

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.467 OF 2017

Dinesh Dayalal Vadodaria

...Appellant

Versus

1. Mahek Developers,
704, Sukhra Building, Gaushala Lane,
Malad (E), Mumbai- 400 097

2.Parag V. Shah
(erstwhile proprietor and Partner of
Mahek Developers L-03, Panchsheel
Garden, Mahavir Nagar, Kandivli (west
Mumbai- 400 0567)

3. Sethia Estate Development Private
Limited Partner of Mahek Developers, a
Company Incorporated under the
Companies Act, 1956 having address at
704, Sukhra Building, Gaushala Lane,
Malad (E), Mumbai- 400 097

4.Raj Arcade Homes Pvt. Ltd.
A company incorporated under the
provisions of the Companies Act, 1956
having its address at B-509, Mox Plaza,
5th floor, Opp Link Road, Pengent House,
Malad (west), Mumbai-400 064

5. Basantraj Meghraj Sethia
2201/02 Prathmesh Tower,
Opp. Don Bosco High School, Gorai Road,
Borivali (W), Mumbai 400 092.

...Respondents

...

Mr. Mehul Shah with Ms Snehal Dukhale for the Appellant.
Mr. Pravin Samdhani, senior Advocate with Mr. Bhavin Bhatia and Mr.
Sanjeev R. Singh for the Respondent Nos.3 to 5.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED: 2nd APRIL, 2018.

JUDGMENT:

The Appellant herein has challenged the impugned order dated 16th January, 2017 whereby the learned Judge, City Civil Court at Dindoshi (Borivali Division), Goregaon, Mumbai dismissed the Notice of Motion No.3136 of 2016 filed by the above Appellant in S.C. Suit No.2646 of 2016.

2. The Appellant was the Plaintiff whereas the Respondents were the Defendants in above referred suit and shall be hereinafter referred to as the Plaintiff and the Defendants respectively.

3. The case of the Plaintiff in brief is that the Defendant No.1 M/s. Mehek Developers had proposed Slum Rehabilitation Scheme on the portion of the plot bearing No.CTS 471 /A (PT) village Kandivali. The Slum Rehabilitation Authority has sanctioned the said scheme by letter of intent dated 8th February, 2017 and by revised letter of intent dated 23rd February, 2009. The Plaintiff claims that he had entered into

an agreement dated 29.6.2010 with the Defendant No.1 through Defendant No.2 being the proprietor of Defendant No.1 to purchase a commercial area admeasuring 6050 sq. ft. as well as two car parking spaces. The Plaintiff claims that he had handed over sum of Rs.45,50,000/- to the Defendant No.1 towards full and final consideration.

4. The Plaintiff claims that Defendant No.2 had introduced him to Defendant No.5, who is a director of the Defendant No.3 company and told him that he would be entering into a partnership deed with the Defendant No.3. Subsequently, Defendant No.3 was taken as a partner and accordingly the Defendant No.1 -proprietorship was converted into a partnership firm.

5. The Plaintiff claims that the Defendant No.5 had time and again assured the Plaintiff that obligations under agreement dated 29th June, 2010 would be fulfilled, however, he avoided and evaded executing the registered document as per the Maharashtra Ownership of Flats Act (MOFA), 1963. It is alleged that the Defendant No.5 joined as a Director of Defendant No.4-Company and thereafter got the development rights transferred in the name of the Defendant No.4-

company with an intention of frustrating and defeating claim/rights of the Plaintiff. The Plaintiff therefore filed a suit for specific performance and for permanent injunction and during the pendency of the suit sought to restrain the Defendants from going ahead with the construction of the building. The Plaintiff has also sought to restrain the Defendants from creating any third party rights in respect of the premises, which were agreed to be sold to the Plaintiff and further to appoint a court receiver in respect of said premises as well as two car parking spaces which were agreed to be sold to the Plaintiff under the said agreement.

