<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.408 OF 2015
WITH
NOTICE OF MOTION NO.245 OF 2015
IN
SUIT NO.70 OF 2015

Sheth Developers Private Limited ….. Appellants

V/s

Beau Monde "A" Tower
Co-operative Housing Society Limited & Ors. ….. Respondents

WITH
NOTICE OF MOTION NO.1247 OF 2015
IN
APPEAL NO.408 OF 2015

Sheth Developers Private Limited ….. Applicants

IN THE MATTER OF

Sheth Developers Private Limited ….. Appellants

V/s

Beau Monde "A" Tower
Co-operative Housing Society Limited & Ors. ….. Respondents

Mr. Vineet Nak, Senior Counsel a/w Mr. Nimay Dave and Mr. Monil Punjabi i/b M/s. VND & Associates for the Appellants/Applicants.
Mr. A.A. Kumbhakoni, Senior Counsel a/w Ms. Alpana Ghone, Mr. Rajmani Verma, Ms. Namrata Barot i/b M/s. Navdeep Vora & Associates for the Respondents.

CORAM : A.S. OKA &
A.A. SAYED, JJ.

DATED : 21 JULY 2016

ORAL JUDGEMENT: (PER A.S. OKA, J.)

1 The submissions of the learned Senior Counsel appearing for the parties were heard yesterday. By this Letters Patent Appeal, the original Defendants/Developers have taken exception to the order dated 29 April 2015 passed by the learned Single Judge which was taken out for grant of interim relief pending the final disposal of the suit.

2 With a view to appreciate the submissions canvassed across the bar, a brief reference to the facts of the case will be necessary. For the sake of convenience, we are referring the parties as per their status before the learned Single Judge.

3 The first three Plaintiffs are Co-operative Housing Societies duly registered under the Maharashtra Co-operative Societies Act, 1960. It is claimed that the fourth Plaintiff Society which is also a registered Co-operative Society as an Apex Body or Federal Society of the first three Plaintiffs. It is pointed out that the first three Plaintiffs are the Co-operative Housing Societies constituted by the purchasers of flats in the three buildings constructed by the Defendants/Developers. The said buildings are known as New Beau Monde Towers A, B and C respectively.

4 The case of the Plaintiffs is that the members of the first to third Plaintiffs entered into the Agreements for acquiring flats in the said three buildings in accordance with the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act (for short “MOFA”). According to the case of the Plaintiffs, as per the layout prepared by the Defendants/Developers, apart from the said three Towers, there was a proposal to construct another building on the larger property. The name of the said building is Cnergy.

5 The Plaintiffs are relying upon various terms and conditions incorporated in the Agreements for Sale executed by the Defendants/Developers in favour of the flat purchasers. It is pointed out in the Plaint that the amounts were collected from the flat purchasers by the Defendants/Developers in terms of clauses 31 and 48 of the Agreements executed in accordance with section 4 of the MOFA. In the Plaint various breaches allegedly committed by the Defendants/ Developers of their statutory obligations under the MOFA as well as of the contractual obligations under the Agreements executed were pointed out. It is pointed out that in terms of clause 31 of the Agreements, the amount of Rs.15,67,93,500/-was collected from the purchasers of the flats in the said three Towers. It is contended that the Defendants/

Developers never took any step for formation of the Apex Body of the first three Plaintiffs-Societies and the Society of the flat purchasers in the fourth building. It is pointed out that the aforesaid amount of corpus fund along with accumulated unutilized interest was to be paid to the Apex Body of the Plaintiffs/Societies of the flat purchasers. It is contended that apart from the aforesaid amounts sums of Rs.3,05,76,969.24, Rs.3,58,51,167.34 and Rs.2,54,05,961/- were collected by the Defendants/Developers from the purchasers of the flats in the said three Towers/Buildings in accordance with the clause 48 of the Agreements executed under section 4 of the MOFA.

6 Apart from setting out various breaches allegedly committed by the Defendants/Developers, reliance is placed on the correspondence exchanged between the parties. The first substantive prayer made in the Plaint is for passing a decree directing the transfer of the land together with three residential buildings (Towers 'A' to 'C') with club house and common areas as well as Cnergy building in favour of the fourth Plaintiff. A decree was sought directing the Defendants/Developers to form a Company or Co-operative Society of the purchasers of the premises in Cnergy Building. Various consequential prayers were made as regards the execution of the conveyance.

