

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1525/2014
WITH
NOTICE OF MOTION NO.1559/2017
IN
SUIT NO. 962/2014

Electronfab Engineering Pvt. Ltd.

... Applicant

V/s.

Runwal Constructions and Sandeep Runwal
Partner of Runwal Constructions

... Respondents

Mr. Janak Dwarakadas, Senior Advocate a/w. Ankit Lohiya, Aditya Mehta, Sheetal Sabnis, Ipshita Sen & Praveen Kejriwal i/b. M/s. Gagrats for the Plaintiff

Mr. Navroz Seervai, Senior Advocate a/w. Sharan Jagtiani, Nirman Sharma, Pinky Patel & Sahil Harjani i/b. M/s. Desai & Diwanji for Defendant Nos.1 and 2.

CORAM: K.K. TATED, J.

ORDER RESERVED ON : DECEMBER 6, 2017

ORDER PRONOUNCED ON : DECEMBER 20, 2017

PC. :

1. The Notice of Motion No.1525/2014 is not on board. By consent of the parties taken on board.
2. Heard the learned counsel for the parties. By consent of the parties both the Notices of Motion are taken up for hearing together. Both the Notices of Motion are being disposed of by common order as the facts are similar to each other.

3. Notice of Motion No.1525/2014 is filed by the Plaintiff for an order of appointment of Court Receiver, High Court, Bombay or some other fit and proper person as Receiver of the suit land and/or 24 flats more particularly described in Exhibit-B and C-2 of the plaint with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 and to direct the Court Receiver to put the Plaintiff in possession of the same as an agent of the Court Receiver without any security and/or compensation. The Plaintiff also prayed for an order of injunction restraining Defendants from alienating, selling, dealing with, encumbering, disposing off or in any manner creating third party rights in or from parting with possession of the suit land and/or 24 flats more particularly described in Exhibit-B and C-2 of the plaint or any part thereof to any person other than the Plaintiff.

4. This court had passed order dated 16.01.2015 granting ad-interim relief in favour of the Plaintiff. Para 4 of the said order reads thus:

“In the premises, there is a case made out for grant of ad-interim relief. The question, however, is of moulding of appropriate ad-interim relief. It is a matter of fact that the project as proposed by the Defendants has not yet taken off, though there is some plinth found to be constructed on the suit plot, as per the Plaintiff. Interests of justice would be served if, in these premises, the Defendants are restrained from dealing with the suit plot without reserving and ear-marking an appropriate area, i.e. 14,306 sq.ft. carpet inclusive of balconies, representing the aggregate area of the suit flats. As and when such area is earmarked and reserved, further orders can be sought from this Court so as to restrict the to injunctive relief to such reserved and earmarked area. As and when such application is made, the question whether the area so reserved or earmarked will adequately protect the Plaintiff's interest or not, can be considered by this Court. Further

directions, if any, regarding securing of the amounts in respect of the subject flats to the Plaintiff, may be considered as and when further orders are sought from this Court.”

5. The Defendant filed Notice of Motion No.1559/2017 for vacating or modifying the interim order dated 16.01.2015 passed by this court in Notice of Motion No.1525/2014 and to substitute the same with an ad-interim order of injunction in terms of para 35 and 36 of the affidavit in support thereof or to pass such other order as this Hon'ble Court deems fit.

6. This court, by order dated 16.01.2015 granted liberty to the Defendants to file appropriate proceedings for modifying the said order as and when such built up area admeasuring approximate 14306 sq.ft (carpet) including balcony as and when is ready for earmarking and reserving. Pursuant to the said liberty granted by this court by order dated 16.01.2015 the Defendant filed the present Notice of Motion with following reliefs:

“(a) that the Hon'ble Court be pleased to vacate or vary the ad-interim order dated 16th January 2015 passed by this Hon'ble Court in Notice of Motion No.1525 of 2014 and to substitute the same with an interim order of injunction in terms of para 35 and 36 of the affidavit in support hereto or to pass such other order as this Hon'ble Court deems fit.”

“(b) for ad-interim reliefs in terms of prayer clause (a) hereinabove.”

“(c) for costs of this Notice of Motion.”

