

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO.2134 OF 2011****IN****SUIT NO.1680 OF 2011**

Rockline Developers Pvt. Ltd.

... Plaintiff

Versus

Abdul Razak Sattar Chunawala And 6 Ors.

... Defendants

.....

Mr. Simil Purohit, a/w. Mr. Tejas Shah, i/b. Lilani Shah & Co., for the Plaintiff.

Mr. Swapnil Bangur, i/b. Yatin Shah, for the Defendants.

Mrs. A.A. Kadam, Section Officer from the Office of Court Receiver present.

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CORAM**: S.C.GUPTE, J.****DATED****: 18 JULY 2017****P.C.:**

. Heard learned Counsel for the parties.

2. This Notice of Motion is taken out in a suit praying for a declaration that the Defendants have no right, title or interest in respect of the suit property described in Exhibit "A" to the plaint, including the area allegedly encroached upon by the Defendants, which is described in Exhibit "B" to the plaint . The suit also prays for a decree of possession in respect of the entire encroached property described in Exhibit "B".

3. The short facts of the case may be stated thus:

One Byramjee Jeejeebhoy Pvt. Ltd. was an owner in respect of the suit property, being land or ground situated at Village Oshiwara, Taluka Andheri, bearing Survey No.47, CTS 737(part). By an agreement for sale, Byramjee Jeejeebhoy agreed to sell the property to the predecessor-in-title of the Defendants, namely, one Sattar Ahmed Chunawala. The property was described as admeasuring about 16046.18 sq. mtrs. or thereabouts and shown on a plan and described in a schedule to the agreement for sale. Disputes arose between Byramjee Jeejeebhoy and Chunawala, as a result of which, Byramjee Jeejeebhoy filed a suit in the City Civil Court at Bombay, being Suit No.268/1976. Pending that suit, by a development-cum-sale agreement, Chunawala agreed to sell the property to the Plaintiff. After the execution of this agreement, consent terms were entered into between Byramjee Jeejeebhoy and Chunawala confirming inter alia the transfer of ownership as between Byramjee Jeejeebhoy and Chunawala of the suit property. Chunawala, thereafter, issued a possession letter to the Plaintiff. This possession letter made it clear that what was agreed to be sold under the development-cum-sale agreement to the Plaintiff was not only land bearing CTS No.737 (part), but also a portion of CTS No.720 (part). It was acknowledged in this possession letter that, while drafting the consent terms in Suit No. 268 of 1976, this particular land, i.e. CTS No.720 (part), was erroneously omitted from the consent terms. The possession letter noticed that it would be the obligation of the Plaintiff to get the schedule of the consent terms rectified from the owners, i.e. Byramjee Jeejeebhoy. In any event, the possession letter made it very clear that what was granted to the Plaintiff by Chunawala was development rights in respect of the entire land, that is to

say, land in excess of what was actually reflected in the contract between the parties and which included not just CTS 737 (part), but also CTS No.720 (part). The possession letter clarified that, upon a complete survey of the property by the concerned authorities, whatever additional area may be ascertained in respect of the land, the Plaintiff would be entitled to such land without payment of any additional compensation to Chunawala. After the execution of this possession letter, but before rectification could be carried out in the consent terms, Chunawala died. Chunawala is survived by his legal heirs, who are Defendants to the present suit. The Defendants, for their part, by a supplementary agreement dated 18 May 2001, confirmed the whole transaction including the agreement for development-cum-sale dated 19 June 1989, the memorandum of possession dated 23 April 1990, the declaration dated 23 April 1990, and the writing dated 6 August 1993 between Chunawala and the Plaintiff as well as the power of attorney executed in favour of the Plaintiff by Chunawala as valid, subsisting and binding upon the Defendants. The agreement also records that there was a discrepancy in the area of the property, as reflected in the revenue records and that, in the event the area of the property described in the schedule written under the supplementary agreement was enhanced, such enhanced area shall also belong solely and absolutely to the Plaintiff and no additional compensation would be payable by the Plaintiff to the Defendants in respect thereof. Subsequent to this supplementary agreement, there is also a declaration made on oath by the Defendants, which also confirms that what was agreed to be sold by the Defendants to the Plaintiff was so much of the land as was found upon measurement. The declaration confirmed that the property was sold to the Plaintiff on 'as is where is basis' and that the Plaintiff had the authority to develop the entire

property that may be found upon measurement. Subsequent to this declaration, a deed of conveyance was also duly executed by the Defendants in favour of the Plaintiff on 17 December 2004. This conveyance also makes it clear that what was sold and conveyed unto the Plaintiff, was the entire piece or parcel of land at Village Oshiwara, Taluka Andheri bearing CTS No.737 (part), 720 (part) and now being 737 (part) and 720 A (part) together with the structures standing thereon as also “additional area as may be actually ascertained upon survey and upon rectification of the City Survey Records in respect of the property and delineated on the plan thereof surrounded by a red colour boundary line annexed to the plan annexed to the conveyance”.

