IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.132 OF 2015
IN
PUBLIC INTEREST LITIGATION NO.131 OF 2008

M/s. Crescendo & Ors. … Applicants

In the matter between

Kamlakar Motiram Satve & Anr. … Petitioners
Vs.
The State of Maharashtra & Ors. … Respondents

ALONGWITH
ORDINARY ORIGINAL CIVIL JURISDICTION
PUBLIC INTEREST LITIGATION NO.91 OF 2008

Mr. Rajendra Thacker … Petitioner
Vs.
State of Maharashtra & Ors. … Respondents

ALONGWITH
ORDINARY ORIGINAL CIVIL JURISDICTION
PUBLIC INTEREST LITIGATION NO.21 OF 2008

Medha Patkar … Petitioner
Vs.
The State of Maharashtra & Ors. … Respondents

Aspi Chinoy, Sr. Adv., a/w. Mr. Chetan Kapadia, Adv. a/w. Mr. S V Doijode, Adv. a/w. A V Doijode, Adv. a/w. Mr. P A Kabadi, Adv. a/w. Ms. Falguni Thakkar, Adv. i/b. Doijode & Associates for applicant.
Mr S G Deshmukh, Adv. for the petitioner in PIL No.131 of 2008.
Mr. Rohit Joshi, Adv. i/b. M/s. Gouri Godse, Adv. for respondent Nos.5 & 6 in PIL No.131 of 2008.
Mr. Suresh Pakle, Adv. a/w. Ms. Trupti Puranik, Adv. for BMC respondent No.4 in PIL No.131 of 2008.
Ms. Kiran Bagalia, Adv. for MMRDA.
Mr. Vinay Bhorge, Adv., i/b. Utangale & Co. for respondent No.3 in PIL No.131 of 2008.

CORAM : MRS. ROSHAN DALVI &
MRS. MRIDULA BHATKAR, J.J.

DATE OF RESERVING THE ORDER : 12th OCTOBER, 2015

DATE OF PRONOUNCING THE ORDER : 29th OCTOBER, 2015

O R D E R

1. The applicants are stated to be amongst the Hiranandani Group of Companies and hence claim under respondent Nos.9 and 10 in PIL No.131 of 2008, respondent Nos.6, 6A to 6C in PIL No.91 of 2008 and respondent No.6 in PIL No.21 of 2010 (applicants). The aforesaid petitions were filed essentially for writs of mandamus in respect of certain tripartite agreements / contract entered into by and between the State of Maharashtra, the applicants and the MMRDA. The applicants breached various terms of the contract. The petitioners in the petitions sought to right the wrong. An interim order came to be passed in PIL Nos.131 and 91 of 2008 by the Division Bench of this Court dated 4th October, 2008 under which applicants were restrained from selling flats which were amalgamated to one individual or to various individuals together. It was clarified that the applicants could sell flats only of 80 and 40 Sq.mtrs. without amalgamation. The order was subject to orders which may be passed in the above petitions. The applicants were not to claim equities for the work done. All the above three petitions were heard and a judgment was passed on 22nd February, 2012 by the Division Bench of this Court in which one of us (Roshan Dalvi, J) was a party. Under the said judgment various orders and directions came to be passed in the nature of the writ of mandamus.

2. The parties have commenced to act upon the order and certain documents as directed have been filed. The order has yet

largely remained at that.

3. Under clause 'd' of the said judgment the applicant as the developer was not to putting any further construction of whatsoever nature on the remainder of the plot under the Powai A.D.S. until the flats which were directed to be constructed were constructed strictly as per the contract between the parties. The applicants were directed to construct only 1511 flats of 40 Sq.mtrs. and 1593 flats of 80 Sq.mtrs. <u>without any amalgamation exception or further allowance</u>. Out of these flats 15% of the flats were directed to be sold at the rate of Rs.135/- psf to the State of Maharashtra in a transparent manner. The applicants were only thereafter entitled to put up any further constructions.

4. Hence under the interim order dated 4th December, 2008 there was an injunction <u>against sale</u> of the flats which were amalgamated contrary to the contract and under the judgment dated 22nd February, 2012 there was an injunction <u>against construction</u> of any further flats until the aforesaid 1511 and 1593 flats were constructed.

5. The applicants have sought to put up 7 new buildings. There is stated to be an injunction of the learned Single Judge of this Court confirmed by the Supreme Court in respect of 4 of those buildings. The construction has remained incomplete. Not a single flat of 40 Sq.mtrs. or 80 Sq.mtrs has been completely constructed. The applicants are stated to have put up plans for construction of buildings at another location in Powai A.D.S. for complying with the judgment dated 22nd February, 2012. At such a juncture the applicants under the aforesaid application require the Court to allow the

applicants to execute Maharashtra Ownership Flats Act (MOFA) agreements in favour of the purchasers of 22 flats and to sell 207 unsold amalgamated flats, the construction of which is stated to have completed before February, 2012 when the order against construction came to be passed.

