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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8975 OF 2015

Ms Gazala Z. Shaikh & Ors. ...Petitioners.
vs
M/s Sobha Developers Ltd. ...Respondent.

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Mr Nitin Khamgaonkar for the Petitioners.
Mr Avinash V. Joshi for the Respondent.

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CORAM : B.P.COLABAWALLA, J.
NOVEMBER 28, 2018.

P.C. :

Rule. Respondent waives service. By consent of parties rule is made returnable forthwith and heard finally.

2 This Writ Petition has been filed challenging the Judgment and Order dated 29th December, 2014 passed below Exh.20 by the learned Civil Judge, Senior Division, Pune in Special Civil Suit No. 638 of 2014. Exh.20 was an application filed by the respondent herein under Order VII Rule 11 of the Code of Civil Procedure,1908 (for short "CPC"). This application was filed on the basis that the suit was undervalued, and therefore, the plaint was liable to be rejected under Order VII Rule 11 of CPC. This application was allowed by the Trial Court and hence this Writ Petition.

3 Learned advocate appearing on behalf of the Petitioner submitted that the impugned order was grossly wrong in view of the fact that admittedly in the present case the suit property was governed under the provisions of the Maharashtra Ownership Flats

(Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. He submitted that this being the case the court fees were payable under Section 6(iv)(j) of the Maharashtra Court Fees Act. He submitted that when a builder (the respondent in the present case) enters into an agreement with the flat purchaser (the petitioner herein) and such agreement contains provisions which are to be incorporated as provided under the Maharashtra Ownership Flats Act, 1963, then all such agreements must necessarily be held to be special agreements which can be enforced by filing suits where valuation would be a notional valuation under Section 6(iv)(j) of the Maharashtra Court Fees Act. He submitted that it cannot be that in such matters suits for specific performance should be valued under Section 6(xi) of the said Act. In this regard, the learned advocate for the Petitioner relied upon a decision of Single Judge of this Court in the case of **Maria Phitomina Pereira Vs. Rodrigues Construction [1990(2) Bom.C.R. 77]** and a Division Bench decision of this Court in the case of **Aziz Abdul Malik Ajani and Ors Vs. Mrs Dulcine Lobo and Others [1996 BCI 245].**

4 On the other hand, the learned counsel appearing on behalf of the respondent supported the order passed by the Trial Court. He submitted that in the facts of the present case and the documents placed on record it was clear that the Petitioners herein (the Plaintiffs before the Trial Court) had filed a suit for possession, declaration and injunction based on an agreement for sale of the suit property dated 22nd March, 2013. The consideration payable under the said agreement was Rs.1,57,04,640/- and hence it was susceptible in terms of money. This being the case, learned advocate appearing on behalf of the respondent submitted that the learned Trial Court

was completely correct in directing the plaintiffs to pay the court fees on the said amount of Rs.1,57,04,640/-. He consequently submitted that there was no error in the order passed by the Trial Court that required interference and hence this Writ Petition be dismissed.

5 I have heard learned counsel for parties at length and have perused the papers and proceedings in the Writ Petition. I have also carefully gone through the impugned order. It is not in dispute that the suit has been filed to direct the defendants to handover the possession of the suit flat and also to execute the necessary documents for forming the society and conveying the land in favour of the society. A permanent injunction is also sought from dealing with the suit flat in any manner whatsoever. This relief has been claimed on the basis of an agreement of sale dated 22nd March, 2013 and which was registered at the office of the Sub-Registrar, Haveli at Sr. No. 2122 of 2013. This agreement admittedly has been entered into by the plaintiff with the defendant, who is a builder/developer. This agreement is an agreement to which the provisions of the Maharashtra Ownership Flat Act, 1963 squarely apply. This is undisputed. This being the admitted position, I find that the facts of this case are squarely covered by two decisions rendered by this Court in the case of **Maria Phitomina Pereira** (supra) and **Aziz Abdul Malik Ajani & Ors** (supra). I find that the impugned order is directly contrary to the aforesaid two decisions of this Court.

6 The facts in the case of **Maria Phitomina Pereira** (supra) reveal that the Plaintiff filed a suit in the Bombay City Civil Court for specific performance of an agreement dated 21st February, 1983 together with an agreement dated 4th August, 1980 and sought a

decree for possession of a flat bearing No.11 on the 1st Floor of the building known as Mary Apartments, situated at Borivali, Bombay. The consideration mentioned in the agreement was about Rs.87,000/-. When the plaintiff took out a Notice of Motion for adinterim reliefs, the defendants contended that the Court had no pecuniary jurisdiction to maintain and try the suit. This contention was upheld and the Bombay City Civil Court held that it had no jurisdiction and the plaint was ordered to be returned to the plaintiff to be presented before the appropriate Court. This is how the matter came up before this Court in appeal. In the plaint before the City Civil Court, it was contended by the plaintiff that the suit had been filed to enforce the obligations on the part of the defendants under the provisions of the Maharashtra Ownership Flats Act, 1963 and there was no provision under the Bombay Court Fees Act for providing for fees payable in such a suit. It was, therefore, contended that the suit had to be valued under the provisions of Section 6(iv)(j) of the Bombay Court Fees Act. As against this, the learned Judge of the Bombay City Civil Court came to the conclusion that the suit was essentially for specific performance of an agreement, and therefore, the same had to be valued as provided under Section 6(xi) of the said Act. It is on these facts that in paragraph 6 this Court held as under;

