
(2011) 11 BOM CK 0041

In the Bombay High Court

Case No : Appeal from Order No. 1117 of 2011 with Civil Application No. 1490 of 2011 in A.O. No. 1117 of 2011

M/s. Buildtech Engineers 33, Jai Jawan Co-op. Hsg. Soc.,
Sector 17, Vashi, New Mumbai

APPELLANT

Vs

Mahadeo Bandu Sonawane and Others

RESPONDENT

Date of Decision : 18-11-2011

Acts Referred:

Citation : (2012) 2 MhLj 784

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : Vijay Thorat with Ravi Kadam instructed by S.S. Pandey, for the Appellant; Pravin Samdhani instructed by . Mamta Sharma for Respondents 5-7, Mr. Sanjay Jain instructed by . C.P. Mishra for Respondents 15(c) and 16 and Mr. Narendra Walavalkar instructed by . Lalit V. Jain for Respondents 18 and 19, for the Respondent

Judgement

R.M. Borde, J.—This Appeal from Order is presented by the original plaintiff taking exception to the order passed in Notice of Motion No. 1328/2007 decided by the Judge, City Civil Court, Greater Mumbai on 17th September, 2011. The plaintiff has presented Notice of Motion claiming an order of temporary injunction restraining the defendants, their agents, servants or their officers from dispossessing the plaintiff from the suit property i.e. an area of 14918.50 sq. ft. together with available FSI of 17080 sq. ft. on City Survey No. 342/1 to 82 for construction of building KAVERI situated at Little Malbar Hill, Sion-Trombay Road, Near Poonam Petrol Pump, Chembur, Mumbai without following due process of law on the grounds set out in the plaint.

The plaintiff in the plaint has made following substantial prayers:

(a) That it be declared that the Suit Agreement executed between the plaintiff and the defendants on 1st October, 2003 and the second suit agreement between plaintiff and defendant no. 18 and 19, on 25th June, 2004 vis-a-vis a

suit property i.e. Area admeasuring 14918.50 sq. ft. together with the available FSI of 17080 sq. ft. on C.T.S. No. 342/1 to 82 for construction work of building Kaveri situated at Little Malbar Hill, Sion-Trombay Road, Near Poonam Petrol Pump, Chembur, Mumbai 400 071 is still legal, valid, subsisting and enforceable;

(b) That the Defendants their servants, their agents, their officers and their constituents be restrained by an order of permanent injunction from dispossessing the plaintiffs from the suit property i.e. Area admeasuring 14918.50 sq. ft. together with the available FSI of 17080 sq. ft. on C.T.S. No. 342/1 to 82 for construction work of building Kaveri situated at Little Malbar Hill, Sion-Trombay Road, Near Poonam Petrol Pump, Chembur, Mumbai 400 071, without following due process of law;

2. According to the plaintiff by a letter of allotment dated 23rd December, 1960, Government has allotted a plot of land having an area of 72 1/2 gunthas at Chembur to M/s. Harijan Vijay Co-operative Housing Society Ltd. Due to some dispute between the members of Harijan Vijay Co-operative Hsg. Society and defendants herein, the defendants presented a writ petition bearing No. 3400/2002 in the High Court which was ultimately disposed of in view of the consent terms placed on record on 22nd October, 2002. As per the consent terms M/s. Harijan Vijay Co-operative Housing Society agreed to hand over an area admeasuring 14918.50 sq. ft. together with the available FSI for construction of building Kaveri to the defendants. It is not disputed that Co-operative Housing Society has constructed three buildings on the suit property and handed over flats to the members. The defendants with a view to construct a building for the members entered into a development agreement with the plaintiff in respect of suit property on 1st October, 2003. Pursuant to the said consent terms one Mrs. Gandhari Soma Jadhav and defendants nos. 18 and 19 were appointed as promoters and have entered into a separate development agreement with the plaintiff on 25th June, 2004. Thus, the defendants have entrusted the work of construction of building to the plaintiff and also handed over the physical possession of the suit property to the plaintiff. It is submitted by the plaintiff that by virtue of development agreement the plaintiff is entitled to sale additional flats to the prospective buyers other than the members of the Society. The Society is also entitled to utilize and consume FSI and also can purchase TDR and utilize the same while constructing building on the disputed property. The plaintiffs states that after taking possession of the property, he has taken certain steps by carrying out the construction over the property handed over to him by the defendants such as construction of cabin securing electricity connection and submission of the plans etc. According to plaintiff by virtue of the development agreement rights are created in his favour in relation to the suit property and the plaintiff has right and interest in the property. Despite this the defendants have attempted to dispossess the plaintiffs from the suit property. Hence the suit seeking a decree of perpetual injunction and restraining the defendants from interfering in the possession of the plaintiffs over the suit property.

