IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 815 OF 2015
IN
SUIT NO. 292 OF 2015

Goregaon Sukhnivas Co-operative Housing
Society Limited … Plaintiff

Versus

M/s. Sukushal Builders & Developers & Ors. … Defendants

Mr. Cherag Balsara, instructed by Mr. Bhavin R. Bhatia, for the Plaintiff.
Mr. Vinod Kumar Y. Mishra for the Defendants.
Mr. Kushal Mhatre, Defendant No. 2 (c) present.

CORAM; S.J. KATHAWALLA, J.
DATE: 23rd March, 2016.

P.C:

1. The Plaintiff is a Co-operative Housing Society entitled to leasehold rights in respect of land situated at CTS Nos. 349 (Part) and 349 (1) to (4) admeasuring 556.70 sq. mtrs. (the said land) along with Building No. 21 known a "Goregaon Sukhnivas" (the said building) in the layout of Siddharth Nagar IV situated on the said land under an Indenture of Lease dated 11th September, 2006 executed by Mumbai Housing & Area Development Board (MHADA Unit), Defendant No. 3 in the present suit. The said building comprises of ground plus 3 floors having 16 tenements. The said land along with the said building shall hereinafter be referred to as "the suit property".

2. According to the Plaintiffs as the said building was in a dilapidated condition, the Plaintiffs convened a General Body Meeting on 31st March, 2005, wherein it was decided that the said building required major repairs or redevelopment. Thereafter, the Members of the Plaintiff Society convened a Special General Body Meeting on 1st May, 2005 and decided to redevelop the same. The Plaintiffs invited offers from developers and in the Special General Body Meeting held on 17th & 18th June 2007, the Plaintiffs decided to give development rights to the Defendant No. 1 herein. Pursuant to the decision of the General Body and after issuing an appointment Letter dated 22nd June 2007 to the Defendant No.1, a Development Agreement was entered into with Defendant No. 1 on 26th December, 2007 and registered on the same day. The relevant clauses of the aforesaid Development Agreement are reproduced hereunder:

> *"7. All costs, charges and expenses without limitation of and incidental to obtaining the approval and sanction and incidental to the construction of new building, shifting of existing members, their amount of security deposit, Cash security deposit in joint name, compensation and the cost of preparation of plans, specifications, scrutiny fees, premium and other payments and deposits and out goings to be made with the Mumbai Municipal Corporation, Private, Government, Semi-government or any other statutory body or bodies or local authority, fees of the Architects, RCC consultants, entire cost of construction including Raw Material, Suppliers thereof, Contractors, Registration, Conveyance, CC, IOD, OC and all*

other costs and expenses whatsoever of and incidental and in relation to the said further development shall be wholly, entirely and exclusively borne and paid by the Developers alone including all premium and unforeseen expenses incidental and in relation to the development. In case of NOC from MHADA if required the same shall be obtained by the Developers at their own costs and also the Developers shall pay such deposit towards Electricity meter, water meter, development charges or security deposit for and on behalf of the original members of the Society.

9. The Developers undertake to complete the Re-development work within 20 months from the date of handing over to them complete vacant physical possession by all the members of the society unless the Developers are prevented by force majeure, circumstances, for e.g. Earth Quake, Riots, Natural Calamities, etc., and in such an event the Developers shall be entitled for extension of the period as may be deemed fit at that point of time.

12(iv). In case the Developers fail to keep/obey his/the commitments made in this Agreement or amendments thereof i.e. if the Developers fail in honoring the post dated cheques, escape by keeping the work incomplete for any reason, fails in executing the development project in between etc… for any reason not eliminated than the agreement shall stand cancelled by giving a prior show cause notice of 30 days and thereof cash security deposit kept in the joint name of Society and The Developers shall be transferred to the Society's name directly *(non refundable to the builder) and the Society shall have full rights to terminate the Agreement without any further notice and for which the Society will not have to procure any No Objection Certificate from the Developers and without any prejudice the total amount along with the interest accumulated till that day and time shall be transferred to the Societies account for which both the parties agree upon for not issuing any consent to either parties, and bankers shall be at liberty to transfer the same amount without taking concern of the Developers in this regard. On completion of project peacefully, this clause to be read as clause - 34 of this agreement.*

13(viii). The Society/its existing members shall not be responsible for any acts of commission or omission or for any default on the part of the Developers including the contractual obligations to new buyers/purchasers of the flats in the new building to be constructed by the Developers and the Developers alone shall be responsible for all its acts, representations, contracts, promises, assurances and commissions and omission for all the liabilities and obligations and also for all the costs of constructions of the said new building.

