

Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.(L) 537 OF 2015
IN
SUIT NO.(L) 191 OF 2015**

Sarabjeet Singh Gopal Singh Baweja ...Applicant

In the matter of :

Sarabjeet Singh Gopal Singh Baweja ...Plaintiff

Vs.

Faiyaz Rangwala & Ors. ...Defendants

Mr. Amir Arsi i/b. Mr. Sameer P. Khedekar for the Plaintiff

Mr. Simil Purohit a/w. Mrs. Vas and Ms. J. Perira

i/b. P. Vas & Co., for the Defendants

CORAM : MRS. ROSHAN DALVI, J.

Date of reserving the Judgment : 9th June, 2015

Date of pronouncing the Judgment : 15th June, 2015

JUDGMENT:

1. The plaintiff and defendant No.1 entered into an initial development agreement on 17th May, 2007 for development of the suit plot of land which is owned by the plaintiff and which was earlier tenanted. Later the plaintiff entered into a supplementary agreement with defendant No.2 which is the limited company of defendant No.1 on 17th March, 2011 (defendant Nos. 1 and 2 shall be referred to as the defendant). Both the agreements are with regard to the redevelopment of the plaintiff's plot. The parties agreed that

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the plaintiff would be given specified areas upon redevelopment in the initial agreement and modified the same in the later agreement. The later agreement would, therefore, bind the parties.

2. This agreement came to be executed after certain area consisting of two floors came to be surrendered by the plaintiff to the defendant for the consideration of Rs.4.5 crores. The surrender is specified in clause 4 of the agreement. What the parties agreed in the supplementary agreement is, therefore, based upon and taking into account the said surrender and the payment thereof. What is agreed between the parties is the entitlement of the plaintiff as in clauses 5, 6 and 7 of the agreement.

3. After the execution of the initial agreement 7 out of 9 tenants were paid off by the defendant. The defendant would, therefore, have those areas appropriated to the defendant for sale upon construction. The other two tenants were paid off later. Defendant No.3 is one of them. There are, therefore, no areas for deduction on account of the tenants as no area is to be offered to any of the tenants. The entire property is for free sale by the defendant, subject only to the plaintiff's entitlement.

4. The plaintiff has sought specific performance of the

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aforsaid two agreements and ancillary reliefs in the suit. The plaintiff has applied for the usual reliefs of injunction and the appointment of Court Receiver as also deposit of certain amount in the notice of motion.

5. The case of the plaintiff would have to be seen essentially for the entitlement of the plaintiff under clauses 5, 6 and 7 of the later agreement which would supersede the earlier agreement to that extent.

6. Clause 5 of the supplementary agreement dated 17th March, 2011 contains the non-obstante clause. "Notwithstanding what is stated in the development agreement". The area surrendered by the tenants would have to be deducted from the total FSI and would belong to the defendant. The remaining area would be divided into two equal parts, one for the plaintiff and one for the defendant. The plaintiff's entitlement is shown in Schedule-III to the supplementary agreement.

7. Schedule-III shows the plaintiff's entitlement as per the plan dated 27th March, 2007. That plan, **Exhibit-D** to the plaint shows 1167.85 sq. mtrs of total built-up area proposed to be constructed. Out of such area both parties would have an equal amount of basement and parking area and the plaintiff would have a total of 327.11 sq. mtrs of area

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specified on various floors being ground floor, first floor, 10th floor and 13th floor.

8. Under clause 6 of the agreement the defendant's entitlement would be as per the initial development agreement dated 17th May 2007 remaining unchanged.

9. Under clause 7 of the supplementary agreement the parties have agreed as to the entitlement of the plaintiff when there would be a reduction or increase in the total built-up area thus:

(a) In case of reduction of the total built-up area the plaintiff's entitlement would not be effected.

(b) If higher floors are not sanctioned the plaintiff would be allotted premises on the lower floors which are sanctioned, but the total area would not be reduced.

(c) If there is any increase in the total built-up area the plaintiff and the defendant would share the increase of the total built-up area equally.

