IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1355 OF 2011
IN
SUIT NO. 942 OF 2011
WITH
NOTICE OF MOTION NO.2362 OF 2012
IN
SUIT NO. 942 OF 2011

M/s. Meeti Developers Pvt. Ltd. …Plaintiff
vs.
Mr. Vijay Papneja And Anr. ...Defendants

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Mr. Sandeep Karu, for the Plaintiff.

Mr. Vishal Kanade, i/b. Vinod K. Sharma and Mrs. Kalyani G. Parmar, for Defendant No.1.

Mr. Harinder Toor, a/w. Mr. Rakesh Singh and Mr. A.R. Shaikh, for Defendant No.2.

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CORAM : S.C. GUPTE, J.

2 FEBRUARY 2015

P.C. :

. Notice of Motion No.1355 of 2011 is taken out by the Plaintiff for (i) appointment of Court Receiver with directions to take possession of the suit property and handover the same to the Plaintiff for redevelopment and (ii) interim injunction restraining Defendant Nos.1 and 2 from interfering with the Plaintiff's performance under an agreement for grant of development rights dated 25 October 2007. The Plaintiff is a developer of the suit property, whilst Defendant No.1 is a member of Defendant No.2 Co-operative Housing Society. Defendant No.2 is a lessee of the suit property under MHADA and owns the suit building.

2. During the pendency of this Motion, original Defendant No.2 has taken out Notice of Motion No.2362 of 2012, for rejection of the plaint under Order 7, Rule 11 of the Code of Civil Procedure 1908 and, in the alternative, for framing and deciding preliminary issues of jurisdiction. The Notice of Motion is on the footing that the suit is barred by the law of limitation as well as for the reason of non-joinder of necessary parties. By an order dated 3 December 2012, the following issues were framed as preliminary issues :-

> (i) Whether the suit as filed is barred by the Law of Limitation?
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> (ii) Whether the suit as filed is maintainable in view of Sections 91 and 163 of the Maharashtra Co-operative Societies Act, 1960?

3. When the matter was heard on 22 January 2014, learned Counsel for Defendant No.2 stated that Defendant No.2 was not pressing the contention that this Court has no jurisdiction to entertain and try the suit and that Defendant No.2 would only press its contention that the suit was barred by the law of limitation. Though an affidavit of evidence was filed initially on the issue of limitation, finally the parties did not choose to lead any evidence on the issue and want the issue to be decided only on the oral submissions made across the bar.

4. As far as Notice of Motion No. 2362 of 2012 is concerned, the only grounds which, thus, survive are the objections of Defendant No.2 to the suit on the ground of (i) non-joinder of necessary parties and (ii) the bar of limitation, pleaded by Defendant No.2.

5. The objection on the ground of non-joinder is that individual members of Defendant No.2 Society other than Defendant No.1 herein, as also the Maharashtra Housing and Area Development Authority('MHADA'), who is the owner of the suit property, are necessary parties to the present suit and in their absence, the suit is not maintainable. The suit, as framed by the Plaintiff, seeks a declaration that the agreement for grant of development rights dated 25 October 2007 executed between the Plaintiff and Defendant No.2 is binding on the Defendants. On the basis of this agreement, the Plaintiff seeks directions to the Defendants to deliver vacant possession of the suit premises and a permanent injunction restraining the Defendants from in any manner interfering with the performance of the Plaintiff's obligations under the agreement. In the alternative, the Plaintiff has sought a money decree against the Defendants. Defendant No.2 is a lessee of the suit property, which consists of a plot of land together with a building standing thereon. The plot was leased by MHADA in favour of Defendant No.2. Defendant No.2 had constructed the building standing in the plot with the help of funds provided by its members. Defendant No.2 is in possession of the suit property as the owner of the building through its members. The suit agreement requires the Defendants to vacate the suit building and handover possession thereof to the Plaintiff for redevelopment in accordance with the terms and conditions thereof. Defendant No.2 is arraigned to the suit in its capacity as a lessee of the land and owner of the suit property representing all its members. Neither the lessor MHADA nor individual members of Defendant No.2 Society can be *prima facie* said to be necessary parties to such a suit. In any event, this is not a matter to be decided on an application under Order 7, Rule 11. No preliminary

issue is either framed or pressed in respect of the objection as to joinder of parties. The objection of non-joinder need not be finally decided on the present Notice of Motion.