19. The Society shall grant license to the Developers, their agents and servant to freely enter upon the leasehold plot for demolition of the existing building No. 21 on handing over the quiet, vacant and peaceful possession of the respective tenements and for construction of new building in accordance with the terms and condition imposed by Mumbai Municipal

Corporation and by other concerned authorities while sanctioning the plans strictly for the aforesaid purpose.

34. The Developers will also pay Rs.50,00,000/- (Rupees Fifty lacs only) as Security Deposit to the Society on or before vacating the flats/building. This amount of deposit will be deposited in the joint name of the Society and the Developers. This Cash Security Deposit and the interest earned on this deposit accumulated in the joint account shall be transferred to the Builder after the completion of construction and handing over quiet, vacant, peaceful possession along with non-encumbrance certificate, Occupation Certificate, and the compensation fund and after verifying all the aspects and pints proposed by the builder in his proposals of earlier dates forming part of this agreement as ***SCHEDULE – 5*** *and his confirmation letter dated 28/6/2007 in respect to appointment letter dated 22nd June 2007 forming part of this agreement as* ***SCHEULE – 4****. In case of failure for the reason highlighted in clause – 12(iv) of this agreement the said amount with interest shall be transferred to the societies account without prior notice and shall be informed to the Developers.*"

3. It is further submitted by the Plaintiffs that a Power of Attorney has also been executed by the Plaintiff Society on 23rd April, 2008. Vide the aforesaid Power of Attorney dated 23rd April 2008, Defendant No. 1 was given the authority to apply for and obtain sanction of the proposed building plan from MHADA, interact with the Municipal Corporation of Greater

Mumbai and to carry out other activities for the purpose of redeveloping the said building. The aforesaid Power of Attorney has also been registered.

4. In or about May 2012, the occupants of the aforesaid building vacated their respective structures and were given the initial rent of, Rs.18,000/- per flat per month. However, from April 2013, no amount whatsoever has been paid by Defendant No. 1 to the occupants. This fact is admitted by the Defendants in paragraph 17 of 2nd Defendant's Affidavit dated 19th February, 2015. The Plaintiffs have annexed a list of arrears of rent upto the date of the suit at Exhibit-D to the plaint. From the statement, annexed at Exhibit – 'D' to the Plaint, it appears that as on March, 2014 an amount of Rs.38,44,280/- was due and payable by Defendant No. 1 to the members of the Plaintiff. After the Members of the Plaintiff vacated their respective premises, the said building was demolished in May, 2012 and the occupants thereof have been living in premises taken by them on leave and license. The plight of the Members of the Plaintiffs is pitiable as they have been occupying flats on leave and license and have been deprived from permanent rehab premises.

5. In view of the aforesaid, the Plaintiffs addressed a letter dated 3rd March, 2014 to Defendant No. 1 requiring Defendant No. 1 to comply with its obligations under the aforesaid Development Agreement. The Plaintiffs called upon Defendant No. 1 to immediately pay the outstanding rent as their members were being burdened with payment of rent for temporary alternate accommodation, which Defendant No.1 had failed and neglected to pay. By the aforesaid letter dated 3rd March 2014, the Plaintiffs recorded that in the event of Defendant No.1 not complying with its commitment and contractual obligations and responding positively within 7 days from receipt

of the said letter, action would be initiated against Defendant No. 1. The aforesaid letter dated 3rd March, 2014 was responded to by Defendant No.1 by its letter dated 22nd March, 2014 addressed to the Plaintiffs with an assurance to clear all dues as soon as possible as also increase the rent with effect from January, 2014.

