appellant stated that the developer would be required to construct 500 tenements having an area of 269 sq. ft. each and the said tenements would be required to be given to the eligible slum dwellers free of cost as per the scheme. The total area to be given to the slum dwellers free of cost thus comes to 1,34,500 sq. ft. Mr. Samdani further submitted that in lieu of constructing and providing this 1,34,500 sq. ft. area consisting of 500 tenements of 269 sq. ft. each, the developer would be allowed to construct and sell about 1,00,000 sq. ft. of area as free sale component. Assuming that the developer's profit which traditionally is computed at 15% (both the counsel were unable to give amount of profit which a developer would

make in a slum rehabilitation scheme and we also do not venture to estimate his profit), we would adopt the traditional mode of 15% of the area of the free sale component, i.e. about 15,000 sq. ft. as the profit of the developer. In our view, therefore, the interest of the Appellant would be adequately protected by restraining the Respondent No. 23 from selling, transferring, alienating or otherwise creating any third party interest in respect of 15% (15,000 sq. ft.) out of the free sale area available to him for redevelopment. We accordingly pass the following order:

(i) Orders passed by the learned Single Judge is partly modified to the extent that we direct the Respondent No. 23 not to sell, transfer, alienate, encumber or otherwise deal with or part with possession to the extent of 15% of the area of free sale component, i.e. 15,000 sq. ft. in the free sale area.

(ii) Order of the learned Single Judge refusing to grant injunction for the development and refusing to appoint Receiver is confirmed.

Appeals are disposed of in the aforesaid terms.