

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 333 OF 2016
IN
CHAMBER SUMMONS NO. 1611 OF 2008
IN
EXECUTION APPLICATION (L) NO. 388 OF 2008
IN
SUIT NO. 4345 OF 2001
WITH
NOTICE OF MOTION NO. 1304 OF 2016

M/s R.J. Construction & Ors.

.. Appellants

V/s

Vasant Premji Shah & Ors.

.. Respondents

Mr. A.A. Kumbhakoni, Senior Advocate with Mr. Z. Jariwala i/b M/s Thakore Jariwala & Associates for the appellants.

Mr. F. Devitre, Senior Advocate with Mr. P.K. Dhakephalkar, Senior Advocate, Mr. J.P. Sen, Senior Advocate, Ms. Anuja Abhyankar, Ms. Nikita Mishra and Mr. Murtuza Federal i/b Federal & Rashmikant for the respondents.

Dr. M.S. Deshpande, Court Receiver, High Court, Bombay, present.

**CORAM: DR. MANJULA CHELLUR, CJ. &
G.S. KULKARNI, J.**

DATE : 5th JANUARY 2017

P.C.:

The appellants are before us challenging the order dated 12th February 2016 contending that the respondents herein are entitled not only to the benefit of construction of 1,39,930 sq. ft., inclusive of permitted area of staircase, balcony with all FSI and TDR benefit available under Development Control Regulations applicable at the material time, but also the benefits which may arise in future, however with one rider that the benefit arising out of the balance of land after carving out 4700 sq. mtrs. in terms of the consent terms can also be utilised by the appellants-defendants on 4700 sq. mtrs.

2. In order to understand what exactly was the consent terms agreed between the parties, one has to refer to the consent terms itself. The relevant consent terms are clauses 3, 4, 5, 6, 9, 10, 12 and 17, which read as under:

“3. The Defendants jointly and severally agree, declare, confirm to this Hon'ble Court that on account of the shares of the Plaintiffs as partner in the firm of M/s R.J. Construction Defendant No.1, the Plaintiffs have been allotted rights to develop, construct and sell an area equivalent to 1,39,930 sq.ft. inclusive of all the FSI and TDR benefit available under the provisions of D.C. Regulations 1991 to be constructed on part of the larger land bearing CTS No.532 (Part), 1532, 1533 and 1541 of Village Eksar Borivli (West), admeasuring

about 4700 sq. metres or thereabouts and delineated and shown on the plan annexed hereto and thereon shown surrounded by red colour boundary line and which the said land shown by red colour boundary line on plan annexed to the Consent Terms and right to develop construct and sell Wings E and F aggregating to 1,39,930 sq. ft. inclusive the permitted area of staircase and balcony are hereinafter collectively referred to as the said premises.

4. The more particular description of the entire land admeasuring 16,572.70 sq. metres or thereabouts larger is mentioned in First Schedule hereunder written and (land for short) land admeasuring 4700 sq. mts. forming part of entire land (part land) shown on plan hereto annexed surrounded thereon by red colour boundary line and forming part of the said premises referred to herein above is more particularly described in the Second Schedule hereunder written and the individual shares of each of the Plaintiffs in the said area of 1,39,930 sq. ft. is as mentioned in Third Schedule hereto.

5. The Defendants jointly and severally agree, declare, assure, undertake and confirm to this Court that the Defendants have submitted to Brihan Mumbai Mahanagar Palika for its approval building plans for putting up interalia construction 1,39,930 sq. ft. in stilt + 13 + 14th (part) comprising in the said Wings E and F referred to above and the said proposal submitted to Brihan Mumbai Mahanagar Palika is registered under No. Chc./8673/B5 II/AR.

6. *The Defendants jointly and severally hereby agree, declare, confirm and undertake to this Court that the Defendants shall entirely at their own costs, charges and expenses follow up the proposals for development of the said entire land inclusive of the said Wings E and F referred to above and apply for and obtain from all concerned authorities including from Brihan Mumbai Mahanagar Palika all permissions /consent/ NOC/BCC etc. required for effectual development and construction of the buildings thereon and that the Plaintiffs shall not be held responsible to contribute or pay any amounts including any deposits which are required to be paid for obtaining the said approvals/ NOC/Consent/CC/BCC etc. and that the Defendants jointly and severally agree and undertake to this Court to bear and pay all the amounts payable in respect of the items mentioned in Fourth Schedule hereto.*

9. *The Plaintiffs shall entirely at their costs, charges and expenses carry on and complete the construction of the said Wings E and F referred to above as per the sanctioned building plans and permissions/NOC/Consent/CC granted by Authority and the Plaintiffs shall entire at their costs, charges and expenses carry on and complete the construction of the said Wings E & F referred to above.*

10. *The Defendants or any one claiming through Defendants shall not interfere obstruct prevent object or raise any dispute against the Plaintiffs and or nominee/s of the Plaintiffs for in development/construction/sale of all or any*

part of the said Wings E and F together with part of the said larger land annexed to Consent Terms and surrounded by red colour boundary line in the manner whatsoever.

12. The Defendants while developing the remaining part of the said entire land shall not claim or have any benefit arising out of the said construction of the said Wings E and F and/or the part of the said entire land shown on the plan surrounded by red colour boundary line and that the benefit in respect of the said premises and the said part of the land shall always belong and shall be utilised by the Plaintiffs and or nominee/s of Plaintiffs for their own benefit only.