6. In view of Defendant No. 1 not having commenced any construction work despite having obtained the IOD/CC of 3 storeys and on account of non-payment of the rent to the Plaintiffs members, the Plaintiffs convened a Special General Body Meeting on 15th April, 2014, wherein it was resolved to terminate the Development Agreement and Power of Attorney granted to Defendant No. 1. On 30th April 2014, (erroneously mentioned as 2013) the Plaintiffs terminated the said Development Agreement dated 26th December, 2007 and Power of Attorney dated 23rd April, 2008. The aforesaid termination letter exhaustively sets out the breaches committed by Defendant No. 1, which includes the 1st Defendant's failure and neglect in procuring permission from MHADA i.e. the Planning Authority. The Plaintiffs have categorically stated that vide Clause 9.1 of the Development Agreement dated 26th December 2007, Defendant No. 1 had undertaken to complete redevelopment work within a period of 20 months from the date of handing over to Defendant No. 1 complete vacant physical possession by all the members of the Society. The Plaintiffs have contended that Clause 13(vii) empowered the Plaintiff to terminate the Development Agreement and appoint new developer after issuing a 7 days show cause notice in the event of Defendant No. 1 being for any reason whatsoever, unable to start the development project of Building No. 20 within a period of 5 months from the date of the appointment letter issued to Defendant No. 1. Clause

34 of the said Development Agreement required Defendant No. 1 to pay a security deposit of Rs.50 lacs to the Society on or before the members of the Plaintiff Society vacating their respective flats, which was not done by Defendant No.1. The Plaintiffs have expressly stated in paragraph 10 of the said Termination Notice that intimation was being given to Defendant No.1 in consonance with the agreed terms of termination and therefore, on expiry of 30 days from the date of receipt of the said notice by Defendant No. 1, the Plaintiffs would be entitled to deal with the aforesaid plots in any manner, as the Plaintiffs deem fit and proper.

7. Defendant No. 1 vide its letter dated 29th May, 2014 replied to the aforesaid termination, contending that Defendant No. 1 had incurred an expenditure of Rs.1,52,80,939/- towards the permission for redevelopment of the aforesaid building. Vide paragraph 5 of the said letter dated 22nd March 2014, Defendant No. 1 offered to pay to the Plaintiffs the arrears of the transit rent to all 16 Members from May-June, 2013 till May, 2014 immediately. However no amount whatsoever was paid by Defendant No. 1 to any member towards arrears of the transit rent as promised.

8. The Plaintiffs have issued Public Notices on 13th June, 2014 in the Free Press Journal in English and Mumbai Mitra in Marathi, giving express notice that the aforesaid Development Agreement and Power of Attorney had been terminated.

9. The Plaintiff filed the present suit and applied for ad-interim reliefs *inter alia*, restraining Defendant No. 1 from interfering with the possession of the Plaintiffs in respect of the aforesaid plot or from obstructing construction by

the Plaintiffs on the aforesaid plot. By an Order dated 9th December 2014, this Court granted ad-interim reliefs in terms of prayer clauses (c) and (d) of the Notice of Motion. Also by an order dated 12th February, 2014, this Court granted reliefs in terms of prayer (a) of the Notice of Motion in addition to prayer clauses (c) & (d).

10. The Plaintiffs have placed on record an order dated 15th March, 2013 passed by this Court in Notice of Motion (L) No. 291 of 2013 in Suit (L) No. 117 of 2013, which suit was filed by the Defendant No. 1 herein for specific performance of a Development Agreement entered into with another Co-operative Society for re-development of its building. The Plaintiffs pointed out that in the said suit, a Notice of Motion had been filed by Defendant No. 1 for appointment of Court Receiver. This Court by its order dated 15th March, 2013, dismissed the said Notice of Motion with the following observations:

> *"24. From the aforesaid facts, it is therefore clear that the Plaintiff has prayed for specific performance of the Agreement dated 26th December, 2007, which, as prima facie established, was not executed by the Society on the day alleged and the date of which has been manipulated by the Plaintiff. Despite holding a Power of Attorney in its favour, the Plaintiff has not proceeded to take any steps qua the redevelopment of the suit property. Again, the Plaintiff has admitted that for a period of three years, it was unable to proceed with the proposed redevelopment. Though the Plaintiff has tried to shift the blame for such delay onto the policies of MHADA and/or MCGM, the allegation is devoid of any particulars. Again, the Society and its members have, in no way, benefited after executing the agreement in April*

2007. Admittedly, the Society and its members have not received a single paisa from the Plaintiff, from the date of the execution of the Agreement till its termination. Furthermore, in fact, the building which was in a dilapidated condition has further deteriorated and is on the verge of collapse. The members are justified in having lost faith in the Plaintiff and unanimously deciding to terminate the Agreement. The first Defendant Society and its Members have already entered into a fresh Development Agreement with the second Defendant dated 6th July, 2012. The second Defendant has, pursuant to the said Agreement, done the following acts:

