

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**FIRST APPEAL NO. 1597 OF 2016
WITH
CIVIL APPLICATION No. 4533 OF 2016 IN F.A. NO.1597 OF 2016
WITH
FIRST APPEAL NO. 1585 OF 2016
WITH
CIVIL APPLICATION No. 4517 OF 2016 IN F.A. NO.1585 OF 2016**

M/s. Prominent Estate Holdings Pvt. Ltd. ... Appellant/Applicant
Vs.
Far Holdings Pvt. Ltd. & Ors. ... Respondents

Mr. Rajesh Shah a/w. Nirav Barot i/b. Maneksha and Sethna,
Advocate for the appellant/applicant.
Mr. B.B. Parekh a/w. Dr. Deepti Mukesh, Advocate for the
respondents.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 13th September, 2017.

P.C.:

Admit. By consent, both the First Appeals are taken together,
heard finally and decided at the stage of admission, as the parties
are same and the issue involved in both the Appeals is identical.

2. These two Appeals are directed against the judgment and order
dated 19th August, 2016 passed in Suit No. 5333 of 2007 (High Court
Suit No. 1973 of 2007) and Suit No. 5327 of 2007 (High Court Suit
No. 1965 of 2007). The appellant/plaintiff is a private limited
company, who has filed the suit for declaration and specific

performance of the Agreement of Sale which was executed on 18th July, 2002 in respect of two flats, i.e., Flat nos. 601 and 602 in B-Wing of the Building known as Sagar Elegance. Defendant No. 1 is the main contesting party, who is the builder/developer and defendant nos. 2, 3 and 4 are the formal parties. The Letter of Intent in respect of these two flats were issued on 14th October, 1995 in favour of defendant nos. 2, 3 and 4. However, due to delay in the construction of the building, defendant nos. 2, 3 and 4 lost their interest in the suit flats and they substituted the appellant/plaintiff company in the shoe of purchasers of the suit flats. Thus, the appellant/plaintiff company, defendant nos. 2, 3 and 4 and defendant No. 1/builder entered into Tripartite Agreement in respect of two flats on 18th July, 2002. The appellant/plaintiff agreed to purchase flat No. 602 for an amount of Rs.27,32,800/- and flat No. 601 for Rs.28,67,200/-. The Agreements were registered on 20th July, 2002. Some amount was paid by the appellant/plaintiff to defendant nos. 2, 3, and 4 which was already paid by defendant nos. 2, 3 and 4 to defendant No. 1 at the time of issuance of Letter of Intent. It was agreed between the parties that the balance consideration of amount was payable to defendant No. 1. There was no time limit mentioned in the Agreement, so the plaintiff company waited for the completion

of the suit premises till 2007. In between, the appellant/plaintiff waited for the possession of the flats, however, there was no development in the construction of the building. The plaintiff issued the letter on 27th December, 2006 and demanded possession. The appellant/plaintiff also showed the willingness and readiness to pay the balance amount. However, as the suit flats were not ready and defendant No. 1 failed to handover the possession of the suit flats to the plaintiff, the plaintiff filed two suits for declaration and specific performance of the two flats. After service of notice, defendant No. 1, i.e., main contesting party, appeared and filed written statement. However, defendant nos. 2, 3 and 4 did not appear and did not file written statement. Defendant No. 1 denied any obligation on its part of specific performance. It was denied that there was no failure on the part of defendant No. 1 for the completion of the contract. Defendant No. 1 has denied that there were lapses on his part for the delay of construction of the building. It is contended that the delay to construct the building was caused on account of the appellant/plaintiff and other flat purchasers. It was contended that the plaintiff and other flat purchasers themselves have entered into the construction of suit building and that obstructed defendant no. 1 to complete the building. Defendant No. 1 while contesting the suit

has denied the responsibility of specific performance. The learned Judge after considering the averments in the plaint and the contentions raised in the written statement, have framed 13 issues. He accepted the case of the plaintiff on the point of readiness and willingness to perform his part of the contract. He also accepted that the plaintiff has proved the case to decree the specific performance of the contract in respect of the suit property pursuant to the Agreement dated 18th July, 2002 to hold that plaintiff is entitled to alternate relief of the amount of compensation and so also refund of the amount which was paid to defendant No. 1 against the suit flats. However, the learned Judge refused to decree the specific performance of contract in respect of handing over the possession of the suit flats. Thus, the learned Judge partly decreed the suit by granting alternate relief of possession and refund of money and rejected the relief of specific performance of the contract in respect of possession of the suit flats. Being aggrieved by the said judgment and order, the plaintiff company filed this Appeal.

3. The point of determination before this Court is as follows:

“Whether the learned trial Court has erred in rejecting the relief of specific performance in respect of possession of the suit flats in favour of the plaintiff?”