“(d)”

7. The present suit is filed by the Plaintiff for specific performance

of letter of allotment dated 23.11.2005 in respect of 24 flats in favour of the Plaintiff and for other reliefs. Those reliefs read thus:

(a) That this Hon'ble Court be pleased to declare that the said Allotment Agreements dated 23 November 2005 for allotment of the said 24 flats are valid and subsisting between the Plaintiff and the Defendants and that the Defendants are bound and liable to perform the same:

(b) That this Hon'ble Court be pleased to declare that the termination of the said Allotment Agreement by Defendant No. 1 vide its letters dated 2 December 2013 is wrong legal, illegal, invalid, void and not binding on the Plaintiff.

(c) That this Hon'ble Court be pleased to order and decree Defendant No.1 to specifically perform the said Allotment Agreements dated 23 November 2005 and execute and register the said Agreements for Sale as mandated by the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963 and take all steps necessary to fulfil their obligations under the said Allotment Agreements and the said Agreements for Sale (including to allot and hand over possession of the said 24 flats to the Plaintiff)

(d) that in the alternative to prayer (c) above, this Hon'ble Court be pleased to order and decree the Defendants to pay to the Plaintiff a sum of Rs. 22,70,13,300/- (Rupees Twenty Two Crores Seventy Lakhs Thirteen Thousand Three Hundred only) as per the particulars set out in Exhibit OO to this Plaint along with interest at the rate of 18% per annum compounded quarterly thereon from the date of filing of the Suit until payment and/or realisation thereof:

(e) that in the alternative to prayer (c) above, this Hon'ble Court be pleased to order and decree the Defendants to repay the amount of Rs.1,61,06,700/- along with interest at the rate of 18% per annum compounded quarterly thereon from the date of filing of the suit until payment and/or realisation thereof.

(f) that this Hon'ble Court pleased to order and decree that the payment of the amounts referred to prayers (d) and (e) be duly secured by a valid and subsisting charge on the said land and the said 24 flats more particularly described in Exhibits B and C-2 to the Plaintiff.

(g) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay or some other fit and proper person as Receiver of the said land more particularly described in Exhibits B & C-2 to the Plaintiff with all powers and/or the said 24 flats under Order 40 Rule 1 of the Code of Civil Procedure, 1908 and that the Plaintiff be put in possession of the same as agent of the Court Receiver and without security and /or compensation.

(h) that pending the hearing and final disposal of the present Suit, the Defendants, their servants and agents howsoever be restrained by an order and injunction of this Hon'ble Court from either directly or indirectly, from alienating, selling, dealing with, encumbering, disposing off or in any manner creating third party rights in or from parting with possession of the said land and/or the said 24 flats more particularly described in Exhibits B and C2 to the Plaintiff or any part thereof to any person other than the Plaintiff.

(i) for ad interim relief in terms of prayers (g) and (h):

(j)

(k)

8. The learned senior counsel for the Plaintiff submits that the Defendant No.1 executed 24 allotment agreements by which Defendant No.1 agreed to allot and sell the Plaintiffs 24 flats upon terms and conditions as stated in the each allotment letter. He submits that the allotment agreement /letters contained the following provision, except flat number and consideration amount:

“This is to confirm that the above mentioned Flat No.905 in Building A-1 at Runwal Infinity Mulund (West) has been allotted to you for a total consideration of Rs.21,73,000/- (Rupees Twenty One Lacs Seventy Three Thousand Only).

We confirm having received of part sum of Rs.6,51,900/- towards token amount.

The payment terms for the above Flat will be as per the payment schedule given below:

- 1. 30% on or before issuing this letter.*
- 2. 45% on or before completion of slabs (Equally divided into total number of slabs)*
- 3. 5% on or before completion of Brick Work*
- 4. 5% on or before completion of External Plaster*
- 5. 5% on or before completion of flooring work*
- 6. 5% on or before completion of Sanitary & Plumbing work*
- 7. 5% at the time of possession.*

All other charges i.e. Society Charges and maintenance charges will be extra stamp duty and registration charges will be payable and shall be borne by you. The said allotment is subject to Terms and Conditions set out in the sale agreement which shall be executed shortly. We reserve the sole right to make any addition, modification, changes, alteration and reduction etc. in the said premises as per the direction of the Municipal Commissioner of Gr. Mumbai or any other such authority from time to time or as desired by you.

