

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 19 OF 2017
WITH
CIVIL APPLICATION NO. 21 OF 2017

M/s. Trishul Developers .. Appellant
vs.
M/s. Golden Canteens and ors. .. Respondents

Mr. Aspi Chinoy, Sr. Advocate a/w. Mr. Sanjay Jain and Mr. Nishant Sashidharan i/b Mr. Varun Shah for the Appellant.

Shri. Madon, Sr. Advocate a/w. Mr. Sanjiv Sawant for Respondent No.1.

Mr. Mayur Khandeparkar a/w. J.N. Jayale for Respondent Nos.2 to 8.
Ms Madhuri M. More for Respondent No.6 (MCGM).

CORAM : M. S. SONAK, J.

Date of Reserving the Order : 01 FEBRUARY 2017.

Date of Pronouncing the Order : 03 FEBRUARY 2017.

ORDER :-

1] Heard learned counsel for the parties.

2] With the consent of and at the request of learned counsel for the parties, this appeal from order is disposed of finally, at the stage of admission.

3] The challenge in this appeal is to the order dated 21 December 2016, by which, the trial Judge has restrained original defendant Nos.6 and 7, i.e., Municipal Corporation of Greater Mumbai (MCGM), from issuing Construction Commencement Certificate to the appellant till the dispute between the plaintiff (respondent No.1) and defendant Nos.1 to 4, in respect of 716 sq. ft. area is resolved.

4] Mr. Aspi Chinoy, learned Senior Advocate for the appellant (original defendant No.4), submits that the impugned order is vague, confusing, riddled with inconsistencies, contradictions and patent errors. He submits that in the development agreement entered into between the appellant and the original owners of the suit property (defendant Nos.1 to 3), there is already reference to liability for allotment of area of 716 sq. ft., in the redeveloped premises. This means that the operative portion of the impugned order, stands substantially complied with, though, without prejudice. He submits that if the area referred to in operative portion is to be treated as 1206 sq.ft., even then, the appellant, without prejudice, is prepared to reserve an area of 1206 sq.ft., on the ground floor of the redeveloped building, which will more than secure the rights, if any, of the plaintiff. Mr. Chinoy submits that such security will amply protect the interest, if any, of the plaintiff.

5] Even otherwise, Mr. Chinoy submits that the plaintiff has neither made out any *prima-facie* case nor can it be said that the balance of convenience was in favour of grant of relief of this nature, which will virtually stall the redevelopment. Mr. Chinoy submits that the old Theatre building, in which, the plaintiff claims right of tenancy to the extent of 1206 sq.ft has been demolished in the year 2004. The impugned order is virtually open ended and based upon the same the plaintiff is and will obviously insist upon unreasonable terms for settlement or resolution of the dispute. Taking into consideration the appellant's offer to secure the claimed premises, without prejudice, restraint upon the issue of Commencement Certificate is liable to be lifted. The balance of convenience is clearly against the continuance of any such order.

6] Mr. Madon, learned senior advocate for respondent No.1-original plaintiff, submitted that this is only an ad-interim order and therefore, this court ought not to interfere with the same. He submitted that the demolition of the old building and the proposed redevelopment is in breach of restraint orders made by the Small Causes Court in R.A.D. Suit No. 371 of 2003 instituted by the plaintiff against defendant Nos.1,2 and 3. Such restraint orders equally bind the appellant, who claims through the owners, i.e., defendant Nos.1 to 3. Mr. Madon submits that the conditions of the IOD prescribe that the Commencement Certificate will not be issued by the MCGM unless the registered agreement with existing tenants and consent letter from existing tenants is furnished. As per the development agreement entered into between the appellant and defendant Nos.1 to 3, there is acknowledgment that the plaintiff is the existing tenant, though, tenanted area is incorrectly stated as 716 sq.ft., when in fact, the same should be 1206 sq.ft. On basis of such material, learned trial Judge was justified in making the impugned order and there is no case made out to interfere with the same.

7] Mr. Mayur Khandeparkar, learned counsel for defendant Nos.1 to 3, submits that the demolition of the old building was before any restraint order was issued by the Small Causes Court in the pending Suit No. 371 of 2003. The plaintiff had falsely alleged breach of the restraint order and has even taken out a notice of motion alleging contempt. The same was, however, never pursued by the plaintiff and there are orders that such notice of motion will be taken up along with the hearing in the suit. The plaintiff has acquiesced with such orders. In such circumstances, there was no justification for making the impugned order, which will only indefinitely delay the

redevelopment and such delay is not in the interest of any of the parties. Mr. Khandeparkar submits that the purpose for institution of the suit, is only to force the appellant-developer and indirectly defendant Nos.1 to 3 to agree to the unreasonable and extortionate demands of the plaintiff. He submits that no orders should be made which will further such malicious intent of the plaintiff. He supports the appeal and submits that the impugned order be set aside.