(i) *Paid Rs. 56 lakhs to the first Defendant Society;*

(ii) *Paid stamp duty of Rs. 22,58,510/- on the said Agreement dated 6th July, 2012;*

(iii) *Constructed monsoon shed over the terrace of the suit building in July 2012, itself;*

(iv) *Put up the file to MHADA for NOC dated 21st September 2012;*

(v) *Paid Rs. 1,00,90,617/- on 16th February, 2013, towards redevelopment of the existing building;*

(vi) *Paid a sum of Rs. One lakh towards water charges to the BMC on 16th February, 2013; and*

(vii) *Appointed an Architect and prepared plans by paying an amount of Rs. One lakh on account to the Architect.*

25. I have also perused the photographs of the building standing on the suit property and the condition of the tenements in the said building. The condition of the building and the tenements therein appear to be pathetic. The building is in such a bad shape that if the same is not *attended to at the earliest, it would amount to inviting a calamity, causing loss and damage to the lives and property of the families residing in the said building. The second Defendant has already taken steps towards redevelopment of the said building. The balance of convenience is therefore completely in favour of the Defendants and against the Plaintiff. In the facts and circumstances of the case, the question of granting any interim relief to the Plaintiff does not arise. The Plaintiff has, in the alternative to the relief of specific performance, prayed for damages to the sum of Rs. 7 crores. The said relief shall be considered by the Court at the time of the final hearing of the suit and appropriate orders would be passed in favour of the Plaintiff, if it so deserves."*

It was submitted by the Plaintiffs that even in the present case, the Plaintiffs had executed a Development Agreement and Power of Attorney dated 23rd April, 2008 but no progress had been made. It was submitted that Defendant No. 1 was just executing development agreements and blocking projects, virtually bringing the innocent tenants and their family members on streets.

11. Defendant No. 2 has filed an Affidavit dated 19th February, 2015 in reply to the aforesaid Notice of Motion, wherein he has contended that he was a partner of Defendant No. 1 along with one Makrand Khanderao Mhatre and Kushal Milind Mhatre. The said Partnership was dissolved on 31st March, 2011 and he became the sole proprietor of Defendant no. 1.

12. On 7th March 2015, Defendant No. 2 passed away. The heirs of Defendant no. 2 have been impleaded as Defendant Nos. 2(a), 2(b) & 2(c) in the above suit.

13. The aforesaid Notice of Motion came up for hearing on 22nd March, 2016 when time was sought on the ground that the arguing Counsel was unwell. At the request of the advocate appearing for Defendant Nos. 2 (a), 2 (b) and 2 (c), the Notice of Motion was adjourned to the next day i.e. 23rd March 2016. On 23rd March 2016, Defendant No. 2 (c) and his advocate were present in Court. Defendant No. 2 (c) claimed that he was now looking after his father's (original Defendant No.2) business. On a query put by the Court regarding the bank balance available with Defendant No. 2(c), it was stated that Defendant No. 2 did not have any money at present in his bank account. On a submission made by the Advocate for the Plaintiffs on instructions from some of the members of the Plaintiffs, who were present in Court that the Office of Defendant No. 2 at Goregaon was shut-down, Defendant No. 2 (c) admitted that the said office was taken on rental basis and the same has been surrendered.

14. The only defences pressed by the Advocate for Defendant Nos. 2 (a) 2 (b) and 2 (c) are two-fold viz.:

(i) Defendant No.1 had carried out considerable work towards redevelopment of the said building and that an expenditure to the extent of Rs.2,50,00,000/- had been incurred by Defendant No. 1;

(ii) Defendant no. 1 had obtained IOD dated 2nd December, 2011 and that the delay in implementation of the project was on account of the Plaintiffs conduct.

(iii) the termination effected by the Plaintiffs on 30th April, 2014 was illegal.

15. On the basis of the aforesaid submissions made by the parties, it is required to be seen whether the termination dated 30th April, 2014 effected by the Plaintiffs for terminating the Development Agreement dated 26th December, 2007 and the Power of Attorney dated 23rd April, 2008 were *prima facie* legal and valid.