> "*6. In that connection, Mr Malik drew my attention to Clause (f) of sub-section (2) of section 3 of the Ownership Flats Act, which imposes, amongst other liabilities, the liability to "specify in writing the date by which possession of the flat is to be handed over and he shall hand over such possession accordingly." This agreement is required to be registered under section 4 of the Maharashtra Flats Act, which has been done. The defendant is a "promoter" within the meaning of Clause (c) of section 2 of the Ownership*

Flats Act. The defendants are constructing the building and have offered to sell the flats to different persons, and the flats and tenements are to be given in accordance with the provisions of the Act. If that is so, I am inclined to agree with Mr. Malik that in a situation of this type where the flat purchaser wants the promoter to comply with the requirements of the law and a suit is filed to enforce such obligations, may be arising out of an agreement as such, in my view such a suit would not fall within the scope of section 6(xi) of the Bombay Court-Fees Act, 1959. It is a statutory obligation which is being enforced and a national valuation under section 6(vi) of the Court-Fees Act would be proper. In fact, in all such agreements, even if they are enforced in favour of the flat purchasers individually, there can be no conveyance in their favour, as ultimately conveyance has to be in favour of the society of all flat purchasers. I may further mention that under the Ownership Flats Act, if the promoter does not comply with these obligations, there are other serious consequences to follow, including a prosecution. Ordinarily such considerations would not arise when a simple contract entered into between two individuals is broken. Therefore, it must necessarily be held that whenever a builder enters into an agreement with any flat purchaser, containing provisions which are to be incorporated as provided under the said Act, all such agreements must necessarily be held to be special agreements which can be enforced by filing suits where the valuation would be a notional valuation under section 6(iv)(j) of the Bombay Court-Fees Act, 1959."

7 Similarly a Division Bench of this Court in the case of **Aziz Abdul Malik Ajani (**supra) held as under:

"6 *It is to be noted that the flat is covered under the Maharashtra Ownership Flats Act. It is clear that the Respondent No.1 wanted the builder/ promoter – Respondent No.2 to comply with the requirements under the said Act and to enforce his rights under it in view of the registered agreement entered into with him by Respondent No.2. These are the special agreements creating statutory obligations upon the builder/ promoter which are required to be registered under Section 4A of the Maharashtra Ownership Flats Act. Section 4,10,11 and 12 of the said Act impose such obligations on the builder/promoter. For enforcing these statutory obligations mandatorily notional valuation under Section 6(iv)(j) of the Bombay Court Fees Act, 1959 is to be made and this would not fall within Section 6(xi) of that Act. It was not necessary to value the flat for Court fees and jurisdiction in this case as essentially the enforcement of those statutory obligations were sought. This was precisely done here and the suit in the city Civil Court was competent. The prayer for possession of the flat was consequential. It is also to be noted that the documents executed between the Respondent No.2 and one Mr Shailesh Shah (who was examined as defence witness) were bogus. It was alleged that Shailesh Shah was given possession under the agreement dated 10th July, 1989 and it was found to be a myth as the flat itself was not ready. It became ready sometime in March, 1992. It was not even a registered one and on a stamp paper purchased by some other Advocate. The learned trial Judge as well as the learned Single Judge declined to accept that Shailesh Shah paid Rs.3 Lakhs in cash for the flat under the said agreement. It was, therefore, held that the said agreement was a bogus one and Shailesh Shah got no title and cannot pass on any to the Appellants. It was held concurrently that the Appellants cannot be called as bonafide purchasers for value without notice. It is clear that the Respondent No.2 to avoid performance of its obligations under*

> *the Maharashtra Ownership flats Act has employed this device of making a show that the flat was transferred first to Mr Shailesh Shah and then by Mr Shailesh Shah to the Appellants. Even the alleged agreement with the Appellants and Mr Shailesh Shah was unregistered and it was rightly held that such agreement cannot be called bonafide or genuinely effected. Further, no reasonable buyer in 1992, when the suit was filed in 1990, would entered into such agreement. There was also nothing to show that the price was paid by the Appellants further the said agreement was a bogus one and was a part of the scheme devised by Respondent No.2 to defeat the statutory rights of Respondent No.1 and to avoid obligations imposed upon it under the Maharashtra Ownership Flats Act. Therefore, we negative this contention."*

8 On going through these two decisions, it is quite clear that the facts of the present case would be squarely covered by the ratio of the aforesaid two decisions. This being the case, the impugned order cannot be allowed to stand. It is, therefore, set aside. Rule is made absolute in the aforesaid terms. However, there shall be no order as to costs.

(B.P.COLABAWALLA, J.)