

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 707 OF 2016

M/s. Mahavir Construction Co. .. Appellant
vs.
Divyakant Chimanlal Shah & Ors. .. Respondents

Mr. Sanjay Jain i/b. Mr. Ritesh K. Jain for Appellant.
Mr. Zain Mookhi with Mr. D. Dave i/b. J. J. Legal for Respondent No. 1.
Ms M. R. Bhoir for Respondent - MCGM.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 13 January 2017
Date of Pronouncing the Judgment : 18 January 2017

JUDGMENT :-

1] Heard learned counsel for the parties. With their consent and at their request, this appeal is taken up for final disposal.

2] This appeal is directed against the order dated 9 December 2015 made by the City Civil Court, Mumbai (trial Court) restraining Municipal Corporation of Greater Mumbai (MCGM) from granting commencement certificate to the appellant in respect of the redevelopment project without entering into any agreement with the respondents / original plaintiffs in the matter of providing permanent alternate accommodation in the new building to be put up, in pursuance of the redevelopment scheme.

3] This Court while admitting the appeal on 27 January 2016, made the following order:

"1. Rule. Learned counsel appearing for the respondents waives service. Heard forthwith.

2. I have heard the parties at length. By this civil application, the applicant seeks stay of the impugned order passed by the learned trial Judge. The learned trial Judge has granted injunction against the Corporation from granting commencement certificate until the applicant executing a permanent alternate agreement in favour of the respondents.

3. Mr. Jain, learned counsel appearing for the applicant (original defendant no.6) invited my attention to the prayers in the plaint and would submit that the learned trial Judge has virtually decreed the suit in favour of the plaintiffs at the ad-interim stage. He submits that the applicant has already filed a suit for eviction against the respondent no.1 (original plaintiff) in the Small Causes Court at Mumbai. The said suit is pending.

*4. Learned counsel also placed reliance on the judgment of the Division Bench of this court rendered on 23rd June, 2014 in Writ Petition (Lodging) No.1135 of 2014 in case of **Municipal Corporation of Greater Mumbai vs. State of Maharashtra & Others** and more particularly paragraphs 9(l) and (p) and would submit that though without prejudice to the rights and contentions of the applicant, the applicant was ready and willing to execute the agreement in respect of the area admeasuring 388 sq. ft. similar to the area offered in the other agreements entered into with other tenants, the original plaintiff has refused to execute such agreement. The original plaintiff is seeking larger area from the applicant. In my prima-facie view, the guidelines framed by the Division Bench in Writ Petition (Lodging) No.1135 of 2014 thus would not apply in this situation.*

5. Learned counsel appearing for the original plaintiff on the other hand submits that the building is already demolished and thus the applicant shall be directed to safeguard the area which the original plaintiff would be entitled to in lieu of the existing area which was in possession of the tenant through whom, the plaintiff is claiming rights in the suit property.

6. The matter was adjourned from time to time to enable the parties to settle the dispute amicably.

7. The other tenants, who are situated on the plot have been already shifted. The project of the redevelopment cannot be stalled by the original plaintiff.

8. The defendant no.6 has already rendered an undertaking before the trial Court that in the event of the plaintiff proving his entitlement for larger area before the learned trial Judge, the applicant would pay the amount of compensation as may be ordered by the learned trial Judge. In my view, in view of such undertaking also rendered by the applicant, the impugned order passed by the learned trial Judge deserves to be stayed. It is ordered accordingly.

9. The civil application is accordingly disposed of. No order as to costs."

4] In pursuance of the interim order dated 27 January 2016, MCGM has issued the necessary commencement certificate. There is also no dispute that the old building, in which, the original plaintiffs had a residential apartment has already been demolished on or about 1 August 2013. There is also no dispute that the other tenants in such building, have already been shifted and there is nothing on record to indicate that such other tenants have any

issues with regard to the proposed redevelopment. In fact, it is in the interests of all concerned that the redevelopment is completed at the earliest.

