

JSN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE NO. 1548 OF 2012

IN

EXECUTION APPLICATION NO. 1163 OF 2012

IN

APPEAL NO. 919 OF 2001

WITH

NOTICE OF MOTION NO. 2385 OF 2001

IN

SUIT NO. 3448 OF 2001

Jaycee Developers & Anr

...Appellants

Versus

Deepak E Dhawan & Ors

...Respondents

Mr Prateek Seksaria, *with Ms Ankita Singhania i/b Mr Ashok A Dhanuka & Ms Ramola Bhowmik for the Applicant/Respondent No.1.*

Mr Sanjay Jain, *with Mr SH Khokhawala, i/b Nankani & Associates for Respondents Nos. 3 to 10.*

Mr Mayur Khandeparkar, *with Ms Krishna Raja, i/b LJ Law for Respondents Nos. 11 to 14.*

Mr Bhavin Gada, *i/b Mahesh A Thaker, for the Respondent No.15.*

CORAM: G.S. PATEL, J

DATED: 8th March 2017

PC:-

1. I have heard this matter on more than one occasion. *I have heard the Applicants once before, and Mr Seksaria for them at some length today.*

2. I have before me a Notice under Order XXI Rule 22 of the Code of Civil Procedure, 1908 (“CPC”) by the 1st Respondent-Applicant (“**Dhawan**”). The Judgment Debtors and other noticees are before me to show cause. The decree in question is a consent decree taken in an appeal on 29th October 2001. The present application relates to only one part of that decree i.e. Clause 7(a). However, since Mr Seksaria’s arguments have centred on an interpretation of the consent decree, it is necessary to set out the whole of it:

1. Agreed, Declared and Ordered that Suit agreements as mentioned in paragraphs 19 and 20 of the Plaint and Power of Attorney dated 5th March 1993 annexed as Exhibit ‘D’ to the Plaint are valid, subsisting and binding on the parties to the Suit and they shall and do perform the same read with the terms set out below.

2. Respondent No.1 agrees and undertakes to this Hon’ble Court to perform and is ordered and decided to specifically perform the Suit agreements as mentioned in paragraphs 19 and 20 of the Plaint and is further ordered and decreed to execute such documents, deeds, letters etc and to do such acts and deeds that may be necessary to specifically perform the suit agreements.

3. Respondent No.1 declares that he has received possession of the Suit being Plot No. 65, Juhu JVPD Scheme Vile Parle, Mumbai 400 057 admeasuring 635.49 sq. mtrs or thereabout as more particularly described in Exhibit A to the Plaint from MHADA on 16th October 2001 and has also obtained Index II in respect thereof.

4. Respondent No.1 declares that an indenture of Lease dated 11th October 2001 has been executed by MHADA in his favour and the same is registered with the Sub Registrar of Assurance at Bandra, Mumbai under Serial No.7207 of 2001.

5. Respondent No.1 agrees and undertakes to this Hon'ble Court and is ordered to hand over forthwith possession of suit plot to the Appellants to enable the Appellants to develop the Suit plot as per the terms and conditions agreed hereunder?

6. Agreed that the Appellants do construct a ground plus seven (7) storey residential building on the suit plot and further agrees to complete the construction of the said building within a period of 30 months from the date of handing over possession of ground floor premises to the Post and Telegraph Department. It is further agreed that the Appellants are at liberty to construct 8th floor on the suit plot, if permissible.

7. Agreed that after completion of the construction of the residential building as mentioned in clause 6 above, the Appellants shall hand over to:

(a) **Respondent No.1 two flats of total constructed area admeasuring about 360 sq mtrs i.e. 180 sq. mtrs on each floor (approximately) spread over on the top two floors of the building.**

- (b) Respondent No.1 constructed area of 160 sq mtrs (approximately) on the ground floor of the building the construction reserved for Post and Telegraph Department as mentioned in the NOC dated 29th May 1993 from the Bombay Municipal Corporation annexed as Exhibit "E" to the Plaint as per the approved plan to enable Respondent No.1 to hand over the same to Post and Telegraph Authorities:
- (c) Respondent No.2 a flat admeasuring about 90 sq mtrs (approximately) on the 3rd Floor of the building:
- (d) Respondent No.3 a flat admeasuring about 110 sq mtrs (approximately) on the 5th Floor in the said building.