17. The Plaintiffs shall be at liberty without any further reference or consent of the Defendants or any one claiming through Defendants to deal with the said premises or any part thereof including part of the said entire land shown by red colour boundary line on the plan annexed to the Consent Terms and to receive compensation/consideration and to make use thereof without rendering any account to the Defendants or nay one claiming through the Defendants.”

3. Apparently at the time of consent terms filed before the Court in the year 2004, the entire area of the land was about 16,000 and odd sq. mtrs. and several towers were already in existence on substantial portion of the land. As per the consent terms, Wings E and F were referred to as the construction area to be put up for which already a plan was submitted by the appellants-defendants.

Therefore, by virtue of the above consent terms, it was clearly understood that the appellants-defendants will get the permissions and plans sanctioned for construction of Wings E and F and all the expenditure for such development and obtaining the plans would be met by the appellants-defendants. It was further agreed that the respondents-plaintiffs will have to put up the actual construction of Wings E and F at the costs of the respondents-plaintiffs. As on that date, the land identified by the parties measured about 4700 sq. mtrs. and Wings E and F which were comprised of 1,39,930 sq. ft., construction was to be put up on this 4700 sq. mtrs. In that context, the above terms came to be agreed between the parties.

4. By the time the present dispute arose, Development Control Regulations seems to have been revised giving rise to additional benefit to the owners of the land. Therefore, out of 16,572 and odd sq. mtrs. if 4700 sq. mtrs. is set apart for the respondents-plaintiffs, according to the appellants-defendants, they are not claiming any benefit arising out of either 1,39,930 sq. ft. or any part of land admeasuring 4700 sq. mtrs., but the benefit they are able to generate from the rest of the land they want to put up construction on 4700 sq. mtrs. or the balance of the land after utilising the land for Wings E and F (1,39,930 sq. ft.).

5. Reading of clauses 9, 10, 12 and 17 clearly indicate not only the benefit arising out of the premises which are referred to as

Wings E and F, but also the rest of the land out of 4700 sq. mtrs. will accrue only to the respondents-plaintiffs, and the appellants-defendants are not entitled to any of the benefits arising out of the premises or the land or any part of land, i.e. out of 4700 sq. mtrs.

6. The contention of Mr. Kumbhakoni, learned Senior Counsel arguing for the appellants, is that the appellants are not claiming any benefit arising out of either the premises admeasuring 1,39, 930 sq. ft. or any part of the land comprised out of 4700 sq. mtrs., but he is only trying to put up the benefit generated from the other portion of the land or the premises other than the premises and the land given to the plaintiffs by making use of open space out of 4700 sq. mtrs. demarcated for the benefit of the respondents-plaintiffs. His contention is supported by the Architect of the respondents-plaintiffs since the Architect opines that there is possibility of putting up two more wings, i.e. the benefit generated from other portion of the defendants' property. Directly the appellants may not be seeking any benefit arising out either of the premises or any part of the land which was demarcated for the benefit of the respondents-plaintiffs in terms of the consent decree. But one has to see whether by allowing him to use a portion of 4700 sq. mtrs. land or premises, the benefit which has already accrued or is going to accrue to the plaintiffs will be reduced or not. As on the date of consent terms, construction of Wings E and F were to be put up because the plan was already submitted to the Mahanagar Palika

as indicated in the consent terms. Therefore, even the expenses towards obtaining such plans and further development to put up the actual construction was to be borne by the appellants-defendants. Since the buildings, i.e. Wings E and F, were not yet put up, the plaintiffs undertook to construct the building at their own costs.

7. Learned Senior Counsel Mr. Kumbhakoni further argues that initially the appellants-defendants were to construct Wings E and F and hand over to the same to the respondents-plaintiffs, but it could not be complied with by the appellants-defendants. Therefore, the respondents-plaintiffs approached the Court in a suit where ultimately they entered into consent terms. Even if we take into consideration the submission made on behalf of the appellants-defendants that the appellants-defendants were to put up the construction but they did not put up, it would only mean that since the respondents-plaintiffs were putting up the construction of Wings E and F at their costs, the entire land of 4700 sq. mtrs. was put at the disposal of the plaintiffs to the benefit of the plaintiffs and plaintiffs alone. In that background, probably the terms and conditions, as referred to above, have come into existence.

8. With the revision of Development Control Regulations, both the plaintiffs and the defendants may be in a position to put up further construction, but the question is where they should put up that construction. In the present case, apparently the appellants-

defendants will not allow the respondents-plaintiffs to put up any construction on the balance of the land belonging to the defendants, even if the plaintiffs were to get additional benefit of construction. But whether the appellants-defendants are entitled to make use of 4700 sq. mtrs. to put up construction taking benefit from the balance of the land belonging to the defendants, though they are not asking directly the benefit arising out of measurement of 4700 sq. mtrs. of land set apart for the plaintiffs. The benefit or the permission the appellants-defendants are claiming now would definitely reduce the benefit which has already accrued further going to accrue to the plaintiffs in future so far as 4700 sq. mtrs.

9. In that view of the matter, the learned Single Judge was justified in rejecting the claim of the appellants-defendants. The appellants have not made out any good ground warranting interference by this Court. Accordingly the appeal is dismissed.

10. In view of disposal of the appeal, the notice of motion does not survive and stands disposed of.

(G.S. KULKARNI, J.)

CHIEF JUSTICE