If payment is not made as per schedule the said allotment stands cancelled.”

9. The learned senior counsel for the Plaintiffs submits that some time in the month of May 2006, Defendant No.1 informed all the flat purchasers that Brihanmumbai Municipal Corporation had issued stop work notice to them, as the Forest Department had intended to declare as a forest land zone where the building was to be built. He submits

that the Municipal Corporation issued stop work notice to Defendant No.1 on 18.05.2016 and thereafter the Tahasildar, Kurla and CTS Officer, Mulund by Mutation Entry No.777 made an entry in property card on 25.05.2006 declaring the land as private forest. He submits that in spite of that Defendant No.1 sent the Plaintiffs 24 customer copies of proforma agreement for sale franked by paying the necessary stamp duty and 24 office copies of the same which were also stamped by a nominal amount of Rs.100/- each. He submits that as per the allotment letter the Plaintiff paid sufficient amount to the Defendants.

10. The learned senior counsel for the Plaintiff submits that the action taken by the Corporation and the Tahasildar was challenged by the Defendant in the court of law. Thereafter the matter reached upto the Supreme Court. Before the Supreme Court passes a final order, the Defendant issued intimation of cancellation dated 02.12.2013 in respect of the flats in the building 1A in the project "Runwal Infinity" (CTS No.544, 544/1 situated at LBS Marg, Mulund (W), Mumbai – 400080). He submits that thereafter the Plaintiff made correspondence with the Defendant in respect of the allotment letters. He submits that as the Defendants failed and neglected to execute the agreements, as per allotment letters they filed the present suit on 25.11.2014.

11. The learned counsel for the Plaintiff submits that during pendency of the present suit the Respondents Defendants are required to be restrained by an order of injunction from creating any third party right, title and interest in respect of the suit flats/land and reserve and

earmark the approximate area as per the allotment letters issued in favour of the Plaintiff. He submits that if during pendency of the proceedings, third party right, title and interest is created by the Defendants, nothing will survive in the present proceedings.

12. The learned senior counsel for the Plaintiff submits that though the Defendants made a statement in their Affidavit in support of Notice of Motion No.1559/2017 that at present the Defendants are not intended to construct the building No.A1 (New Building No.5), they filed the list of indicative concession dated 11.11.2017 for proposed residential building on plot bearing No.CTS No.544, 544/1 of village Nahur at LBS Marg, Mulund (W), Mumbai (Exhibit- A to the additional affidavit in support of Notice of Motion No.1559/2017). He submits that bare reading of the said document shows that the Defendants have decided to take up the construction of building A1 (New Building No.5). He submits that if during pendency of the present suit the Defendants are not restrained by an order of injunction from dealing with the suit land to the extent of the Plaintiff's right over 24 flats in building No.A1 (New Building No.5) irreparable loss and injury will be caused to them. He submits that pending the hearing and final disposal of the present suit in the interest of justice, this Hon'ble Court be pleased to allow the Notice of Motion No.1525/2014 or to continue the ad-interim relief dated 16.01.2015 granted by this court.

13. On the other hand, the learned senior counsel for the Defendants vehemently opposed the Notice of Motion No.1525/2014. He submits that the Defendant has already cancelled the allotment letters which

were issued in favour of the Plaintiff. He submits that if allotment letters are cancelled, there is no question of granting any interim relief in favour of the Plaintiff at present. He submits that the present suit is filed by the Plaintiff for specific performance of letter of allotment issued by the Defendant in their favour. He submits that whether the Plaintiff may or may not succeed at the time of final hearing, till that time there is no question of restraining the Defendants from developing and/or creating third party right, title and interest in respect of their own property. He submits that in the present suit the Plaintiff has specifically made prayer clause (d) for compensation of Rs.22,70,13,300/- with 18% p.a. interest in alternative to main prayer.

14. The learned senior counsel for the Defendants submits that the Defendants filed the Notice of Motion No.1559/2017 for vacating the ad-interim relief as the liberty granted by this court by order dated 16.01.2015. He submits that as per the order dated 16.01.2015 the Defendants are ready and willing to keep 14306 sq.ft. carpet area inclusive of balcony in a building which is partly constructed/under construction. He submits that to that effect the Defendant made a statement in para 35 and 36 of Affidavit in support of the Notice of Motion No.1551/2017.