4. The learned counsel for the appellant/plaintiff company has submitted that the learned trial Judge has failed to appreciate that the plaintiff company has not committed any breach of the contract and there was no evidence brought on record by the defendant no. 1 to show the impossibility of the performance of the suit agreement. The learned counsel has further submitted that in view of Section 16 of the Specific Relief Act, only under certain conditions, the Court can reject the relief of specific performance. However, the learned trial Court has not discussed either of the conditions contemplated under Section 16 of the Specific Relief Act. He has further submitted that the learned Judge ought to have appreciated the evidence of Mr. Pudusserry Joseph Paul, witness for the plaintiff and so also the admissions given by the witness of the defendant Mr. Sameer Sultan Maredia in respect of completion of the project. He further submitted that the front portion of the 14 storied building is ready and the suit flat nos. 601 and 602 situated on the front side in the 6th floor of B-Wing building. He has further submitted that the defence of the defendants that the plaintiff company along with other flat purchasers have taken over the task of completion of the suit building and therefore, they were responsible for the construction of the building, is false. He further submitted that in the cross-examination, DW-1

has mentioned about the supplementary agreement with the plaintiff and other flat purchasers, i.e., Committee of flat purchasers, however, no such supplementary agreement was ever produced on record by defendant No. 1 to prove such responsibility of the construction was on the plaintiff and other flat purchasers. He submitted that due to the fault of defendant No. 1 alone, the construction of the building was delayed and the learned Judge has not given any sufficient and satisfactory reason to refuse the specific performance in terms of the impugned agreement in respect of possession of the suit flats.

5. Per contra, the learned counsel for respondent No. 1 while opposing the appeals has submitted that the appellant/plaintiff company has not come before the Court with clean hands. The appellant/plaintiff company has suppressed in the plaint and also in the evidence, that the plaintiff and other flat purchasers have formed a Committee to monitor the construction of the suit building. He relied on the cross-examination of the witness of plaintiff wherein it was admitted that such Committee was formed and Committee was to monitor the construction of the suit building. He further submitted that the flat purchasers have collected the amount to pay Municipal tax and also to bear the construction expenditure, however, the

accounts of the collection and expenditure of the funds are not produced. He submitted that it is the plaintiff company and other flat purchasers who are in fact responsible for the delay in the construction of the building. The learned trial Judge has rightly observed that the delay is caused because of the obstruction of the Committee constituted by the flat purchasers and thus, rightly denied the relief of specific performance. He has further submitted that the appellant/plaintiff company is estopped from demanding the specific performance of the suit agreement. In support of his submissions, he relied on the judgment of the Hon'ble Supreme Court in the case of **Mohan Rai, Bharath Rai vs. The State of Bihar, reported in AIR 1968 SC 1281.**

6. Considered the submissions of the learned counsel for both the sides and the case law cited. In the case of **Mohan Rai, Bharath Rai** (supra) it was a criminal case and two complaints were made and Supreme Court held that the decision in the former case cannot operate as an issue estoppel against the appellants because they were not parties in the former case. I fail to understand how the ratio laid down in this case and how principal of issue estoppel itself under section 115 is applicable in the present set of facts.

7. I have gone through the evidence of PW-1 Pudusserry Joseph Paul and also the evidence of DW-1 Sameer Sultan Maredia. It is a short case of two witnesses. The witness for the plaintiff has specifically mentioned about the payment of the amount and that the plaintiff was always ready and willing and also continued to be ready and willing to perform the agreement and to pay balance amount in respect of suit flats. The witness of defendant, though has denied that the plaintiff was never original allottee, did not deny the specific execution of tripartite agreement. As the trial Court has held the issue of readiness and willingness in favour of the plaintiff, I need not discuss any evidence on that point. To refuse the relief of specific performance in respect of handing over the possession of suit flats, it was necessary for the defendant to bring the circumstances and fact on record by way of evidence that construction of the building and handing over the possession of the suit flats was impossible. The witness of the defendant in the cross-examination has admitted that the construction of front portion upto 14th floor and backside portion upto 7th floor is completed. The evidence of this witness was recorded on 8th October, 2015 and the suit flats were on the 6th floor and on the front portion of the suit building. Thus, the construction of the flats was more or less complete when the evidence of DW-1 was

recorded. The learned Judge has committed error in appreciating this evidence. The learned Judge need not have considered any evidence in respect of formation of the Committee, collection of funds by the Committee of the flat purchasers. Unnecessary weightage is given by the learned Judge on this point. As per the evidence of the witness of the plaintiff and the admissions given by him in the cross-examination, a Committee was formed by the plaintiff along with other flat purchasers in fact to assist and facilitate the construction of the building. As there was delay in the construction of the building, the flat purchasers have collected the funds to pay municipal taxes and so also to help the construction. It was a voluntary act of the flat purchasers and that cannot be taken as legal obligation of the Committee to monitor and construct the building. If at all it was the contention of the defendant that the construction of the building was stalled because of the activities of the Committee, then some circumstantial or documentary evidence ought to have been produced by the defendant no. 1 to prove his contention. Suggestions and submissions that the construction was stalled because of the obstruction and interference of the plaintiff are imaginary and baseless. The learned trial Judge should not have allowed the defendant no. 1 to capitalize the formation of the

Committee and collection of the money by them was intention and the act of the Committee to take over the work of the development and construction of the building. It was necessary on the part of the defendant to produce some agreement of MOU between the parties that it was a joint venture by the plaintiff and defendant No. 1 and other flat owners about the construction of the suit building. In absence of any such evidence, such imaginary defence ought to have been thrown and no finding should have been passed on such submissions and contentions. The witness of the defendant has given admission that it was responsibility of defendant No. 1 to complete the construction. In view of this, the order of the trial Court in respect of refusal of specific performance is set aside. First Appeals are allowed. The suit is decreed in terms of prayer clause (b) and directed to hand over the possession. Balance consideration against possession is to be paid at the time of handing over possession. Decree to be drawn accordingly.

(MRIDULA BHATKAR, J.)