5] Mr. Jain, learned counsel for the appellant submits that the impugned order is *ex facie* illegal and unreasonable. The impugned order had in fact granted final reliefs at the ad interim stage. This is despite the fact that there was no *prima facie* case made out by the original plaintiffs and in any case the balance of convenience was certainly not in favour of grant of relief, which would completely stall the redevelopment project. Mr. Jain submitted that the decision in the case of ***Municipal Corporation of Greater Mumbai vs. State of Maharashtra & Ors.***¹ was not at all applicable to the facts and circumstances of the present case and the learned trial Judge erred in relying upon the same, without adverting to the facts and circumstances of the present case. For these reasons, Mr. Jain submits that the impugned order is required to be set aside.

6] In the alternate, Mr. Jain submitted that the interim order dated 27 January 2016, is liable to be made absolute, since, commencement certificate has already been issued and the so-called interest of the original plaintiffs is also sufficiently protected. Without prejudice, Mr. Jain submitted that the appellant will keep apart one tenement admeasuring 388 sq. meters in the new

1 Writ Petition (L) No. 1135 of 2014 decided on 23 June 2014.

building which is proposed to be put up, similar to the tenement which is being offered to the other tenants in the old building which is already demolished. In addition, Mr. Jain submits that the appellant will deposit in the trial Court a sum of Rs.8,92,012/-, which represents compensation in lieu of alternate accommodation with effect from 1 August 2013 to 31 March 2017, in order to secure the claim of the original plaintiffs in this regard. Mr. Jain submits the appellant will continue to deposit the amount of Rs.23,280/- per month before the trial Court for the period beyond 31 March 2017, again, as and by way of compensation in lieu of alternate accommodation. Mr. Jain submits that apart from the original plaintiffs, there are other claimants to the tenancy of the apartment in the demolished building. Mr. Jain submits that therefore, there is no question of paying such amounts directly to the original plaintiffs, as otherwise, such payment might invite claims from the other claimants. Mr. Jain submits that such an arrangement will secure the interests of the original plaintiffs and there is absolutely no necessity to directly or indirectly restrain the completion of the redevelopment project, particularly since all other tenants have vacated the old building and have accepted terms similar to those now proposed by the appellant, without prejudice.

7] Mr. Mookhi, learned counsel for the original plaintiffs has submitted that the other tenants in the old building may have had

smaller apartments, however the original plaintiffs were in occupation of apartment having carpet area of 450 sq. ft. comprising 1 BHK with open terrace admeasuring about 1027 sq. ft. Mr. Mookhi submits that, in all, the premises occupied by the original plaintiffs admeasured around 1477 sq. ft. and therefore, the appellants are duty bound to enter into an agreement with the original plaintiffs to provide for permanent alternate accommodation commensurate with such premises. Mr. Mookhi pointed out that there is a rent receipt which clearly refers to the premises as a terrace flat. There is a notice issued by the MCGM on 29 April 2011, which also refers to the premises is having area of 1477 sq. ft. in all. There are consent terms dated 11 December 1991, in which, it is stated that the predecessor-in-title of the original plaintiffs had exclusive rights to the terrace portion. If all these material is taken into consideration, then there is no question of the appellant proceeding with the construction or redevelopment, unless, the appellant signs an agreement or assures that apartment / apartments proportionate to that held by the original plaintiffs will be allotted to the original plaintiffs.

8] The rival contentions now fall for my determination.

9] As noted earlier, the old building stands demolished since 1 August 2013 or thereabouts. The tenants in such demolished

building, other than the original plaintiffs are accepting compensation in lieu of alternate accommodation and further, are satisfied with the assurance that tenement admeasuring about 388 sq. ft. will be provided to them in the new building. The controversy in this case is whether the original plaintiffs are entitled to only one tenement admeasuring 388 sq. ft., or whether the original plaintiffs are entitled to a tenement having larger area or two tenements in lieu of the larger premises allegedly held by them in the old building which has since been demolished. Until such dispute is adjudicated, it is not in the interests of any party that the actual redevelopment work itself should be stalled or stopped. The impugned order, at the ad interim stage had virtually stalled the redevelopment at the site, by imposing a restraint upon the MCGM to issue a commencement certificate. Such an order was clearly not justified and therefore, by interim order dated 27 January 2016, such an order was stayed. In pursuance of the stay order, the MCGM has also issued commencement certificate to the appellant.