6. As far as the objection to the maintainability of the suit on the ground of the bar of limitation is concerned, it is submitted by Defendant No.2 that the suit being for specific performance of a contract, is governed by Article 54 of the Schedule to the Limitation Act, 1963. It is submitted that the limitation period for filing of such a suit begins either from the date fixed for the performance of the suit agreement or the date when the plaintiff has notice of the refusal of performance on the part of the defendant, whichever is earlier. It is submitted that under the suit agreement, Defendant No.2 Society was required to separately obtain from each of its members individual agreements between the members and the developers, i.e. the Plaintiff, confirming the provisions of the suit agreement and agreeing to abide by and give effect to the same. It is submitted that such agreements were to be executed simultaneously with the execution of the suit development agreement. It is submitted that the date of the suit agreement thus being the date of performance on the part of the Defendant Society, the time for filing of the specific performance suit begins to run from the date of the suit agreement itself.

7. The contention is hardly tenable in view of the rival pleadings of the parties. It is the case of the Plaintiff that the 2nd Defendant Society was originally ready and willing to perform the suit agreement and, in fact, had stood by the suit development agreement and even sought to prosecute a dispute against Defendant No.1 herein before the Co-operative Court on that basis.

In the dispute before the Co-operative Court it was claimed by Defendant No.2 that Defendant No.2 and its members other than Defendant No.1 herein, were ready to have the suit property redeveloped through the Plaintiff and that the project of redevelopment could not be taken up only because of the obstruction caused by Defendant No.1. On the other hand, in its reply to the Notice of Motion No.1355 of 2011, it is claimed by Defendant No.2 that, at the time of the execution of the development agreement dated 25 October 2007, the Plaintiff had represented to Defendant No.2 that Plaintiff will convince all members of Defendant No.2 Society to sign individual agreements. It is a matter of fact that upto a certain point of time after the execution of the development agreement, the 2nd Defendant Society had stood by the development agreement and had offered to abide by the same. On these pleadings and facts and in the absence of any evidence being led in the matter, it is not possible to accept the contention of Defendant No.2 that the time for performance of the agreement on the part of the 2nd Defendant Society, namely, its obligation to procure individual agreements from its members, was sacrosanct or that there was a breach of that obligation on the day of the suit development agreement itself. There is, thus, no merit in the objection of limitation and the same is rejected. The preliminary issue concerning limitation is, thus, decided against the Defendants and in favour of the Plaintiff.

8. Now coming to the Notice of Motion of the Plaintiff for interlocutory reliefs claimed in the suit, the reliefs are claimed on the basis that the agreement for grant of development rights dated 25 October 2007 is not merely an agreement for development but an agreement for development coupled with an agreement for sale

of immovable property. It is submitted that this agreement is valid and binding on the Defendants; that the Plaintiff has performed and is willing to perform its part of the contract under the development agreement; and that the Defendants are bound to perform the development agreement *inter alia* by handing over vacant and peaceful possession of the suit building to the Plaintiff to enable the Plaintiff to redevelop the same.

9. The Motion is opposed by the Defendants inter alia on the grounds that the development agreement contemplated individual agreements between the Plaintiff and each of the members of the 2nd Defendant Society. It is submitted that the development agreement cannot operate in the absence of such individual agreements. It is submitted that the development agreement has since been terminated by Defendant No.2 It is submitted that the Plaintiff has never been ready and willing to perform its part of the contract and has no *prima facie* case to claim the reliefs. It is also submitted that the balance of convenience is in favour of the Defendants.

10. At the outset, it needs to be noted that the development agreement provides as follows :-

> 4. The parties hereto covenant that the Society shall separately obtain from each of its members individually separate Agreements entered into with the Developers confirming the provisions hereof, and agreeing to abide by and give effect to the same simultaneously with the execution of these presents.