7 A decree was also sought directing the Defendants/Developers to render true and faithful accounts of the corpus amount of Rs.15,67,93,500/- collected in terms of clause 31 of the Agreements. There is a money decree prayed for refund of the said amount with interest thereon. There is also a prayer for passing a decree directing the Defendants/ Developers to render true and faithful accounts to the first to third Plaintiffs of the utilization of the other three amounts collected from the members of the first to third Plaintiffs in terms of clause 48 of the Agreements. There are prayers made seeking money decree in relation to the said three amounts recovered from the members of the first to third Plaintiffs together with interest thereon.

8 A Notice of Motion No.245 of 2015 was taken up by the Plaintiffs for grant of various interim reliefs. The first prayer in the said Notice of Motion was for injunction restraining the Defendants/ Developers from alienating unsold premises in Cnergy Building and from parting with possession thereof. By way of further interim relief, a prayer was also made directing the Defendants/Developers to render the true and faithful accounts of the aforesaid amounts which were collected by them from the members of the first to third Plaintiffs. Directions were sought against the Defendants/Developers to deposit the aforesaid four amounts in the Court with interest thereon at the rate of 18% p.a.

9 On 14 October 2014, a limited ad-interim relief was granted by the learned Single Judge. While granting ad-interim relief, the learned Single Judge observed that the prayer made regarding deposit of the amounts lying with the Defendants will not be considered at ad-interim stage.

10 The operative part of the impugned order dated 29 April 2015 reads thus:

"38. Hence the following order:

(a) The defendant shall deposit Rs.15.67 Cr less Rs.10.82 Cr being the refundable deposit under clause 31 of the agreement taken from the plaintiffs' members. The term deposit receipts produced in Court shall be liquidated by the Prothonotary & Senior Master from the aforesaid account No.02124470069429 of the defendant in the HDFC Bank and the entire amount shall be invested by the Prothonotary & Senior Master of this Court in a FDR in any nationalized bank pending the suit.

(b) The Prothonotary & Senior Master shall also deposit the remainder of the amount deposited by the defendant in FDR of any nationalized bank pending the suit.

(c) The defendant shall further deposit Rs.7.11 Cr which is total of the amounts given by the members of the three buildings of the plaintiffs under clause 48 of the agreement to the defendant in this Court which shall be similarly invested by the Prothonotary & Senior Master of this Court pending the suit.

(d) The defendant shall be entitled to offer accounts of the expenses incurred by the defendant for the infrastructural facilities as also for the maintenance of the three buildings of the plaintiffs to the plaintiffs pending the suit. After the accounts are satisfactorily

provided the defendant shall be entitled to apply to Court to withdraw the aforesaid amount deposited with all accrued interest therefrom.

(e) The defendant shall not enter upon the suit plot of land described in Exhibit A to the plaint or any of the car parking spaces except the car parking spaces for flat Nos.1501 & 1502 remaining unsold. Once it is sold the flat purchaser of those flats would be entitled to those car parking spaces.

(f) The defendant shall not allot any car parking spaces in the suit plot of land to any other party pending the suit.

(g) The defendant shall also not deal with, dispose of, alienate, encumber, part with possession or create any third party rights in the plot of land of the plaintiffs' buildings.

(h) The defendant shall not maintain the BMS (Building Management System) or the Securities System for the plaintiffs' plot of land.

(i) The defendant shall remove the security guards put up by the defendant at the gate of the plaintiffs' property.

(j) The aforesaid amounts shall be deposited by the defendant within 8 weeks from today.

(k) Notice of Motion is disposed of accordingly."

11 The learned Senior Counsel appearing for the Appellants/ Defendants submits that they have mainly disputed the correctness of the directions issued regarding the deposit of the amounts. His first submission is that clauses (a) and (c) of the operative part of the impugned interim order are in the nature of a money decree and such drastic reliefs could not have been granted by way of interim relief. He