8. Agreed and declared that the Appellants shall be entitled to flats of the entire remaining constructed area of 560 Sq. mtrs and shall be entitled to and at liberty to dispose of the same and appropriate sale proceeds thereof for their own benefit. The Respondents shall have no claim in respect of the said balance constructed area and for the sale proceeds thereof.

9. Respondent No.1 agrees and undertakes to this Hon'ble Court and is ordered to hand over possession of the constructed area of 160 sq mtrs (approximately) on the ground floor of the building handed over to him by Appellants under Clause 7(b) above to the Post and Telegraph Department and the Appellants agree to co-operate with Respondent No.1 to enable him to comply with the requisitions contained in this clause.

10. The Appellants as constituted Attorney of Respondent No.1 agree that after the completion of the building mentioned in clause 6 above, they will form a co-

operative housing society of the Occupants of the said building within a period of one year after receipt of the occupation certificate and other permissions from the Municipal Corporation of Greater Mumbai.

11. After the formation of the Co-Op Housing Society as mentioned in clause 10 above Respondent No.1 undertakes to assign and is hereby ordered and decreed to assign his right title and interest in the Suit plot of land in the name of the Co-Op Housing Society by executing a deed of assignment as provided in clause (m) of the Indenture of Lease dated 11th October 2001. All the allottees of flats hereunder including those to whom the Appellants may sell their portion of the construction area shall be made members of Co-Op Housing Society.

12. Respondent No.1 agrees and undertakes to this Hon'ble Court and is ordered and decreed to pay to Respondent No.3 a sum of Rs. 13 lacs within a period of six months from the date thereof.

13. Agreed that the total permissible construction area is 1270 Sq mtrs inclusive of area for Post and Telegraph Department. Further agreed, declared and ordered that any decrease in the FSI shall be shared by the parties hereto proportionately.

14. Agreed, Declared and ordered that the Appellants shall prepare the plans for the constructions and get them sanctioned by the authorities. The Respondents agree and undertake that they shall co-operate in having the plans as prepared by the Appellants sanctioned by the Authorities and agree and undertake to sign all Applications, Paper, Documents in that behalf to enable the Appellate to develop the Suit plot in accordance therewith.

15. The Respondents agree and undertake to this Hon'ble Court that they shall not sell, dispose of or create any third party rights in respect of the flats to be handed over to them by the Appellants as mentioned in clause 7 above till the occupation certificate from the BMC is obtained in respect of the entire building.

(Emphasis added)

3. It is not, I think, necessary to delve into a more complex or detailed history of the matter. The following facts must suffice. Clause 13 of the Consent Terms contemplated a construction of 1270 sq mtrs inclusive of an area for the Post and Telegraph Department. Clause 13 also spoke of a possible decrease in FSI to be shared equally or proportionately by the parties. There is no dispute, and Mr Seksaria himself cannot dispute, that the total area actually constructed was 1165 Sq mtrs, less than the area mentioned in the Consent Terms. Now Clause 7(a) did speak of Dhawan getting 360 sq mtrs in the aggregate, and, specifically, 180 Sq.mtrs. on each floor. Since there is a pro-rata reduction, Mr Khandeparkar for Respondents Nos. 11 to 14 and Mr Jain for Noticees 3 to 10 point out that having regard to the wording of Clause 13, Dhawan's entitlement fell from an aggregate of 360 sq mtrs to 325.85 sq mtrs. What he has been offered is an area 342 94 Sq.mtrs. Indeed, he is in part possession of this, as the following narrative shows.

4. Mr Seksaria's argument is that it matters not to his client whether there was a reduction in the built up area. He says the developer should have brought in TDR or done whatever was necessary to build more, if only to ensure Dhawan had his 360 sq

mts. In other words irrespective of what was permissible or was actually built up, Dhawan's entitlement must remain untouched. Specifically, Mr Seksari submits that Clause 7(a) of the Consent Terms is unaffected by Clause 13 of those very Consent Terms although Clause 13 appears later in the Consent Terms. It is impossible to accept this argument. Clause 13 makes no such exception for Dhawan.