This clause coupled with the recital in the development agreement that (i) the consideration receivable for transfer of the members' respective entitlements in respect of TDR/FSI from the developer shall belong to the members alone and it is the members alone who would be entitled to receive and appropriate the receivable consideration amount and the Society shall have no right, title and claim in respect thereof, and (ii) the members in their capacity as owners shall alone be liable to capital gains tax on the consideration received by them for transfer of their respective entitlements in favour of the developers, makes it clear that the parties clearly proceeded on the footing that the individual agreements between the Plaintiff and each of the members of the 2nd Defendant Society, would be an essential requirement for both the efficacy and performance of the suit development agreement. Leaving aside the question of simultaneous execution of such individual agreements, the execution of the individual agreements was an essential pre-requisite in the contemplation of the parties for the redevelopment project to go through. Admittedly, only 7 out of 14 members of the 2nd Defendant Society have entered into individual agreements with the Plaintiff. This is the first major hurdle in the way of the Plaintiff for seeking specific performance of the development agreement. *Prima-facie,* the Plaintiff has been unable to show that the performance of the suit development agreement can be claimed in the absence of individual agreements of 7 other members of the 2nd Defendant Society.

11. Secondly, in the absence of a clear concurrence or agreement on the part of 7 out of 14 members of the 2nd Defendant Society for implementation of the redevelopment project, it is doubtful whether, in the first place, the development agreement had the backing of a majority of the members of 2nd Defendant Society. To make matters worse, the agreement is now claimed to have been terminated by the 2nd Defendant Society, by its members

unanimously adopting a resolution for such termination as far back as on 7 June 2010. Though it is the case of the Plaintiff that the termination of the suit development agreement was not communicated to the Plaintiff, such communication having been placed by the Defendants on record in their pleadings, there is no challenge to the termination by the Plaintiff so far. This is the second formidable difficulty in the way of the Plaintiff in seeking specific performance of the suit development agreement.

12. At the minimum, what emerges from the pleadings of the parties and their stand across the bar is that not a single member of the 2nd Defendant Society now supports the redevelopment proposed to be undertaken through the Plaintiff. This Court in the case of **Gopi Gorwani v. Ideal Co-operative Housing Society Ltd.**[1], whilst dealing with a similar agreement of redevelopment of a Housing Society, held as follows :-

> " The work of redevelopment of a Housing Society is such that a Society must have confidence in its developers. Once the members of the Society have expressed loss of trust, faith and confidence in the developer on account of various deviations and violations done by the developer, which is clear from the correspondence on record, the Society cannot be forced to get the redevelopment work done through the Plaintiff. "

13. As it clearly emerges from the pleadings of the parties and their respective stands across the bar, the Society as a whole has lost its confidence in the Plaintiff and as will be presently noticed, such loss of confidence is backed by a clear *prima-facie* case of inaction on the part of the Plaintiff. In that case, it will be inappropriate to force the Society to get the redevelopment work done from the Plaintiff.

1 AIR 2013 Bombay 133

14. When it comes to readiness and willingness to perform its obligations under the suit development agreement, the Plaintiff stands on a further weaker wicket. Under the agreement, the Plaintiff can insist on vacant possession of the suit building only in the event of the Plaintiff performing its prior obligations. The relevant clauses of the suit agreement in this behalf are noted below:-

> 8. The Developers shall at their own costs acquire TDR FSI of other properties, from open market or from MHADA. The same shall be procured in the name of the Society and shall carry out the construction work in respect of the said new building at his own costs by utilising the entire FSI available in respect of the said property as also utilising the FSI of other property by purchase of TDR as may be the maximum permissible as per the Development Control Regulation Act, 1991 and in accordance with the Plans to be got duly approved from MCGM and on the terms and conditions herein set out.
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> 11. The Developers before submitting the building plans to the MCGM for approval by utilising the FSI of the said property as well as FSI by way of utilising TDR, shall furnish to the Society, copy of the Building Plans together with copy of the Development Rights Certificates in respect of the new building for its approval. The Society within 7 (Seven) days of receipt of the same will approve the same and in case, there are any changes suggested by the Society which are not permissible by MCGM; the matter will be referred to the Developer's Architect, whose decision shall be final and binding upon the parties hereto. The developers will not be entitled to carry out any amendments to the building plans which result in relocation and/or reduction of the area of the flats earmarked for the members without the consent of the society.
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> 16. That the Developers have agreed to pay to the member of the Society a lump sum consideration of Rs.27,20,000/- (Rupees Twenty Seven Lacs Twenty Thousand only) and the said amount is payable to the member in the following manner :-
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> > (i) Rs.16,00,000/- (Rupees Sixteen Lacs Only) on the execution of the Tripartite Agreement

between the Society, the Developers and the Members of the Society.