invited our attention to relevant clauses in the Agreements and in particular clauses 31 and 48 of the said Agreements. He pointed out that the Appellants/Defendants are in position to show that the large amount out of the amounts collected as per clause 31 of the Agreements were utilized by the Appellants/Defendants for maintenance and management of the infrastructural facilities. He submitted the fact that such amounts have been spent is noted even in the impugned order. He submitted that when there is a material on record to show that the amounts were spent for the benefit of the flat purchasers themselves, there was no occasion to direct the deposit of entire amount of Rs.15.67 crores. As regards clause (c) of the operative part of the order, he submitted that though the Municipal taxes were paid by the Appellants/Defendants, the Plaintiffs/ Societies have directly obtained refund of Rs.1.85 crores from the Municipal Corporation. He submitted that the Appellants/Defendants are in position to produce the documents to show the amounts which have been utilized out of the funds collected in accordance with clause 48 of the Agreements and if the said documents are perused, the amount lying balance with the Appellants/Defendants will be much less Rs.7.11 crores. He pointed out that the exercise ordered to be done in terms of clause (d) of the operative part of the order ought to have been directed to be undertaken before passing such a drastic order of deposit of the amounts. He also invited our attention to clauses (e) and (h) of the impugned order. He submitted that flat Nos.1501 and 1502 are in possession of the Appellants/Defendants and, therefore, their access to the said flats cannot be prevented. He pointed out that the Defendants have been protected only to the extent of car parking space. The submission is that there was no warrant to pass such a drastic interim order as in the suit there was a money decree prayed for by the original Plaintiffs in respect of the amounts which are ordered to be deposited by the Defendants. He submitted that there are good reasons for delay in forming the Apex Body and the reasons have already been explained. The learned Senior Counsel appearing for the Plaintiffs supported the impugned order.

12 We have already quoted the operative part of the impugned order. As far as clause (a) of the operative part of the impugned order is concerned what is relevant is clause 31 of the Agreement which reads thus:

> *"31) The Developer has informed the Flat Purchaser and the Flat Purchaser is aware that it may be proposed to form an Apex Body of all the co-operative Societies to be formed for all the Wings of the said Building and other buildings to be constructed on the said larger plot for the purpose of carrying out the maintenance, repairs and/renovation of various infrastructure and common facilities items to be provided and comprised to the said plot as per layout conditions. The Apex Body to be formed shall be a body incorporated under the provisions of the Maharashtra*

Co-operative Societies Act, 1960 ***OR*** *a company which shall be incorporated under the provisions of the Companies Act, 1956 and the Developer shall incorporate the Apex Body as per its discretion. The Flat Purchaser shall make his contribution as may from time to time be required to be made by the Society formed for the purpose of the Building in which the premises agreed to be purchased by the Flat Purchaser is to be located for enabling the society to pay its contribution to the Apex Body for the aforesaid purpose. The Flat Purchaser shall at the time of taking possession of the said premises from the Developer pay to the Developer a sum of Rs. __ __ ___/- ~~per sq.ft. of the carpet area of the said premise~~ which will be held by the Developer as deposit till the Apex body is formed and constituted. On formation of the Apex Body the said deposit shall be handed to the Apex body. The said deposit shall be used as corpus and interest earned whereon shall be utilized by the Developers/Apex body for maintenance and management of the infrastructure facilities such as internal roads, street lights, storm water drains, drainage system, sewerage, filtration plant, water filtration plant, water tank tower, gardens, club house and other indoor ad outdoor recreational facilities, security etc. in case it is so required the corpus may also be used by Apex Body at their discretion for the said purpose or for any one or more of them. It is however agreed that the Flat Purchaser shall nevertheless also be strictly liable to pay monthly contributions to the Society as may be determined by the Co-operative Society to the Apex Body as aforesaid. The said deposit of Rs.__ ____ /- ~~per sq.ft.~~ to be paid by the Flat Purchaser shall be in addition to the Flat Purchase price of* *the said premises and the other deposits payable by the Flat Purchaser as specified in this Agreement."*

(underline supplied)

13 It is an admitted position that as per the said clause, the Appellants/Defendants collected a total sum of Rs.15,67,93,500/- from the members of the first to third Plaintiffs. On plain reading of clause 31, the said amount collected from the flat purchasers was to be retained by the Appellants/Defendants as a deposit till the Apex body was formed in terms of the Agreements. Clause 31 further provides that on formation of the Apex body, the said deposit shall be handed over to the Apex body. What important is that clause 31 provides that the said deposit shall be used as a corpus fund and the interest earned thereon shall be utilized by the Apex body for maintenance and management of infrastructural facilities such as internal roads, street lights, storm water drains, drainage system, etc. As far as the corpus fund is concerned it is provided that only the Apex body will have discretion to use the corpus fund for any of the said purposes. Thus, on plain reading of clause 31, it is crystal clear that the Appellants/ Defendants could not have touched any part of the amount collected which was to be retained as a corpus. At highest, interest earned could have been utilized for the maintenance and management of infrastructural facilities as provided in clause 31 of the Agreements.