5. The second argument earlier raised, though in fairness not by Mr Seksaria, was that Clause 7(a) required that the decree holder be given this area on the top two floors of the building. The area available was on the 6th and 7th floors. On the 8th floor there is a built area of 66 sq mtrs. It was earlier argued that even this was irrelevant, and 180 sq mtrs must be given to Dhawan on the 8th floor and another on 180 sq mtrs on the 7th floor. This argument is not pressed by Mr Seksaria. He accepts that his client is in possession of premises on the 7th floor. It is not in dispute that this is less than 180 sq mtrs; but the reason is that the deficit is inevitable given the fact that not 1270 sq mtrs but a lesser amount of 1165 sq mts was ultimately constructed.

6. The Execution Application seeks very many things including imprisonment, fine and so on. Prayer clause (g)(i), however reads thus:

(g) strictly without prejudice to the other prayers and in the alternative and only in the event of this Hon'ble Court holding that the other prayers cannot be granted:

(i) the persons enlisted at Sr. Nos. 1 to 13 of Column (I) hereinabove, be ordered and directed to hand over the 6th and 7th floors of the building Shiv Prisha more particularly described in the Schedule below to Respondent No.1;

7. As far as the 7th floor is concerned, Dhawan is already in possession. Mr Khandeparkar states that the present status of the matter is such that Dhawan can take immediate possession of the premises on the 6th floor. The keys to that floor are even now deposited with the City Civil Court in other proceedings. None have any objection to this. This statement is noted.

8. This does not satisfy Dhawan. Mr Seksaria urges that Dhawan has been thwarted at every stage of the matter since the decree or at least since the building was ready. Every conceivable objection has been taken against him. Mr Seksaria points out that in this very Execution Application on 9th October 2013, Dhawan sought a direction for handing over keys of the 7th floor flat and for possession of that flat on a without prejudice basis. That Chamber Summons was disposed by Dhanuka J by his order dated 9th October 2013. The Chamber Summons was opposed, but the submissions on behalf of the Respondents were not accepted. Accordingly, in paragraph 12 of that order Dhanuka J said:

12. Applicant is permitted to apply for handing over keys of flat No. 701 as described in paragraph (a) of the Chamber Summons without prejudice to the rights and contentions of both parties before City Civil Court, Bombay. If any such application is made, the City Civil Court shall handover the keys of Flat No. 701 deposited by Respondent No.11 described in prayer (a) of the Chamber Summons to the

Applicants within one week from the date of such application. It is made clear that Applicant would be entitled to occupy the said flat.

9. This order was carried in Appeal. A Division Bench of Dr DY Chandrachud J of this Court (as he then was) and MS Sonak J disposed of that Appeal at the stage of admission by a detailed order. The appellate order sets out the facts at length. It is necessary only to note a few. There was a development agreement of 5th March 1993. The 4th Respondent to the Appeal was obliged to provide certain residential flats to Dhawan. That development agreement came to be terminated and a suit for specific performance followed. Consent Terms were arrived at on 29th October 2001. These are the Consent Terms to which I have referred and they were entered into in an Appeal filed by the developer before AP Shah and SA Bobde JJ as they each then were.

10. In November 2009, the developer brought suit in the City Civil Court against Dhawan in an attempt to restrain him on entering into the suit property. A statement was noted on behalf of Dhawan, and no ad interim relief was granted.

11. In 2011, Dhawan put the Consent Decree into execution. The developer filed an application before the City Civil Court seeking to deposit in the court the keys to the two flats constructed on the 6th and 7th floors and which, according to the developer, were kept vacant for Dhawan. On 28th September 2012, Dhawan's Chamber Summons in Execution Application came up before a learned Single Judge of this Court, who noted that the developer had already

offered to deposit the keys to the 6th and 7th floors in the City Civil Court.