15. The learned counsel for the Defendants submits that after decision of the Apex Court in respect of the forest matter, they submitted their list of indicative concession to the Corporation on 01.11.2017. He submits that till today the Defendants have not filed any plans for construction of building A1 (New Building No.5).

Therefore, there is no question of making any incorrect statement and/or suppression of material facts on affidavit.

16. The learned senior counsel for the Defendant submits that in the matter of ***Arunima Baruah Vs. Union of India & Ors. (2007) 6 SCC 120*** the Apex Court held that if the fact suppressed is not material for determination of *lis* between the parties the court may not refuse to exercise its discretionary jurisdiction. He relies on para 12 of the said authority, which reads thus:

“12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.”

17. The learned senior counsel for the Defendant also relies on judgment of the Apex Court in the matter of ***S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors. (2004) 7 SCC 166***. He submits that in this authority, the Apex Court held that suppression of fact must be material one in the sense that, had it not been suppressed it would have had an effect on the merits of the case. He relies on para 13 and 14 of the authority which read thus:

“13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken 1917(1) KB 486. Thus when the liability to Income Tax was questioned by an applicant on the ground of her non- residence, the fact that she had purchased and was maintaining a house in the country was held to be a material fact the suppression of which disentitled her from the relief claimed (Ibid). Again when in earlier proceedings before this Court, the appellant had undertaken that it would not carry on the manufacture of liquor at its distillery and the proceedings before this Court were concluded on that basis, a subsequent writ petition for renewal of the licence to manufacture liquor at the same distillery before the High Court was held to have been initiated for oblique and ulterior purposes and the interim order passed by the High Court in such subsequent application was set aside by this Court (1977) 2 SCC 431. Similarly, a challenge to an order fixing the price was rejected because the petitioners had suppressed the fact that an agreement had been entered into between the petitioners and the Government relating to the fixation of price and that the impugned order had been replaced by another order (1983) 4 SCC 575.

14. Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable, the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226 AIR 1961 SC 1506. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it

is in a position to do so on the basis of the affidavits filed. If however a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the Court to entertain the writ petition. The Rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another Court. But this Court has also held in C. B. Gosain Bhan V. State of Orissa (1963) 14 STC 766 that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32 (1969) 1 SCC 110. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226 (AIR 1954) SC 207. Therefore the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.”

18. The learned senior counsel for the Defendant submits that they specifically stated in their Affidavit in reply that there is no intention of the Defendant at present to start the construction of the building No.A1 (New Building No.5). He submits that till today the plans are not submitted for building No.A1 (New Building No.5) for sanction with Corporation. Therefore, there is no question of restraining the Defendants from dealing with their own property without reserving and/or earmarking a particular area, that may be entitled by the Plaintiff in case they succeed in the present litigation. He submits that even at the time of passing the ad-interim relief, this court, by order

dated 16.01.2015 allowed the Defendants to deal with the project by reserving and/or earmarking the particular area i.e. 14306 sq.ft. (carpet) inclusive of balcony representing the carpet area of the suit flats as per allotment letters. He submits that bare reading of para 4 of the said order shows that this court has not directed to reserve 14306 sq.ft. carpet area in the particular building only i.e. Building No.1A (New Building No.5). He submits that at present building No.1A (New Building No.5) is not in existence at all. Even plans are not submitted by the Defendants with the Corporation for sanction.

19. The learned senior counsel for the Defendants submits that in fairness the Defendants are ready and willing to make a statement before this court that they will not create any third party right, title and interest in respect of the total carpet area of 14343.76 sq.ft. in building No.B1 and B2 of which work is in progress as stated in para 35 and 36 of the affidavit in support of the Notice of Motion No.1559/2017.

20. The learned senior counsel for the Defendants submits that if the ad-interim relief is not vacated, irreparable loss and injury will be caused to the Defendant. He submits that considering the fact that the suit is for specific performance of allotment letters, whether the Plaintiff may or may not succeed and if the Defendants are restrained from proceeding with the development, irreparable loss will be caused to the Defendants only. He submits that in view of these facts the Notice of Motion made by the Plaintiff may be dismissed and the Notice of Motion made by the Defendant may be allowed with the Defendant's statement that they will not create any third party right,

title and interest in respect of 14343.76 sq.ft. area as per para 35 and 36 of the their affidavit in support of the Notice of Motion.

