IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.807 OF 2014
IN
CHAMBER SUMMONS NO.453 OF 2014
IN
EXECUTION APPLICATION NO.1349 OF 2012
IN
SUIT NO.200 OF 2002
ALONGWITH
NOTICE OF MOTION (L) NO.59 OF 2015
IN
APPEAL (L) NO.807 OF 2014
IN
CHAMBER SUMMONS NO.453 OF 2014
IN
EXECUTION APPLICATION NO.1349 OF 2012
IN
SUIT NO.200 OF 2002

Dalvi Developments Pvt. Ltd. ...... Appellants.

V/s

Ganesh Benzoplast Limited
& Ors. .... Respondents.

Mr. Shailesh Shah, Senior Counsel alongwith Mr. Jaydeep Mitra and Ms. Varsha Telange for the Appellant.

Mr. Dinyar Madon, Senior Counsel alongwith Mr. Viral Shukla, Priti Patel, Savita Rama i/b Shukla & Associates for the Respondents.

CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.

DATE: 8th January, 2015

<u>P.C.:-</u> (Per V.M. Kanade, J.)

1. Heard the learned Senior Counsel for the Appellants and the learned Senior Counsel for the Respondents.

2. Appellants are aggrieved by the order passed by the learned Single Judge dismissing the Appellant's Chamber Summons opposing execution of Consent Terms which were filed in Suit No.200 of 2002. It is submitted that under the said Consent Terms, what was agreed between the parties was that the Defendants were to handover possession of the premises as explained in Clause No.11(e). It is submitted that if this was not done then under Clause No.11(g), Plaintiffs were entitled to claim interest @ 2% per annum for delay in handing over possession of the premises alongwith liquidated damages @ 75,000/- per floor per month to the Plaintiffs and/or their nominees. It is submitted that the Chamber Summons ought not to have been dismissed and an opportunity ought to have been given to the Appellants to lead evidence to show that the liquidated damages which were claimed by the Respondents were excessive.

3. The learned Senior Counsel appearing on behalf of the Appellants invited our attention to the Consent Terms and submitted that since it is not in dispute that the possession has already been handed over, the question of payment of

liquidated damages does not arise.

4. In our view, the said submission cannot be accepted. It is a settled position in law that once a degree is passed in terms of the Consent Terms, the Executing Court cannot go beyond the degree. Secondly, perusal of the Consent Terms clearly indicates that what was agreed between the parties was that the Plaintiffs were to be given actual physical possession of the premises in question which were complete in all respect, failing which Plaintiffs would be entitled to claim interest @ 2% per annum alongwith the liquidated damages @ Rs 75,000/- per floor per month. The contention of the learned Senior Counsel appearing on behalf of the Appellants that since the possession has been handed over the question of payment of liquidated damages does not arise, is without any substance. Clause 11(e) read with Clause 11(g) clearly indicates that the Appellants were under an obligation not only to handover the actual possession but also to complete the incomplete work as per the sanctioned/approved plan and ensure that the work is completed in all respect within four months from the date of filing of the Consent Terms. Clause 11(e) and Clause 11(g) of the said Consent Terms read as under:-

> “11(e) Defendants hereby agree and undertake to this Hon'ble Court that

Defendants shall complete the incomplete work of construction as per sanctioned / approved plan by concerned authorities at its cost, charges and expenses, in respect of basement and shop no.6 in all respect; within one month from the date hereof and put the Plaintiffs No.1 and 2 and/or their nominees in actual physical possession of the basement and shop no.6 and shall complete the construction work in respect of flats on 2nd and 3rd floor in all respect within four months from the date hereof and put the Plaintiffs No.1 and 2 and/or their nominees in actual physical possession for use and occupation as an owner thereof and shall obtain occupation certificate from the concern authorities within six months from the date hereof; within the stipulated period of time being the essence of the contract; in respect of the premises/flats mentioned herein."

"11(g) The Defendants hereby agree and undertake to this Hon'ble Court that in the event of delay in giving the possession of the said premises and flats more particularly explained in clause no.11(e). The Defendants hereby agree and undertake to this Hon'ble Court to pay interest @ 2% per annum for such delay in handing over the possession of the said premises and flats duly constructed and completed in all respects for the use and occupation of the Plaintiffs and or their nominees and also with a view to secure the payment of the said amount of interest the Defendants hereby further

> agree and undertake to this Hon'ble Court not to sale two flats admeasuring 550 Sq. ft. & 445 Sq. ft built up saleable area on the 5th floor of the said building. In the event of the Defendants do not hand over the possession of the flats on 2nd and 3rd floor duly constructed and completed in all respect within four months from the date hereof. The Defendants hereby agree and undertake to this Hon'ble Court to pay the liquidated damages at the rate of Rs 75,000/- per floor per month to the Plaintiffs and/or their nominees.”

The aforesaid Clauses therefore clearly spell out that the Plaintiffs became entitled to damages upon non-completion of the entire work as per Clause 11(e) of the said Consent Terms.

5. Moreover, as rightly pointed out by Mr. Madon, the learned Senior Counsel appearing on behalf of the Respondents that the Appellants not having challenged the order passed by this Court under Order 21 Rule 22, it was not open for the Appellants/Defendants to revert back to the earlier stage of the proceedings. He has relied on the judgment of the Apex Court in *Barkat Ali and Another vs. Badrinarain (Dead) by Lrs*[1] Para 12 of the said judgment reads as under:-

1 (2008) 4 SCC 615

> “12. In this background, where a judgment-debtor has an opportunity to raise an objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under Order 21 Rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of preliminary stage which amounts to a decree is appealed against and order is set aside or modified.”

The ratio of the above judgment clearly covers this aspect.

6. The learned Single Judge, therefore, was justified in not entertaining the Chamber Summons. We do not see any reason to interfere with the order passed by the learned Single Judge.

7. Reserving the right of the Appellants to make such application as maintainable in law, Appeal is dismissed.

8. Since the Appeal itself has been dismissed, Notice of Motion does not survive and the same is also disposed of.

(REVATI MOHITE DERE, J.) **(V.M. KANADE, J.)**