10. There has indeed been an increase in the total built-up area. The defendant has supplied the latest plan to the plaintiff upon the plaintiff's query. That plan shows the total

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built-up area proposed to be 1170.20 sq. mtrs and further fungible FSI availed by the defendant making the gross built-up area upon the fungible FSI additionally granted to be 372.83 sq. mtrs. Hence the proposed area for construction has been increased to 1543.13 sq. mtrs in the later plan submitted by the defendant himself.

11. The plaintiff demands 1/2 of the additional increased FSI showing the total built-up area under clause 7 of the supplementary agreement.

12. The defendant would claim that because it is increased due to the grant of fungible FSI which the defendant alone has paid for, the plaintiff is not entitled to any such increase. It is argued on behalf of the defendant that when the supplementary agreement was executed the requirement of fungible FSI was neither known nor contemplated by the parties.

13. A reading of the relevant part of clause 7 becomes imperative, which runs thus:

“However, if there is any increase in the total built up area of the new building as per the said approved plans the said increase in area shall be shared equally between the Owner and the

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Developer”.

14. The parties have agreed that if there is any increase, the clause would apply. Any increase would bring within its purview increase upon any circumstances such as legislation, contract or otherwise. It must be an increase in the total built-up area of the new building. The fungible FSI would result in increase in the total built-up area in the new building. It is stated that the defendant has paid Rs. 9.5 crores for purchasing such FSI. The fungible FSI is, therefore, purchased at a premium. Consequently that fungible FSI is not required to be used for housing any existing tenants or occupants. It would be the fungible FSI to be used by the defendant alone. That user is agreed to be shared by the defendant equally with the plaintiff. Because it happens to be fungible is not the reason it is not to be equally divided as “any increase” is to be equally divided. The increase in the area is to the extent of 375.28 sq. mtrs. The defendant would, therefore, have to grant to the plaintiff the total area of 327.11 sq. mtrs plus 187.64 sq. mtrs = 514.75 sq. mtrs.

15. It is argued on behalf of the defendant that the plaintiff was to put up a residential building initially, which was later contemplated to be a commercial structure and still later a residential structure has been already put up. Therefore, also the equal entitlement under clause 7 need not be granted.

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The argument is wholly without substance. Under clause 9 of the agreement the defendant had the discretion to develop the suit premises as a commercial as well as residential building for which the plaintiff had no objection. Hence whatever be the total built-up area, be it commercial or residential, both parties were to partake equally in it.

16. The defendant has agreed to reserve for the plaintiff 156.04 sq. mtrs on the 4th floor, 71.25 sq. mtrs on the ground floor, 75.02 sq. mtrs on the first floor with a terrace area of 32 sq. mtrs totalling to 333.34 sq. mtrs in place of the precise entitlement of the plaintiff under Annexure-III to clause 5 of the supplementary agreement dated 17th March 2011. This would be sufficient compliance of clause 5. However there has to be sufficient compliance of clause 7 also.

17. The defendant shall have to provide for the plaintiff 181.41 sq. mtrs of additional area on any one of the floors of the suit building.

18. Hence the following order:

1. The defendant shall inform the plaintiff which specified area on which one floor of the suit building shall be provided to the plaintiff aggregating to 181.41 sq. mtrs aside from the aforesaid offer of the defendant

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on the ground floor, first floor, 4th floor and the terrace of the suit building.

2. The defendant shall not sell any of the constructed premises until such area is specifically carved out, kept aside for the plaintiff and informed to the plaintiff.
3. The defendant shall be entitled to sell any of the remaining premises after the area of the plaintiff's entitlement is specified.
4. Parties shall have liberty to apply in terms of the above entitlement / reservation of area.
5. Notice of Motion is disposed off accordingly.
6. This order is stayed for 2 weeks. However the defendant shall not sell any part of the suit premises to any third party or encumber, alienate and create third party rights in any premises.

(ROSHAN DALVI, J.)