4. The foregoing narration makes it very clear that what was sold by the Defendants to the Plaintiff was not merely land admeasuring 18609.23 sq. mtrs. of land described in the schedule of the conveyance, but the entire property, which is shown delineated on the plan annexed to the conveyance and boundaries of which are stipulated in the conveyance. This land was clearly not fully measured on the date of the conveyance. It was to be measured and survey records were to be rectified on the basis of such measurement. It is the area finally ascertained upon such survey, measurement and rectification, which was to be treated as the land conveyed by the Defendants to the Plaintiff.

5. This also makes it apparent that the Defendants' claim of being in possession of land in excess over 18609.23 sq. mtrs. conveyed to the Plaintiff has no prima facie merit. (The Defendants are in possession of area which is stated to be 1141.50 sq. mtrs. or any other area.) Ever since

the Plaintiff was put in possession of the land, he was in possession of the entire land comprised within the description referred to above and which is now estimated at about 24252.30 sq.mtrs., which is the current measurement of the land based on the Collector's report.

6. Learned Counsel for the Defendants relies on a judgment of a Division Bench of our Court in case of **Mahadev P. Kambekar vs. Krishna Woollen Mills**¹. Relying on this judgment, it is submitted that the description of the land in the body of the conveyance as also in the schedule of the conveyance that it is 18609.23 sq.mtrs. or thereabouts implies that there could be a difference of a few meters here and there and that, in any event, it cannot be to the extent of over 6000 sq. mtrs. as is now alleged in the plaint. In the case before the Division Bench of our Court, the description of the property was simply 14902 sq. yards or thereabouts. The Court was concerned with this description and found that 'thereabouts' in this context could be a few yards more or a few yards less. There was no clause in the documents before the Division Bench such as the one that we have here that the area was not ascertained but was to be ascertained subsequent to the execution of the document and such area, even if it be in excess of the area mentioned in the document, as was found to be part of the property at such measurement, was to be treated as the area conveyed to the Plaintiff. This is a singular important distinguishing feature of the present case.

7. Learned Counsel also submits that the Division Bench did not countenance in **Krishna Woollen Mills'** case the approach of the learned

¹ 2007(5) Bom. C.R. 726

Single Judge on the adequacy of the agreed consideration. The Division Bench held that the Single Judge had to apply his mind to this aspect of the matter before any decree of specific performance could be passed. The Division Bench, in the first place, was considering an appeal from a decree of specific performance. Under Section 20 of the Specific Relief Act, the Court is expected to apply its mind to all aspects of the matter while exercising its discretion on whether or not to allow specific performance. In that context, the Division Bench held that adequacy of consideration in a matter like this had to be considered before a decree was passed. (In that case the actual land was found to be 21069 sq. yards as against the description in the document, namely, 14912 sq. yards or thereabouts.) This aspect of the matter is clearly not germane at this stage, when we are considering interim reliefs in a suit for declaration based on conveyance of the property. In any event, the appeal Court, whilst hearing an appeal from an ad-interim order in this matter, has ordered the Plaintiff to deposit a sum of Rs.1.5 cores as an adhoc amount to the credit of the suit as a condition of the ad-interim order and I do not propose to disturb that part of the order. This amount of Rs.1.5 crores shall remain to the credit of the suit and continue to be invested for the purpose of any final monetary relief that the Court may grant to the Defendants in the matter.

8. Accordingly, the Plaintiff has clearly made out a prima-facie case for confirmation of the ad-interim order passed by this Court. The balance of convenience clearly weights, in the facts of the case, in favour of the Plaintiff. Accordingly, the ad-interim order granted by this Court on 25 August 2011, and as modified by the appeal Court on 14 September 2011, is confirmed pending the hearing and final disposal of the suit.

9. The Notice of Motion is disposed of accordingly.

(S.C.GUPTE, J.)