6. The petitioners in the petitions as also MMRDA have vehemently opposed grant of any such reliefs.

7. 22 flats are stated to be flats in respect of which agreements of sale were already executed prior to the interim order. The agreements are not produced. The application shows only that the applicants had agreed to sell 22 flats in 4 buildings under construction for which substantial payments have been received by account payee cheques as shown in the columnar statement in paragraph 3 of the application. The amounts are shown to be received prior to the interim order dated 4th December, 2008. Possession of the flats are shown to have been delivered after the interim order and before the final order in all but three cases.

8. The applicants contend that they were not restrained from constructing the flats under the interim order and hence could not be restrained from accepting balance consideration and putting the flat purchasers in possession thereof. It would follow as a matter of corollary that if the applicants were to continue the development work and construct the flats they must be entitled to sell them and to put the purchasers in possession. The purchasers would have legal rights under MOFA. Consequently for the acts of development of the applicants the 22 flats purchasers should not be adversely or prejudicially affected.

9. The petitioners contend that the petitioners have filed certain contempt petition for contempt or breach of the interim order and hence no order for execution of MOFA agreements may be passed. The applicants alone would be liable for breach of the interim order if found to be in the contempt petition. The MOFA agreements would be executed upon the allowance given to the applicants for continuing the development work though subject to the orders in the petitions. Hence the first part of prayer 'a' in the above C A No.132 of 2015 would require to be granted.

10. The applicants have constructed 207 amalgamated flats pending the petitions. These amalgamated flats constitute amalgamation of flats admeasuring 40 Sq.mtrs. or 80 Sq.mtrs. The Court is informed that not only 2, but also 3 or 4 such flats have been amalgamated into one. The amalgamation has been seen to be wholly contrary to the tripartite agreements / contract between the parties. The applicants have been seen to be in complete breach of the agreement. The ethos of the judgment has been the sanctity of the contract. The contractual honour has been directed to be preserved. The construction which was put up and the development which was allowed to continue under the interim order was to be subject to the orders in the petitions. The construction of 207 unsold amalgamated flats must, therefore, be subject to the order in the petitions. The judgment in the petition has been passed. The construction must, therefore, abide the judgment. The construction having been seen to be blatantly in breach of the contract has not been allowed to be continued. The application of the applicants under C A No.132 of 2015 for permitting the sale of the flats constructed in breach of the contract would tantamount to putting a premium on default. If they were to be allowed to be sold, an order and allowance in that respect

would have been passed in the judgment itself. That has not been done.

11. At the time of the hearing of the petitions, 70 buildings were stated to have been constructed containing 207 such flats which were lying vacant then. There is no flat as contemplated under the agreement between the parties at all on site. More than 3000 such flats are directed in the judgment to be constructed. It may take decades before such construction would be completed. The buildings already constructed would literally rot. The application is stated to be taken out to prevent such wanton waste. Though the Court would not put a premium on default, the Court would certainly consider prevention of national waste. Though the contract was executed as far back as on 19th November, 1986 for the grant of flats to middle class persons and not as a largesse for the developer, the flats wrongfully constructed in breach of the contract remained on earth. They would not be made available for sale. Since the flats are amalgamated, they would be out of reach of the persons for whom they were meant to be constructed. The development was to be on a large area of 230 acres of land. The applicants would be entitled to load TDR on the available FSI. Even after construction of buildings containing 1511 and 1593 flats, the plot would be able to offer further construction under the TDR purchased by the applicants. Hence 207 flats wrongfully constructed would in fact come out of the TDR purchased by the applicants which can be regularised only after 1511 and 1593 flats are constructed from the available FSI. Under those circumstances it may be prudent to allow to sell of those flats, but not to allow the applicants to avail of any profits therefrom. The applicants have applied for their own liquidity position and for realising funds for the construction directed to be put up by them

which was required to be put up 30 years ago. The Court cannot be concerned with the cost incurred by the applicants in construction. They are in business of their own volition. They have sought to construct under the contract. They must abide the contract. The construction which has been put up cannot be condoned by giving the applicants any benefits therefrom.

12. Hence the following order :

1. The applicants are allowed to execute MOFA agreements in favour of purchasers of 22 flats mentioned in paragraph 3 of the above application. If the purchasers are required to make payment of any further amount, such payment shall be made not to the applicants directly but to the Prothonotary and Senior Master of this Court by account payee cheques drawn in his name.
2. The applicants shall be allowed to sell 207 amalgamated flats, the purchase price of which shall not be received by the applicants or paid by such purchasers directly to the applicants. The purchase price shall be paid only by account payee cheques in the name of the Prothonotary and Senior Master, the notice of which shall be given to the petitioners with particulars of the flats sold and dates on which possession is handed over of flats to any third party.
3. The cheques received in respect of (1) and (2) above shall lie deposited to the credit of the above three petitions and shall be invested by the Prothonotary and Senior Master in fixed deposit receipt of any Nationalised Bank for a period of 61 months or more from time to time.
4. The amount of the purchase price of all these flats shall paid to the applicants only upon notice to the petitioners after 1511

flats of 40 Sq.mtrs. and 1593 flats of 80 Sq.mtrs are constructed as directed in the judgment dated 22nd February, 2012 by the applicant as the Hiranandani Group of Companies.

5. The application is disposed of accordingly.

(MRS. MRIDULA BHATKAR, J.) **(ROSHAN DALVI, J.)**