

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION

APPEAL FROM ORDER NO.962 OF 2014
WITH
CIVIL APPLICATION NO.1169 OF 2014

Nirmal Singh Virk & Ors.

... Appellants.

V/s.

Malad Ambika Premises CHS Ltd. & Anr.

...Respondents

Mr. R. P. Ojha for the Appellants.

Mr. Sunil Nimbalkar for Respondent No.2.

Mr. Y. R. Shah i/b. Sunil Shukla for the Respondent No.1.

CORAM: K.K. TATED, J.

DATED : FEBRUARY 9, 2015

PC. :

1. Heard the learned counsel for the parties. This appeal is preferred by the Plaintiffs challenging the order dated 29/10/2013 passed by the Bombay City Civil Court below Exhibit 6 in S.C.Suit No.997/2012 holding that the City Civil Court has no jurisdiction to entertain the suit filed by the Appellant Plaintiffs in view of section 91 of the Maharashtra Cooperative Societies Act 1960 (said Act).

2. Few facts of the matter are, as under:

The Appellants are Plaintiffs. Respondent No.1 is Defendant No.1 and Respondent No.2 is Defendant No.2. The Plaintiffs filed Special Civil Suit No.997/2012 in the Bombay City Civil Court, Bombay for the following reliefs :

- a) That the Defendants may be ordered and decreed to allot the Plaintiffs a flat on third floor, facing road side admeasuring 401 sq.ft. carpet area as per individual agreement dated 16/04/2008 in Malad Ambika CHS Ltd. Upper Govind Nagar, Malad (E) Mumbai – 400 097.
- b) That this Hon'ble Court be pleased to declare the allotment letter 30/11/2011 as null, void and illegal and the Defendant No.2 has no right to allot a flat in newly constructed building to the members of Defendant No.1.
- c) That the Defendant No.2 may be ordered to pay Rs.48750/- agreed monthly rent for 6 months i.e. from November 2011 to April 2012 to the Plaintiffs as per the terms and conditions of individual agreement dated 16/04/2008.
- d) That the Defendant may be ordered to produce list of the members to whom flats have been allotted in newly constructed building i.e. Malad Ambika CHS Ltd. Upper Govind Nagar, Malad (E) Mumbai – 400 097.
- e) Pending the hearing and final disposal of the suit Defendants may be restrained by a permanent order and injunction from allotting and/or handing over the possession of the flat in the newly constructed building to the members of the Defendant No.1 unless or until the Plaintiffs are provided flat on third floor, facing road side admeasuring 401 sq.ft. carpet area as per individual agreement dated 16/04/2008 in Malad Ambika CHS Ltd. Upper Govind Nagar, Malad (E) Mumbai – 400 097.
- f) Pending the hearing and final disposal of the suit Defendants may be restrained by a temporary order and injunction from allotting and/or handing over the flats on third floor, facing road side admeasuring 401 sq.ft. carpet area as per individual agreement dated 16/04/2008 in Malad Ambika CHS Ltd. Upper Govind Nagar, Malad (E) Mumbai – 400 097 to any members of the Defendant No.1 unless or until the Plaintiffs' case is decided.

- g) Pending the hearing and final disposal of the suit, the Defendant No.2 may be ordered to pay monthly agreed rent from the month of November till date to the Plaintiffs at Rs.8125/-.
- h) Interim ad-interim relief in terms of prayer clauses (e) & (f) may be granted.
- i) Cost and professional cost may be provided for.
- j) Any other and further relief as the nature and circumstances of the case may require be granted.

3. The said suit was filed by the Plaintiffs on the basis of the agreement dated 16/04/2008 executed between the Plaintiffs and Defendants. In the said agreement it is specifically stated that Defendant No.1 society, as per the resolution dated 14/02/2007 passed in the general body meeting, authorized Defendant No.2 to redevelop the property and hand over possession of the same. Paragraph 11 of the said agreement thus :

“11. It shall be responsibility of the office bearers of the society to allot the flat to each member in the newly constructed building once the developer completes the construction and issue possession letter.”

4. As the Defendants failed and neglected to hand over the possession as per the agreement dated 16/04/2008, the Plaintiffs filed suit in the Bombay City Civil Court, at Bombay. In that suit, the Trial Court framed preliminary issue about the jurisdiction of court below Exhibit 6 and held against the Plaintiffs. Hence, the present Appeal from Order.