12. It appears that thereafter the developer began making claims that Dhawan was liable to make payment of certain amounts towards maintenance charges and additional amounts for a so-called “additional area”. It appears that this was on the basis of the figures that I noted earlier. The actual area constructed throughout the building is less than the Consent Terms contemplated. A pro-rata reduction of Dhawan’s area is also less than what the Consent Terms provided. But what the developer now contended before the Division Bench was that he had provisioned for Dhawan an area that though less than what the Consent Terms said was more than what Dhawan would be entitled to on a proper pro-rata adjustment. The claim before the Appeal Court was, therefore, for payment for this “additional area” — the difference between the actual area on those two floors and the area to which Dhawan was entitled on a pro-rata reduction. I say this because it is in this context, evidently, that the Appeal Court decided the controversy before it and in doing so said this in paragraph 15:

15. The material before the Court makes it abundantly clear that both before the City Civil Court and before this Court, the Appellants have unconditionally accepted their obligation under and in pursuance of the consent decree to allot flats to the First Respondent. Before the learned Single Judge on 28 September 2012, a solemn statement was made on behalf of the Appellants to the effect that the Appellants had already offered the keys of the Sixth and Seventh floors to which the First Respondent was entitled under the consent decree, in the litigation before the City Civil Court.

Before that the Appellants had specifically stated in their application in the City Civil Court accepting that the Sixth and Seventh floors of the building were ready for occupation by the First Respondent. The Appellants started that it was moving an application for the deposit of keys of both the floors which were allotted to the First Respondent in compliance with the Consent Terms. Having regard to this categoric and unambiguous statement both before the City Civil Court and before the learned Single Judge of this Court, there can be no manner of doubt that the Appellants are representatives in interest of the judgment debtor, the Fourth Respondent. The Appellants have unambiguously accepted the entitlement of the First Respondent under the consent decree and their own obligation to provide residential flats to the First Respondent. For this purpose, it is strictly speaking, not even necessary for this Court to refer to the Deed of Assignment which places the matter in any case beyond any doubt. The Appellants have now sought to go back and resile from the solemn statement which was made both before the City Civil Court and before this Court by urging that the Appellant should be allowed to contest whether it is a representative in interest of the Fourth Respondent is entitled. This can ill lie in the mouth of the Appellant having regard to what was stated in the application before the City Civil Court on 1 March 2011 as well as before the learned Single Judge in the course of the execution proceedings on 28 September 2012. The record would make it clear that having made a solemn statement before the City Civil Court and before this Court, the Appellants attempted to resile therefrom. The City Civil Court, in our view, justifiably rejected the contention in its order dated 26 February 2013 which has not been challenged. In the circumstances, the impugned order of the learned Single Judge granting relief in terms of the Chamber Summons as noted above, cannot be faulted. **All**

that the order of the learned Single Judge effectively directs is the enforcement of the assurance which was made on behalf of the Appellants to the effect that the keys were being deposited in pursuance of the entitlement of the First Respondent to the allotment of the flats. As a matter of fact, the impugned order is restricted only to Flat 701 on the Seventh floor. **Undoubtedly, the notice under Order 21 Rule 22 will be disposed of in an appropriate manner by the executing Court on its merits.** However, it would be a travesty of justice to allow the plea of the Appellant to defeat the legitimate entitlement of the First Respondent. The First Respondent has handed over the property for development. The property has been developed, but at this belated stage, the developer by raising all kinds of pleas is attempting to shut out the First Respondent from his legitimate claim for possession.

13. Mr Seksaria attempts to read from this paragraph that he is entitled to 180 Sq. mtrs with no reduction whatsoever and the Appeal Court has sanctioned or certified this claim in his favour. It is not possible to read the appellate order in this fashion at all. It has to be read in the context of the submissions made by the developer before the Appeal Court and we find these in paragraph 7 of the order:

7. After having made an unconditional statement before the City Civil Court that it would deposit the keys and despite the solemn statement which was made before the learned Single Judge of this Court on 28 September 2012 in the course of the execution proceedings, the Appellants filed an affidavit before the City Civil Court on 1 November 2012 claiming that the First Respondent was

liable to deposit an amount of Rs.5.78 lakhs towards the maintenance charges and Rs.29.92 lakhs for an additional area of 17.14 sq. mtrs aggregating in all to Rs.35.71 lakhs. On 26 February 2013, an order was passed by the City Civil Court specifically rejecting the contention of the Appellants that the First Respondent was liable to deposit such an amount. The City Civil Court issued direction permitting the Appellants to deposit the keys in respect of two flats situated on the Sixth and Seventh floors to be handed over to the First Respondent in terms of the Consent Terms dated 29 October 2001. The relevant part of the order of the City Civil reads as follows:-