10] The only question that survives in this appeal is whether the appellant should be put to terms in addition to those already incorporated in the interim order dated 27 January 2016. Even from the pleadings in the plaint, it is clear that the apartment held by the original plaintiffs had carpet area of only 450 sq. ft. The rest of the area referred to in the plaint, is the area of the terrace. The question

whether the plaintiff had any exclusive rights to the terrace or not, is a question which will have to be perhaps decided in the suit. On the basis of the documents referred to by Mr. Mookhi, learned counsel for the plaintiffs, it cannot be said that any strong *prima facie* case has been made out in this regard. The consent terms are required to be read in their entirety. The interpretation that the exclusive rights referred to in clause 4 of the consent terms relates to exclusive rights to the installation and user of dish antenna, is not an interpretation which is unreasonable or implausible. Besides, Mr. Mookhi was unable to point out any legal provision, in the matter of enhanced entitlement on the basis of claim to the terrace.

11] Therefore, for the present, the interests of justice will be met if the following conditions are imposed upon the appellant :-

(A) The appellant will reserve and maintain apartment admeasuring 388 sq. ft. in the new building, for eventual allotment to the plaintiffs or other claimants, claiming through the predecessor in title of the plaintiffs. An undertaking to this effect shall be filed by the appellant before the trial Court within a period of four weeks from today and a copy thereof be furnished to the plaintiffs;

(B) The appellant will deposit in the trial Court, again within a period of four weeks from today, a sum of of Rs.8,92,012/- which corresponds to compensation in lieu of alternate

accommodation for the period between 1 August 2013 and 31 March 2017;

(C) The appellant shall, on or before the 5th day of each month, deposit compensation at the rate of Rs.23,280/- in the trial Court on or before the 5th day of each succeeding month. First of such deposit shall be made on or before 5 May 2017. In case, there is a revision in this amount, the appellant is directed to deposit the revised amount. It is made clear that such deposit shall be, as far as possible, on par with compensation being paid to the other tenants in the old building which has since been demolished;

(D) The trial Court to invest the aforesaid amount in a nationalized bank until the final disposal of the suit or until any further orders, which it shall be at liberty to make in this matter;

(E) The appellant should also file an undertaking before the trial Court that in the event the plaintiffs prove their entitlement for larger area, the appellant will abide by orders made by the trial Court in this regard, including *inter alia* orders as to payment of further and additional compensation;

12] Subject to compliance with the aforesaid directions, the impugned order is set aside. The trial Court to ensure that the

appellant complies with the aforesaid conditions, if necessary, by making further orders in that regard.

13] The deposit of amounts as aforesaid, shall abide by final orders in the suit. It is made clear that in case the original plaintiffs produce no objection certificate from other claimants i.e. legal representatives of their predecessor-in-title, the trial Court will be at liberty to permit the original plaintiffs to withdraw the amounts deposited by the appellant, without prejudice to their rights and contentions in the suit. This however does not mean that this Court has recognized or ruled upon the claims of either the original plaintiffs or the other claimants, in relation to the suit premises. All these are matters which are left open.

14] The observations in the impugned order, interim order dated 27 January 2016 as well as the present order are only *prima facie* and the trial court need not be influenced by such observations whilst deciding the main suit. All contentions of all parties are left open and the learned trial Judge to dispose of the suit in accordance with law and on its own merits.

15] The appeal is disposed of in the aforesaid terms. There shall be no order as to costs.

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

(M. S. SONAK, J.)

Chandka