3. The defendants appeared and resisted the suit by filing written-statement. According to defendants inspite of execution of agreement with the plaintiff in the year 2003, he has not commenced construction of the building. It is stated that plaintiff has suppressed material facts from the Court as regards termination of the agreement and as such he is not entitled to claim equitable relief from the Court. As the plaintiff did not commence the work of construction, defendants were constrained to terminate the agreement. The plaintiff was aware of the termination of agreement, however, he withheld the material fact from the Court. The plaintiff has not presented suit claiming specific performance of agreement but has presented the suit claiming simplicitor injunction. It is contended that the plaintiff is appointed merely a contractor to develop the property and hand over the constructed portion to the members of the Society at the prescribed rate. It is specifically contended that no interest is created in the land and property in favour of the plaintiffs and as such he is not entitled to claim a prohibitory order of injunction. Thus, it is prayed that application seeking temporary injunction be rejected.

4. On presentation of the application for injunction, an ad-interim order was passed in favour of the plaintiff which according to the plaintiff was operative till the decision of the notice of motion. The interim order passed during the pendency of the suit was also continued for certain period after disposal of notice of motion. It is thus contended that the interim order passed by the Courts below during the pendency of notice of motion shall be continued until disposal of the suit.

5. My attention is invited to consent terms arrived at between the parties in Writ Petition No. 3400/2002 and more particularly para no. 4 of the consent terms states thus:

The petitioner shall construct the Building Kaveri as per BMC Rules on the land by themselves and comply with all the terms and conditions of amended layout plan. That the Committee of three Petitioners being Petitioner No. 1, 3 and 10 will be promoters who will complete the construction within 2 years of getting the possession of the land and form a separate Co-operative Housing Society, if permitted by law.

6. It is further provided that the petitioner shall construct the building KAVERI as per the BMC Rules on the land by themselves and comply with all the terms and conditions of amended lay out plan. The Committee of the three petitioners being petitioner (in Writ Petition) nos. 1, 3 and 10 will be promoters who will complete the construction within three years of getting possession of the land and form the separate co-operative housing society, if permitted by law. It is not matter of dispute that 24 petitioners before the High Court in Writ Petition No. 3400/2002 were erstwhile members of the Harijan Vijay Co-op. Hsg. Society and separate society is registered in the name and style as Marathwad Vijay Co-operative Housing Society Ltd. In pursuance to placing on record the terms of settlement the High Court has disposed of Writ Petition No. 3400/2002. Thus as per the

terms of settlement, a group of 24 members was required to construct the building and make allotment of flats amongst themselves and this exercise was required to be done within a period of two years from the date of allotment of possession of the land to the petitioners. In pursuance to the settlement arrived at in the writ petition referred to above, all the 24 members of the separately formed society in their individual capacity and collectively alongwith cooperative society entered into an agreement with the plaintiff on 1st October, 2003. It is stated in Paragraph 6 of the agreement that an area to the extent of 14.5 gunthas has been allotted to group "B" members in pursuance to the settlement for development purpose. The members of group "B" decided to construct 30 flats for 30 members over a plot area admeasuring 14.5 gunthas. Paragraph 9 recites that possession of the area ad measuring 14.5 gunthas together with available FSI is being handed over to the developer on consideration of the price noted in the agreement. Paragraph 11 of the agreement recites that the developer would secure the sanction of plan and complete the construction of the building within a period of one year. Paragraph 12(1) recites that the possession of the plot ad measuring 14.5 gunthas is handed over to the developer at the time of entering into the agreement. Paragraph 12(3) recites that the developer shall commence the construction and complete the same within one month from the date of receipt of possession. However, on account of escalation caused in steel and cement and other construction material, if some further time is required, the same can be allowed with the consent of the architect. The developer was supposed to raise construction with his own cost as per sub-para 4 of para 12 of the agreement. Sub-para 8 recites that if any individual member makes a demand of constructed area beyond 500 sq. ft., he will be charged Rs.1000 per sq. ft. for an area to the extent of 150 sq. ft. beyond 350 sq. ft.. If the member desires to purchase the area more than 500 sq. ft., the developer would be entitled to charge rate beyond 500 sq. ft. as per the prevailing market rate. Sub-para 11 of the para 12 recites that, if any member outside the 30 members of the Society purchases a flat, the developer shall charge at the rate of ----per sq. meter. The rate has not been mentioned in the column and is kept blank. It is also recited in the same clause that the amount derived shall be utilized for construction of the building. Paragraph no. 12(12) of the agreement recites that the developer shall enter into a separate agreement with the prospective purchasers and may recover the price thereof. It is recited in Paragraph 14 of the agreement, that the developer would admit the purchasers as the members of the Society and would allot the flats to them. It is further recited that the developer would recover Rs. per sq. ft. and enter into an agreement and would recover amount in terms of the fresh agreement. The amount that could be charged by the developer is kept blank in column no. 14.