14 Even according to the case of the Appellants/Defendants, the Apex body is not yet formed by them. In paragraph 26 of the impugned order, the learned Single Judge has rightly observed that the amount collected as per clause 31 of the Agreements was to be held by the Appellants/ Defendants/Developers as corpus fund and only interest could have been utilized for the maintenance and management of infrastructural facilities by the Appellants/Defendants/Developers. In paragraph 27 of the impugned order, the learned Single Judge rightly recorded a finding that the Appellants/Defendants were holding the said amount with interest in trust for the Apex body of the first three Plaintiffs-Societies and the Society to be formed of the purchasers of the flats in Cnergy building. In paragraph 28 of the impugned order, the learned Single Judge referred to the admitted position that the Defendants had depleted the corpus fund and now what is available with the Appellants/Defendants is a sum of Rs.10.82 crores which is lying deposited as term deposit in HDFC Bank. It is observed that “the Defendant has admittedly ploughed the deposit amount”. After noticing the fact that the Appellants/ Defendants had utilized a substantial part of the amount which was to be retained as a corpus fund, the learned Single Judge observed that the Appellants/Defendants will have to pay the full amount to the Apex body. It is in the light of this position borne out from the record that that the learned Single Judge passed an order in terms of clause (a). As the

term deposit receipts in the sum of Rs.10.82 crores were already produced in the Court, a direction was issued by the learned Single Judge to the Appellants/Defendants to deposit an amount equivalent to Rs.15.67 crores less Rs.10.82 crores. On plain reading of the terms and conditions of the Agreements executed in accordance with section 4 of the MOFA Act and in particular clause 31 of the Agreements, we are of the view that there was absolutely no defence available to the Appellants/Defendants as far as the sum of Rs.15,67,93,500/- is concerned. Admittedly, this amount was to be held as a corpus by the Appellants. As per the clause 31, the amount was to be retained as a deposit by the Appellants and they had no right to spend even a single Rupee out of the said amount. In fact there is a serious default committed by the Appellants/Defendants by utilizing substantial part of the amount (Rs.4.85 crores) which was to be retained as corpus fund. As stated earlier, only interest on the corpus fund amount will have to be utilized for the purposes specified in clause 31 of the Agreements. We may note here that as far as the amount covered by the clause (a) is concerned, the learned Single Judge has directed the deposit and investment of the said amount and the Plaintiffs have not been permitted to withdraw the said amount.

15 Clause (a) of the impugned order is in the nature of a temporary mandatory injunction. The learned Single Judge had abundant powers to

pass such a direction after finding that though the Appellants/Defendants were under an obligation to hold the said amount as a deposit, they have illegally utilized approximately 1/3rd of the said amount. They were not authorized to do so as per the terms and conditions of the Agreements.

16 As far as clause (c) is concerned wherein a direction was issued to deposit a sum of 7.11 crores, clause (d) takes care of the apprehension expressed by the Appellants/Defendants. It is provided that after the accounts are satisfactorily provided by the Appellants/Defendants, they will be entitled to apply to the Court for withdrawal of the said amount deposited with all accrued interest. In fact, we may note here that the learned Counsel representing the parties without prejudice to the rights and contentions of the parties have agreed that the exercise of examining the accounts can be left to M/s G.M. Kapadia & Company, Chartered Accountants so that any dispute about the accounts submitted by the Appellants/Defendants can be minimized. We must note here that there is no contention raised in the Reply filed by the Appellants/ Defendants to the Notice of Motion that the Plaintiffs/Societies have obtained refund of sum of 1.85 crores from the Municipal Corporation towards property taxes. In fact, the Reply filed by the Appellants/ Defendants to Notice of Motion admittedly does not contain any factual statement regarding amounts allegedly utilized by the Appellants/ Defendants for various purposes as permitted by clause 48 of the

Agreements under section 4 of the MOFA Act. In fact, due to absence of material pleadings, the learned Single Judge would have been justified in directing the retention of the amount of Rs.7.11 crores with the Court. As pointed out earlier, the said amount represents the amount collected from the flat purchasers of the three buildings of the first to third Defendants in terms of clause 48 of the Agreements. The said amount was recovered from the flat purchasers as a deposit which could have been utilized in the event of the flat purchasers committing defaults in the payment of Municipal tax and other outgoings. However, the learned Single Judge has made necessary provisions in clause (d) of the operative part of the impugned order, so that upon satisfying the Court about legal utilization of a part of the said amount, the Appellants/ Defendants could apply for refund. In fact, on plain reading of clause 48 of the Agreements and section 4 of the MOFA Act, the Appellants/ Defendants were not entitled to claim the said amount which is the subject matter of clause (c) of the operative part of the impugned order. However, even the Plaintiffs have accepted the direction contained in clause (d) of the operative part of the impugned order which sufficiently protects the Defendants. In fact, clause (d) provides that the Appellants/Defendants will not loose interest as they have been permitted to withdraw the amount deposited with the accrued interest.