“Initially no such statements were made about recovery of such outstanding amount. Even in this application Exh. 4 no such facts are pleaded about such outstanding amount or its recovery. Only in additional affidavit such facts are disclosed. Moreover, advocate for Respondent submitted that such additional affidavit is tendered after making statement before Hon’ble High Court and hence considering such facts, I am of the view that additional affidavit to the effect that until recovery of that amount, keys should not be handed over to Defendant cannot be given effect. No such amendment asked for even in this application Exh.4 and hence I pass following order:

O R D E R

Application Exh. 4 allowed.

Plaintiff is permitted to deposit two sets of keys in respect of two flats situated on 6th and

7th Floors to be handed over to Defendant in terms of Consent Terms dated 29.10.2001.”

The Order of the City Civil Court has not been challenged by the Appellants. Following this, the Appellants unconditionally deposited the keys of the flats on the Sixth and Seventh floors before the City Civil Court on 28 March 2013.

14. Clearly, therefore, Mr Seksaria is incorrect in his submission that because of this Appeal Court order he is entitled to 180 Sq. mtrs in clause 7(a) of the Consent Terms. He is also incorrect in his submission that what the developers and other Respondents say today was raised before the Appeal Court on 22nd October 2013 and has been negatived. If that was so, there was no question of the Appeal Court saying, as it did that the Notice under Order XXI Rule 22 —what I have before me — would be disposed of in an appropriate manner by the executing court on merits. If Mr Seksaria is correct, there was nothing left to the executing Court to consider or decide at all.

15. I do not see how it is possible for Dhawan to demand that the additional area be procured, or how the demand for 180 sq mts per floor will be secured by imprisoning, fining or penalizing anyone. Correctly read, the consent terms allowed for some play in the joints and contemplated a lower area being constructed. They envisaged a pro-rata reduction being applied to all. Nothing in Clause 13 indicates that Dhawan was to stand apart or that his entitlement to a specified area was inviolate and immune from the adjustment contemplated by clause 13. Had that been the case, Clause 13 would have said so. None can go behind the decree; that much is certain.

But in order to see what is being put into execution, it is always necessary to ascertain what the decree actually says.

16. This Notice can, therefore, be disposed of with the following limited order, i.e., permitting Dhawan (the Applicant / Decree Holder) to make an application before the City Civil Court for the keys to the premises on the 6th floor and on recording the undertaking of the Respondents / Noticees that they will not oppose that application nor obstruct the Applicant from taking actual and physical possession of those premises. That statement is readily volunteered by Mr Khandeparkar and Mr Jain, and it is accepted.

17. In any case, this decree has been partly satisfied with Dhawan taking possession of the 7th floor premises. The question that remains is what is to be done if the Applicant at no stage makes an application for the keys to the 6th floor premises. He should not therefore be allowed to keep this decree pending execution indefinitely and possibly open to repeated applications under Order XXI Rule 22. For this reason, I will further clarify that the application by the Applicant for keys from the City Civil Court must be made within a period of eight weeks from today. Even if no such application is made, technically speaking, the decree would have to be marked fully satisfied right away because the developer and other respondents have offered possession and tendered the keys to the 6th floor premises (in a specific performance suit). I will, however, defer the marking of the decree as fully satisfied so that there is no hindrance in Dhawan's way.

18. The Notice under Order XXI Rule 22 is disposed of in these terms. In the facts of the case, there will be no order as to costs.

19. Mr Seksaria seeks a stay of this order. There is nothing at all to stay. The application is refused.

(G. S. PATEL, J.)

Note: This order is modified as per order dated 14th March 2017 passed on a praecipe for Speaking to the Minutes. The corrections are shown in italics in the cause title and paragraph 1. There is deletion in paragraph 4.