5. The learned counsel for the Plaintiffs submits that the Trial Court

erred in coming to the conclusion that the Bombay City Civil Court at Bombay has no jurisdiction to entertain the suit in view of section 91 of the said Act. He submits that in the present proceedings, the Plaintiffs are seeking declaration that Defendant No.2 – Developer is bound to provide a flat admeasuring 401 sq.ft. on third floor in a reconstructed building to the Plaintiffs. He submits that the Developer, instead of providing such flat, allotted a flat on 5th floor admeasuring 375 sq.ft. He further submits even Defendant No.2 failed and neglected to pay monthly compensation/rent to the Plaintiffs from November 2011 to April 2012. The learned counsel for the Plaintiffs submits that bare reading of the plaint shows that Defendant No.1 society is a formal party and the Plaintiffs are not claiming any relief against them. In spite of that, the Trial Court held that the civil court has no jurisdiction to entertain the dispute between the Plaintiffs and the Defendants. The learned counsel for the Plaintiffs submits that if any declaration is claimed, then the civil court has jurisdiction to entertain the suit. In support of this, he relies on the judgment in the matter of *Alok Agrawal & Anr. Vs. Punam CHS Ltd. & Ors.* 2013(2) BCR 244. He further submits that similar view has been taken by the Apex Court in the matter of *Margret Almeida and Ors. Vs. Bombay Catholic CHS Ltd. & Ors.* 2012 (5) SCC 642 and in the matter of *Marine Times Publications Pvt. Ltd. Vs. Shriram Transport & Finance Co. Ltd. & Anr.* 1991(1) SCC 469.

6. On the basis of this submission and the law laid down by the Apex Court in the aforesaid matters, the learned counsel for the Plaintiffs submits that the impugned order dated 29/10/2013 passed below Exhibit 6 be set aside and it be held that the civil court has

jurisdiction to entertain the Short Cause Suit No.997/2012 filed by the Plaintiffs.

7. On the other hand, the learned counsel for the Respondents Defendant vehemently opposed the appeal. Both the counsel for the Defendant state that bare reading of the plaint shows that the Plaintiffs are claiming main relief against the society. The learned counsel for the Defendants submits that the Plaintiffs have not made any averment in the plaint that the Defendant society is a formal party and they are not claiming any relief against the society. Therefore, in view of section 91 of the said Act, the civil court has no jurisdiction to entertain the suit as filed by the Plaintiffs.

8. The learned counsel for the Respondent No.2 - Defendant No.2 submits that the Developer, as per order dated 18/10/2012 passed by this court (Coram : B. P. Dharmadhikari, J.) in Appeal from Order No.938/2012 reserved a flat No.904 on 9th Floor admeasuring 401 sq.ft. In view of these facts, the learned counsel for the Defendant No.2 submits that there is no substance in the appeal and same be dismissed with costs.

9. Heard both sides at length. In the present proceedings, the issue involved is whether the civil court has jurisdiction to entertain the suit as filed by the Plaintiffs in the Bombay City Civil Court against the Defendants. Bare reading of the plaint shows that there is a dispute between the society and its members on one hand and the members and society with the Developer on the other. In clause 11 of the agreement dated 16/04/2008 it is specifically stated that it is the

responsibility of the office bearers of the society to allot flats to each member in the newly constructed building once the developer completes the construction and issues possession letter. In the present suit, the Plaintiffs are seeking allotment from the developer who has developed the property. Even bare reading of the plaint shows that the Plaintiffs are claiming main relief against Defendant No.1 i.e. cooperative society. Nowhere it is stated in the plaint that Defendant No.1 is a formal party and they are not claiming any substantial relief against them. The case law cited by the Plaintiffs in the matter of **Alok Agarwal** and **Margret Almeida** referred to above are not applicable in the facts and circumstances of the present case. In the matter of **Aolk Agarwal** the issue was about the declaration of open space whether belongs to the cooperative society or the person who has occupied the same illegally. Similarly, the issue in both the above authority and case in hand are altogether different. Hence, they are not applicable in the present matter.

10. Considering the submissions made by the learned counsel for the Appellants, agreement dated 16/04/2008, copy of the plaint and the impugned order passed by the Trial Court, I am of the opinion that the Plaintiffs have not made out any case to interfere with the order dated 29/10/2013 passed by the Trial Court. Hence, the Appeal from Order stands rejected.

11. In view thereof, nothing survives in the Civil Application. Same stands dismissed as infructuous.

(K.K. TATED, J.)