

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 12323 OF 2015

Supreme Indosaigon Associates

..Petitioner.

Vs

1. Deepak Chhabria and Anr.

.. Respondents

Mr. Mayur Khandeparkar a/w Gauraj Shah a/w Ms.Tamsin Monis
i/b A.L.J. & Partner, Advocates for Petitioner.

Mr. Shardul Singh a/w Mr.Rajiv Singh i/b Nitesh Mishra, Advocate
for Respondents.

**CORAM : R.G.KETKAR,J.
DATE : 12/01/2017**

PC:

1. Heard Mr.Mayur Khandeparkar, learned counsel for the petitioner and Mr.Shardul Singh, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the Judgment and order dated 13.10.2015 passed by the learned Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai below Exhibits-90 and 101 in S.C. Suit No. 515 of 2006. By that order, the learned trial Judge rejected the applications made by the defendant.

3. Respondents, hereinafter referred to as 'plaintiffs, have instituted suit inter alia praying for order and direction to defendant to enter into agreement for sale in the prescribed

format under the provisions of The Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short, 'MOFA') and for injunction. The defendant resisted the suit, inter-alia, contending that the transaction between the parties is not for purchasing a commercial unit but it was a security towards the finance given by the plaintiffs. The plaintiffs are merely investors and never intended to purchase seven commercial units.

4. On the basis of the pleadings, issues were framed on 10.6.2014. Issues no. 2 and 3 are to the following effect:-

(2) Whether plaintiffs were acting merely as investors and never intended to purchase the said property?

(3) Whether the transactions between the parties whatever is governed by MOFA?

5. While cross examination of the plaintiffs' witness PW 1 was in progress, the defendant filed application at Exhibit-90 on 3.9.2015 for issuing direction to the plaintiffs to produce (1) individual Audited Balancesheets, (2) Wealth Tax Returns and Net Worth statements, all duly certified by the Chartered Accountant for the years from 1994 till date being 2015, of both Mr. Deepak Chhabria and Mrs Varsha Chhabria. The defendant also took out application at Exhibit-101 on 15.9.2015 for directing the plaintiffs to produce all Bank Statements for the period from 1993 to 2009 pertaining to any and all of their personal accounts and any and all joint accounts of either some or all in their names.

6. By the impugned order, the learned trial Judge has rejected the application on the ground that the plaintiff in his cross examination has deposed that he is not in a position to produce these documents. Burden lies on the defendant to prove whether the plaintiffs are investors. The defendant cannot compel the plaintiffs to produce documents on record. It is against these orders, the defendant has instituted the present petition.

7. In support of this petition, Mr. Khandeparkar relied upon Section 106 of the Indian Evidence Act, 1872 (for short, 'Act'). He submitted that it is within the special knowledge of the plaintiffs as regards the Balancesheets submitted from 1994 onwards. At the relevant time, under the Income Tax Act the only requirement was to submit Income-tax Returns and not the Balancesheets. Even if the defendant were to apply under the R.T.I to the Income tax Authorities, the authorities will not be in a position to furnish information as regards Balancesheets of the plaintiffs. As it is within the special knowledge of the plaintiffs, they should be called upon to produce the Balancesheets for the period 1994 to 2015 for the purpose of finding out whether they have disclosed the transaction between the parties.

8. Mr. Khandeparkar submitted that, at this stage, the Court cannot go into the aspect of relevancy of the documents. The documents which are sought by the defendant will conclusively

establish whether the plaintiffs were merely investors or intended to purchase the units. In fact, though under the MOFA requirement is to pay 20% of consideration, in respect of some units, the plaintiffs have paid almost 90% consideration which shows that the plaintiffs have financed the amount to the defendant and they do not intend to purchase the property. He, therefore, submitted that the learned trial Judge should have allowed the applications Exhibits 90 and 101.

9. On the other hand, Mr. Singh supported the impugned order. He submitted that by order dated 12.3.2014 this Court directed the trial Court to dispose of the suit by 31.12.2014. He submitted that during the course of cross examination, PW 1 has deposed that he is not in possession of the documents. As the plaintiffs are not in possession of the documents, the defendant cannot compel them to produce the documents. He has taken me through cross examination of PW 1 in that regard.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, issues were framed on 10.6.2014. While rejecting the applications, the learned trial Judge has observed that the plaintiffs have not referred to these documents in the pleadings nor relied upon these documents. After settling the issues on 10.6.2014, no attempts were made by the defendant by issuing notice under Order XI, Rule 16 for

production of documents now sought by applications Exhibits 90 and 101. During the course of cross examination of plaintiffs' witness PW 1, he was confronted with this record. PW 1 deposed that he is not in possession of these documents. Apart from that, it is the defence taken up by the defendant that the plaintiffs are investors and they never intended to purchase the property. Burden is on the defendant to establish whether the plaintiffs are investors or not. It will be, therefore, open to the defendant to lead evidence to substantiate their defence. They cannot compel plaintiffs witness to establish their defence. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, petition fails and the same is dismissed. The defendant shall file affidavit of evidence before the trial Court on or before 25.1.2017. All contention of the parties including drawing of adverse inference against the plaintiffs are expressly kept open.

11. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order affecting the decision of the case, may be set forth as a ground of objection in Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)