(ii) Rs.11,20,000/- (Rupees Eleven Lacs Twenty Thousand Only) to each member of the Society at the time of handing over to the Developers the vacant possession of their respective flats and garages in the existing building by all the members at a time within thirty days after issue of IOD from MCGM.

20. After the Developers have obtained the approval of building plan for construction of new building on the said property by utilizing the FSI of the said property as well as the FSI of other property by purchase of TDR FSI and on the Developers paying to the Members consideration of Rs.11,20,000/- [Rupees Eleven Lacs Twenty Thousand Only] as per Clause No.15 to the members all the Members of the Society herein shall vacate and handover the possession of their respective flats in the existing building of the Society who will permit/allow the Developers to enter upon the said property under irrevocable license to enable the Developers to demolish the existing building and construct a new building.

15. A conjoint reading of these clauses makes it clear that the Plaintiff was bound to purchase the requisite TDR, prepare building plans for construction of the new building by utilising both the FSI of the property as well as the FSI obtained by purchase of TDR, obtain approval of such building plans from the 2nd Defendant Society, and then obtain approval of the Municipal Corporation for such building plans. Only after the Plaintiff does all this and offers consideration of Rs.11.20 lacs to each member of the 2nd Defendant Society, then the Plaintiff can require the 2nd Defendant Society and its members to vacate and handover possession of the suit building to the Plaintiff. Admittedly, the Plaintiff has not even bought any TDR for the redevelopment project. There is not a whisper in the plaint or any of the accompanying documents to the plaint that the Plaintiff had, at any time, even offered to purchase such TDR before

calling upon the Defendants to handover possession of the suit building. In fact, the NOC of MHADA relied upon by the Plaintiff in its rejoinder shows that the only built up area permissible for reconstruction of the suit building was 1036.78 sq. mtrs., which was barely sufficient to provide for the accommodation for the existing members of the 2nd Defendant Society. The NOC makes it clear that no additional FSI should be utilised on the plot other than the existing 1036.78 sq.mtrs. From these pleadings and documents, it is clear that the Plaintiff has not *prima-facie* shown to have complied with its obligations under the suit development agreement, particularly, its obligation to purchase TDR/FSI and prepare and seek approval of building plans with the use of such FSI, before calling upon the Defendants to perform their part of the contract *inter alia* by handing over vacant possession of the suit building.

16. On a balance, the Plaintiff has failed to show a *prima-facie* case entitling him to either specific performance of the suit agreement or any of the main reliefs claimed in the suit. Merely because the Plaintiff has made payment of Rs.16 lacs each to the 7 out of 14 members for 2nd Defendant Society and Rs.2 lacs to another member, the Plaintiff, without having taken any further steps towards implementation of the redevelopment project, including purchase of TDR/FSI, cannot seek either the possession of the suit building or a restraint against the Defendants from obstructing redevelopment of the suit property under the suit agreement. None of the two reliefs claimed by the Plaintiff in the present Notice of Motion can be granted. There is also no case for continuation of the status-quo order granted by way of ad-interim relief to the Plaintiff in the Notice of Motion.

17. Even the considerations of balance of convenience weigh heavily in favour of the Defendants. Neither can the redevelopment of the suit building be stalled nor can the 2nd Defendant Society be restrained from taking up redevelopment of its own property pending the final disposal of this present suit. Such status quo order shall work an irreparable prejudice to Defendant No.2 and its members. On the other hand, if the Plaintiff succeeds at the trial in showing that the development agreement was indeed valid and subsisting and that the Defendants were not within their rights to terminate the same, the Plaintiff can very well be awarded damages, which will be adequate to compensate the Plaintiff.

18. Learned Counsel for Defendant No.2 states that the 2nd Defendant Society shall cause its members to bring in the sum of Rs.1.14 crores paid by the Plaintiff to the members and in the event of the members not bringing in such money, the 2nd Defendant Society shall itself bring in the amount of Rs.1.14 crores and deposit the same in this Court within a period of eight weeks from today. The statement is accepted.

19. In that view of the matter, there is no merit in the Notice of Motion and the same is dismissed. There will be no order as to costs.

20. On the application of the learned Counsel for the Plaintiff the status-quo granted by the ad-interim order dated 21 July 2011 shall continue for a period of four weeks from today.

(S.C. GUPTE, J.)