9] The court is conscious that the matter is at the stage of ad-interim relief. However, the impugned order, in the facts and circumstances of the present case, warrants modification, so that the interest of all the parties is protected to the extent possible, without, at the same time, indefinitely stalling the redevelopment project, simply so that the plaintiff is in a position to obtain a settlement of the dispute, solely upon its own terms. No doubt, from the perusal of the development agreement between the appellant and defendant Nos.1 to 3, at this stage, there is *prima-facie* material on record to establish that the plaintiff had tenancy rights in the building which has since been demolished in the year 2004. There is a triable issue as to whether the area of such tenanted premises was 716 sq. ft. as referred to in the development agreement or whether, the same is 1206 sq.ft. as claimed by the plaintiff. However, that is an issue which will have to be decided in the suit in which the impugned order has been made or perhaps in R.A.D. Suit No. 371 of 2003 instituted by the plaintiff before the Small Causes Court.

10] At this stage, therefore, protection can even be granted to the plaintiff, on the basis that the area of tenanted premises was 1206 sq.ft. There is no justification, however, to stall the issuance of Commencement Certificate, by an open ended order that such

Commencement Certificate shall not be issued by the MCGM “***till the dispute about the plaintiff tenant in respect of 716 square feet area is resolved among the plaintiff and defendant Nos.1 to 4.***”.

11] In the impugned order, there is really no discussion on the aspects of *prima facie* case, balance of convenience and irreparable loss and prejudice. On the basis of material on record, however, the plaintiff can be said to have made out a *prima facie* case that it was the tenant in the building which has since been demolished in the year 2004. There is a dispute as to whether such tenanted area was 716 sq.ft. Or 1206 sq.ft. However, the appellant has offered to reserve and maintain the area of 1206 sq.ft. on the ground floor of the redeveloped building, should, the plaintiff, ultimately establish such claim in the pending proceedings.

12] In the impugned order, there is no discussion on the aspect of balance of convenience or irreparable loss and prejudice. The old building stands demolished since the year 2004. In terms of the development agreement, a new Theatre is supposed to come up in the place of old demolished Theatre building. Defendant Nos.1 to 3, who were the owners of the old Theatre building are also to be allotted premises in the redeveloped new Theatre building. The restraint upon issuance of Commencement Certificate, until the dispute between the parties is resolved, is virtually, an open ended order, since neither of the parties can force each other to resolve the dispute upon mutually agreeable terms. Such an order will benefit none of the parties in the ultimate run.

13] The terms of IOD, no doubt, refer to consent of tenants and registered agreements, protecting their interest. However, in the

peculiar facts of the present case, when the appellant agrees to reserve and maintain, without prejudice, 1206 sq.ft of area on the ground floor and where the rights of the plaintiff are yet to be determined, it cannot be said that the two terms of the IOD are to be construed as a licence to the tenant to hold the project to ransom, by refusing to consent or enter into in agreement, until its demands are fully met.

14] In some what similar circumstances, this court, in *M/s. Mahavir Construction Co. v. Divyakant C. Shah & ors.*[#], after recording that the developer was ready and willing to execute agreement in respect of the undisputed areas on terms agreed to by rest of the tenants, stayed injunction restraining the MCGM from issuing Commencement Certificate.

15] The issue of *status quo* by the Small Causes Court can always be looked into in detail by the trial court or for that matter the Small Causes Court in the pending proceedings. However, if the relief in prayer clause (a) of the present plaint is perused, it is clear that the plaintiff claims an area of 1206 sq. ft. in the proposed redeveloped Theatre. If therefore, the plaintiff ultimately succeeds in the pending litigations before the Civil Court or the Small Causes Court, all that the plaintiff will be entitled to, would be the area of 1206 sq.ft.. In such a situation, it cannot be said that the restraint upon the MCGM in issuing Commencement Certificate, is really some relief in aid of final relief. Besides, the grant of such relief ignores the principle of balance of convenience.

[#] Civil Application (St.) No. 35013 of 2015 in Appeal From Order (St.) No. 35011 of 2015 decided on 27/1/2016

16] Accordingly, this appeal from order is disposed of with the following order:

(a) The impugned order is set aside;

(b) However, pending disposal of the notice of motion, the appellant, consistent with their without prejudice offer, shall reserve and maintain, a contiguous area/portion of 1206 sq.ft. on the ground floor of the redeveloped building. In respect of such demarcated portion of 1206 sq.ft., neither the appellant nor defendant Nos.1 to 3 shall create any third party rights;

(c) In case, the parties agree, reservation of area of 1206 sq.ft., as aforesaid and the restraint upon creation of third party rights in respect of the same can continue until Suit No. 3269 of 2016 or RAD Suit No. 371 of 2003 are disposed of;

(e) Further, if the parties agree to the operation of the aforesaid arrangement until the disposal of the aforesaid two suits, there can be no difficulty in placing the plaintiff in possession of area of 716 sq. ft. on the ground floor of the redeveloped building, even during pendency of the two suits, again, without prejudice to the rights and contentions of all the parties. Such occupation and user shall then abide by the result in the two suits; and

(f) The observations in this order are only *prima facie* and the trial court need not be influenced by the same whilst deciding the notice of motion or the suit;

17] The civil application for stay does not survive and the same is also disposed of.

18] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)