16. It is clear from the sequence of events narrated by the Plaintiffs and set out hereinabove that Defendant No. 1 had after executing the Development Agreement dated 26th December, 2007 and the Power of Attorney dated 23rd April, 2008 made no substantial progress in the matter, save and except getting the intimation of disapproval dated 2nd December, 2011. Defendant No. 1 had failed and neglected to pay rent to the aforesaid 16 Members of the Plaintiff Society. The photographs of the said land shows thick plant growth and it is clear that no construction activity was started thereon. There is also an admission in the 1st Defendant's Affidavit in Reply that the aforesaid building was vacated by the occupants in May, 2012.Hence the Defendants allegation of non-cooperation on the part of the Plaintiff is belied.

17. *Prima facie*, it is clear that Defendant No. 1 has not made any progress towards redevelopment of the aforesaid building and cannot perpetually

prevent the redevelopment of the aforesaid building. It is also clear that there is a breach of Clause 9 of the said Development Agreement, requiring Defendant No. 1 to complete construction within a period of 20 months from the date of the 1st Defendant's possession. Under Clause 19 of the Development Agreement, Defendant No. 1 had possession of the aforesaid plots only as a licensee. It is also clear that Defendant No. 1 had not paid the security deposit of Rs.50,00,000/- under Clause 34 of the said Development Agreement dated 26th December, 2007. It is also *prima facie* clear that the Plaintiffs have correctly adopted the procedure under Clause 12 of the Development Agreement by initially giving Defendant No. 1 a Show Cause Notice dated 3rd March, 2014 calling upon Defendant No. 1 to rectify the breaches set out therein and it is only after the failure of Defendant No. 1 to rectify the said breaches that the termination has been effected on 30th April, 2014. *Prima facie*, it is clear that Defendant No. 1 has abandoned the redevelopment of the aforesaid building and that the termination of the Development Agreement and Power of Attorney are legal and valid. In fact, Defendant No. 1 has till date not challenged the aforesaid termination effected way back on 30th April, 2014 and therefore, it can safely be concluded that Defendant No. 1 has no interest whatsoever in redeveloping the suit property. Defendant No. 2 (c) has admitted in Court that he has no amount in his bank accounts, he has surrendered his office premises to the landlord, and has no project in hand. Defendant No. 1 prima facie appears to be entering into Development Agreements, Powers of Attorney in redevelopment schemes and blocking projects. In the present case, there are 16 families who have been dispossessed from their flats for a period of nearly 4 years with the hope of getting permanent accommodation.

18. In view of the aforesaid, the Plaintiffs appear to be *prima facie* justified for having appointed a new developer on September, 2014 as set out in para 61 of the Plaint and para 3 of the Affidavit in Support of Notice of Motion filed by Plaintiffs.

19. The aforesaid facts show that there is irreparable loss, harm and injury caused to the members of the Plaintiff, who have been deprived of their legitimate entitlement for developed flats and have not been given the same despite vacating their respective premises way back in May, 2012. The conduct of the 1st Defendant is clearly malafide. The Plaintiffs have made out a strong *prima facie* case for grant of interim reliefs. The balance of convenience is in favour of the Plaintiffs. The Notice of Motion is therefore allowed in terms of prayer clauses (a), (b) and (c) which are reproduced as under:

> *(a)* *That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to grant temporary injunction restraining the Defendants, their agents, servants from interfering with the peaceful possession of the Plaintiffs of the suit Plot Building No. 21;*
>
> *(b)* *That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to grant temporary injunction restraining the Defendants, their agents, servants from obstructing in any manner the construction of building in the suit property being CTS No. 349(Part) and 349 (1) to (4) owned by the Plaintiffs;*

(c) *That pending the hearing and final disposal of the Suit this Hon'ble Court shall also grant Order and injunction restraining the Defendant nos. 1 and 2 and all their servant, agent or any other persons acting on behalf of the said Defendants from selling, transferring, assigning, mortgaging, allotting, encumbering and/or dealing with disposing off and/or creating any third party rights, title, interest, claim or demand into, upon or in respect of the Suit Property or any premises / flats proposed to be constructed by them, in whatsoever manner.*

20. The above Notice of Motion is accordingly disposed off. Defendants to pay costs of the Notice of Motion to the Plaintiffs.

(S.J. KATHAWALLA, J.)