17 As regards clause (e) of the operative part of the impugned order, the learned Senior Counsel appearing for the Plaintiffs on instructions stated that so long as the Defendants continue to hold flat Nos.1501 and 1502, their access to the said flats and parking spaces in respect of the said flats will not be obstructed by the Plaintiffs. We accept the said statement. In view of the said statement, clauses (e) and (h) of the operative part of the impugned order shall stand clarified accordingly.

18 Our attention is invited to the order dated 9 July 2015 passed by the Division Bench of this Court in terms of the Minutes of Order tendered by the learned Counsel appearing for the parties. It records that fixed deposit receipts of sum of Rs.10.82 crores have been kept in the custody of the Advocate for the Defendants. The Advocate for the Defendants will have to now deposit the said fixed deposit receipts with the Prothonotary and Senior Master of this Court. When a query was made by this Court as regards the time within which the Defendants will deposit the amount payable in terms of clause (a) of the operative part of the impugned order, the learned Senior Counsel for the Defendants without prejudice to the rights and contentions of the Defendants stated that the amount will be deposited within a period of eight to ten weeks. In short, he has sought time of eight to ten weeks to deposit the balance amount of Rs.4.85 crores in terms of clause (a) of the operative part of the impugned order.

19 As far as clause (d) of the operative part of the impugned order is concerned, by consent of the parties, we appoint M/s. G.M. Kapadia & Company, Chartered Accounts. The Defendants shall submit accounts of the expenses incurred by them on the infrastructural facilities as also for the maintenance of the three buildings of the first to third Plaintiffs along with supporting documents in the office of the said Chartered Accountants. Copies of the accounts and supporting documents shall be furnished by the Defendants to the Advocate for the original Plaintiffs. This order will operate only after the deposit of amount in terms of clause (c) of the operative part of the impugned order is made by the Defendants.

20 The Chartered Accountants will hold a joint meeting of the parties for discussing and dealing with the accounts and documents submitted by the Defendants. After permitting both the Defendants and the Plaintiffs to submit additional documents, if any, the Chartered Accountants shall submit a Report to the learned Single Judge of this Court as regards the genuineness of the claim made by the Defendants about the expenditure incurred on the items mentioned in clause (d) of the operative part of the impugned order. The Chartered Accountants shall submit a report to this Court within a period of two months from the date on which the accounts and other documents are filed by the Defendants in their office. For the time being, the remuneration payable to the Chartered Accountants shall

be paid by the Defendants. After the Report is submitted by the Chartered Accountants, while making an Application before the learned Single Judge as provided in clause (d) of the operative part of the impugned order, it will be open for the Defendants to seek necessary relief regarding the reimbursement of the amount paid by them by way of remuneration to the Chartered Accountants. The learned Single Judge shall consider the prayer, if made, in accordance with law.

21 Subject to the modification made as above, the impugned judgment and order stands confirmed.

22 We direct that the fixed deposit receipts retained in the custody of Advocate for the Defendants in terms of the order date 9 July 2015 shall be deposited by them with the Prothonotary and Senior Master, Bombay High Court, Mumbai within a period of six weeks from today. As soon as the fixed deposit receipts are deposited, the Prothonotary and Senior Master shall take necessary steps in terms of clause (a) of the operative part of the impugned order. We grant time of ten weeks from today to the Appellants/Defendants to deposit a sum of Rs.4.85 crores in this Court in terms of clause (a) of the operative part of the impugned order. We also grant time of ten weeks to deposit amount in terms of clause (c) of the operative part of the impugned order.

23 We make it clear that no further extension will be granted.

24 Needless to add that the findings recorded in the impugned order as well as findings recorded in this judgment and order are prima facie findings rendered only for the purposes of deciding the Notice of Motion and all contentions of the parties in the pending suit are expressly kept open.

25 Appeal disposed of in the above terms. Pending Notice of Motion No.1247 of 2015 does not survive and the same is disposed of.

(A.A. SAYED, J.) **(A.S. OKA, J.)**

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