21. Heard both sides at length. It is to be noted that the suit is for specific performance of allotment letters. In those letters, the Defendant agreed to provide the flats in favour of the Plaintiff in the proposed building No.A1 (New Building No.5). Because of litigation with the Government and as the Government declared the suit property as a forest land and Corporation issued stop work notice, the project remained as it is. Thereafter the Apex Court passed an order and allowed the Defendants to proceed with the project. In the meanwhile in view of the amendment in the Development Control Rules, it constrained the Defendants to reallocate the entire project. Not only that till today the plans in respect of Building No.A1 (New Building No.5) are not submitted by the Defendants. In any case, the Defendants, across the Bar made a statement that they are ready and willing to keep 14343.76 sq.ft. carpet area in a constructed building from the said project. Even otherwise, this court, by order dated 16.01.2015 specifically restrained the Defendants from dealing with the suit plot without reserving and/or earmarking a particular area i.e. 14343.76 sq.ft. inclusive balcony.

22. As per para 35 and 36 of the affidavit in support of the Notice of Motion No.1559/2017, the Defendants submit that they are ready to reserve and earmark 14343.76 sq.ft. area (as per corrected statement tendered during the hearing) as under:

ELECTRONFAB EQUIVALENT PROPOSED FLAT DETAILS:

Sr. No.	New Tower No. in which proposed flats are located	New Flat No.	New Inventory Type	New Carpet Area of flats proposed to be reserved
1	B1	401	2.5 BHK	810.84
2	B1	701	2.5 BHK	810.84
3	B2	305	2.5 BHK	810.84
4	B1	2001	2.5 BHK	810.84
5	B1	2101	2.5 BHK	810.84
6	B1	2201	2.5 BHK	810.84
7	B1	2301	2.5 BHK	810.84
8	B2	905	2.5 BHK	810.84
9	B1	2401	2.5 BHK	810.84
10	B2	1305	2.5 BHK	810.84
11	B2	1505	2.5 BHK	810.84
12	B2	1705	2.5 BHK	810.84
13	B2	104	2 BHK	748.00
14	B2	404	2 BHK	748.00
15	B2	1204	2 BHK	748.00
16	B2	1404	2 BHK	748.00
17	B1	101	2.5 BHK	810.84
18	B1	1901	2.5 BHK	840.84
GRAND TOTAL OF AREA IN SQ.FT.				14343.76

23. Considering the fact that whether the Plaintiffs may or may not succeed at the time of final hearing, whether they may or may not entitle for specific performance of the allotment letters or whether they are entitled to compensation, it is necessary to protect the interest of the Plaintiff to some extent i.e. area which they may get at the time of

final hearing of the suit on success. Not only that the Plaintiff is insisting to restrain the Defendants from creating any third party right, title and interest in respect of 24 flats as stated in allotment letter which are not in existence as on today. Even the construction of building No.1A (new building No.5) is not started by the Defendants.

24. In view of these facts and the statement made by the learned senior counsel for the Defendant about reservation / earmarking 14343.76 carpet area in the constructed building, I am of the opinion that the Notice of Motion filed by both the parties deserve to be partly allowed, as under:

- a. Defendants are restrained by an order of injunction from creating any third party right, title and interest in respect of the carpet area of 14343.76 sq.ft. as stated in paragraph 22 hereinabove.
- b. The Defendants are directed to file an undertaking on or before 12.01.2018 in the Registry of this court with copy to other side stating that they will not create any third party right, title and interest in respect of the flats as stated in paragraph 22 hereinabove and they will complete the construction of those flats as early as possible.
- c. Ad-interim relief granted by this court by order dated 16.01.2015 stands vacated.
- d. Both the Notices of Motion stand disposed of accordingly.
- e. No order as to costs.

25. At this stage the learned counsel for the Plaintiff seeks stay of this order.

26. Considering the fact that this court has already restrained the Defendant from creating any third party right, title and interest in respect of the carpet area of 14343.76 sq.ft. as stated in paragraph 22 hereinabove, I do not find any reason to stay of this order. Hence, the oral request is rejected.

(K.K. TATED, J.)