7. There is an another agreement entered into between the 3 promoter members and the contractor. The developer is referred to as a contractor in the subsequent agreement dated 25th June, 2004. Paragraph no. 5 of the agreement recites that the contractor shall charge Rs. 600/-per sq. ft. towards the construction charges

for an area of 300 sq. ft. and if any member intends to have an area beyond 300 sq. ft., the contractor is entitled to charge Rs. 1000/-per sq. ft. for additional 100 sq. ft. area and at the rate of Rs. 2000/-per sq. ft. beyond 400 sq. ft. area. Paragraph No. 14 of the agreement recites that if any member of the Society is not desirous of purchasing a flat, the developer/contractor shall pay Rs. 2 lakhs to such member. It was left to the discretion of the contractor to secure resignation of the members who do not desire to purchase flat and he is also entitled to enroll new members and allot flats to them. It was the responsibility of the administrative committee of the society to enroll such person as a member of the Society and allot shares. Paragraph No. 19 of the agreement stipulates that after construction of the building and allotment of flats to the members, if any further FSI becomes available, the contractor would be entitled to utilize the said additional FSI and construct another building for additional flats and the administrative committee would not take any objection thereto. Paragraph No. 20 of the agreement prescribes that if the developer/contractor desires to purchase any additional TDR, the Society would cooperate in tendering necessary applications. However, the cost of TDR would be borne by the contractor/developer. As per Clause 21 of the agreement the contractor had an option to sell out additional flats to prospective purchasers who are entitled to be enrolled as members and it was the responsibility of the contractor to secure appropriate permission from the Collector and Social Welfare Department and to bear the expenses for that purpose.

8. The Counsel appearing for the appellant vehemently contended that on reading the terms of agreement it is evident that interest in land is created in favour of the developer and he is not merely a contractor appointed for constructing the building and for handing over the constructed portion to the members of the society. Reliance is placed on the judgment in the matter of Chheda Housing Development Corporation v/s. Bibijan Shaikh Farid & ors. (2007 (3) Mh. L.J.) and it is contended that agreement entered into between the members of the Society and the developer shall fall within the ambit of clause (b) of para 12A of the Judgment and, therefore, specific performance of the agreement is permissible. In para 12A of the Judgment it is recorded by the Division Bench thus:

12A. In our opinion, from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be:

- (a) An agreement only entrusting construction work to a party for consideration;
- (b) An agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.

(c) A normal agreement for sale of an immovable property.

An agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced.

9. My attention is also invited to paragraph 16 of the Judgment and it is contended that as the developer is permitted to use additional FSI in terms of the agreement, prima-facie agreement can be specifically enforced and in such circumstances irreparable loss and injury would be caused to the appellants, if the injunction is not granted.

10. I have considered the submissions advanced by learned Senior Counsel for the appellant. It is to be noted that as per the consent terms as recorded in writ petition No. 3400/2002, it was the responsibility of the promoters to complete the construction of building, after getting possession of plot and form separate co-operative Society. In the instant matter, though the agreement is entered into on 1st October, 2003 and inspite of agreement for raising construction of the building with the developer, work of construction has not yet commenced. The first agreement dated 1st October, 2003 stipulates entering into a further agreement and 2nd agreement was entered into on 25th June, 2004. In terms of agreement dated 25th June, 2004, the plaintiff is referred to as a contractor and has been assigned the work of constructing a building at the rate of Rs. 600/-per sq. ft. for first 300 sq. ft. area and at the rate of Rs. 1000/-sq. ft. for additional 100 sq. ft. area and at the rate of Rs. 2000/-per sq. ft. for any additional area beyond 400 sq. ft.. It is true that Paragraph No. 19 of the Agreement refers to utilization of additional FSI by builder for constructing additional building and additional flats and for disposing of the same and for appropriation of the amount. Pursuance to the subsequent agreement entered into between parties plans were still not drawn and it was not ascertained as to whether the additional FSI would be available and how much it would be. According to Counsel appearing for appellant, the plaintiff is entitled to specifically enforce the agreement. In view of the terms of agreement, if read harmoniously, would come within the ambit of clause (b) of para 12A of the Judgment recorded in Chheda Housing Development Corporation's matter (supra). Even if assuming that the terms contained in agreement entitle plaintiff to claim specific performance of agreement, however, the plaintiff is not claiming specific performance of the agreement. The plaintiff has come to the Court merely complaining about the interference by the defendants and is seeking a decree simplicitor for injunction.

11. The argument advanced by the respondent/defendant that the plaintiff has suppressed material facts regarding the termination of the agreement is also required to be considered. My attention is invited to the letter issued by the Advocate for the defendants on 6th October, 2006 wherein in Paragraph No. 6 is specifically recorded that, "if you do not respond in a week's time, the

agreements with my clients shall stand terminated (The agreements already stand terminated, but indulgence was given on your approaching the undersigned and making oral promise of carrying out obligations as per the agreement)". Thus, termination of agreement is communicated by letter dated 6th October, 2006, however, at sametime a week's time is given to the contractor to comply with certain terms. It is recorded in paragraph 5 of the said letter thus:

5. (i) To give in writing that you will provide cost free flats to 24 members, as provided in the agreement signed by you through Mr. Shukla. Though it is desirable that a better worded fresh agreement be drawn and executed dispelling the confusion/contradiction in earlier writings.

(ii) To give undertaking that you will complete the building, as per the I.O.D. Being processed, within one year and give possession of flats to 24 members of the Society and to none else (you Mr. Shukla had asked the members present on 1st October, 2006 meeting, if they will accept money, in lieu - which shows you are driving a wedge).

(iii) To give indemnity/ Bank guarantee that you will complete the Building and not leave it half way.

12. There is another letter dated 8th January, 2007 wherein a final call has been given to the plaintiff-promoter to comply with the conditions. It is also recorded in Paragraph No. 8 of the letter that he is also called upon to enter into a supplementary agreement copy of which was sent to him. It is recorded in Paragraph No. 8 of the letter that if it is not acceptable and if the contractor/ developer fails to respond within 14 days of the receipt of letter, it would be open for the defendants to get the building constructed from a third builder. Thus, there appears to be termination of agreement by virtue of letter dated 6th October, 2006 and 8th January, 2007. It is vehemently contended by the appellant that considering the tenure of the letters quoted above, it cannot be construed as termination of the agreement. The fact, however, remains that there is absolutely no reference to aforesaid two letters in the plaint. Thus, the contention raised by the defendants that there is suppression of material facts by the plaintiff bear some substance. My attention is invited to the Judgment in the matter of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, wherein the Apex Court has observed thus:

The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

13. Considering the fact that plaintiff has suppressed material facts from the Court I am of the view that plaintiff is not entitled to discretionary relief of injunction. The question of balance of convenience also needs to be looked into in its proper perspective. As per the terms of settlement the promoters were required to get the building constructed in two years. The defendants have entered into agreement with the Contractor on 1st October, 2003 and 2nd agreement is dated 25th June, 2004. However, inspite of executing the agreement way back in 2003 and 2004, the contractor has not commenced the work of construction of the buildings. It is to be noted that the 24 members of the Society belong to backward community and their interest does not appear to have been looked after by the builder/developer/plaintiff. Thus the balance of convenience does not lie in favour of the plaintiff. It is also argued by the respondent-original defendants that though the subsequent agreement was entered into between the promoters on behalf of the society, in the instant suit the Society is not made party. The plaintiff has also not claimed specific performance of the agreement neither the Society is made party.

14. For the reasons recorded above, I am of the view that prima-facie case as well as balance of convenience does not lie in favour of the plaintiff. The trial Court was justified in refusing to grant injunction in the matter. It is not a case for the Appellate Court to cause interference. Exercise of discretion by the trial Court cannot be said to be perverse or fanciful. There is no reason to cause interference in the order passed by the trial Court. Appeal from Order stands dismissed.

15. In view of the dismissal of Appeal from Order, civil application does not survive and stands disposed of.

16. The Counsel for the appellant prays for continuation of interim-relief for further period with a view to avail of the appellate remedy by the plaintiff-appellant herein. This Court by order dated 20th October, 2011 directed the parties to maintain status-quo. The order of status-quo passed by this Court shall remain operative for a further period of six weeks from today.