6. The Defendant Nos.1 and 2 did not contest the proceedings. Upon considering the material placed on record by the Plaintiff as well as the Defendant Nos.3 to 5, the learned Trial Judge held that the Plaintiff has failed to establish the prima facie case. The learned Judge further held that there is no privity of contract between the Plaintiff and the Defendant No.3, who has been appointed as a new developer in place of the Defendant No.1. The learned Judge therefore, dismissed the notice of motion. Being aggrieved by the same, the Plaintiff had preferred this appeal.

7. Heard Mr. Mehul Shah, the learned counsel for the Plaintiff and Mr. Pravin Samdhani, the learned senior counsel for the Defendant Nos.3 to 5. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

8. The Plaintiff has sought the relief based on the agreement dated 29th June, 2010. It is not in dispute that the Defendant No.1-a proprietorship concern of Defendant No.2 was granted development rights under the Slum Rehabilitation Scheme to develop the property bearing C.T.S. No.471 (part) admeasuring 5184.30 square meters or thereabouts at Village Kandivali, Taluka -Borivali, Mumbai-400 067. The Plaintiff had allegedly entered into an agreement dated 29.6.2010 with the Defendant No.1 to purchase a commercial premises admeasuring 6050 sq.ft. and two car parking spaces for consideration of Rs.45 lakhs. The said agreement, which was entered into by the Plaintiff and the Defendant No.2 even before sanctioning of the plans by the SRA is admittedly an unregistered agreement. One of the recitals of the said agreement reads as under :-

“xxx

WHEREAS the parties have negotiated between themselves, however, the present agreement for sale clear understanding that the regular agreement will be executed

after the C.C. being granted and under the terms and conditions mentioned in the C.C. under the regular agreement under Maharashtra Ownership of Flats Act for an agreement to sell will be entered in respect of the units/ premises more particularly mentioned in the Schedule-II herein under.”

9. A plain reading of this recital prima facie indicates that the said agreement is in fact not an agreement for sale but is an agreement to execute and register an agreement under the provisions of MOFA Act at a subsequent date. Prima facie such an agreement cannot be specifically enforced.

10. The agreement also records that the Plaintiff had paid to the Defendant Nos.1 and 2 a sum of Rs.45 lakhs as on the date of the execution of the agreement. However, receipt of payment, annexed to the said agreement indicates that the said payment of Rs.45,50,000/- was made between 13.7.2009 to 10.3.2010, which was much before the execution of the said agreement. The receipt prima facie falsifies the contention of the Plaintiff that the said amount was paid as on the date of the execution of the said agreement.

11. The terms of the agreement also records that in the event possession of the premises was not handed over within 12 months the

Plaintiff were entitled to charge interest @ 48% per annum as well as the penalty on the amount, which was already paid to the Defendant Nos.1 and 2. This recital gives a prima facie indication that the agreement is more of a finance or loan agreement and not a sale agreement. The records also indicate that by virtue of deed dated 16.12.2012 Defendant No.1 partnership concern was converted into a partnership with Defendant No.3 as its partner. Subsequently, on 21.1.2010 the Defendant No.1 had retired from the said partnership firm. The records further reveal that upon termination of the development agreement with the Defendant No.1, SRA, by order dated 10.5.2012 appointed Defendant No.4 as a new Developer. The Plaintiff had admittedly not entered into any agreement with the Defendant No.4 in respect of any premises under the said development agreement and hence, there was no privity of contract between the Plaintiff and the Defendant Nos. 3 to 5. This being the case, prima facie the Plaintiff cannot seek any relief against the Defendants.

12. The Plaintiff has thus, failed to establish prima facie case. The records also indicate that after being appointed as a Developer, the Defendant No.4 had submitted revised plans and commenced construction, which has reached the completion of second floor slab.

The Plaintiff has approached the Court after considerable delay. Grant of injunction at this stage will cause hardship and inconvenience to the Defendants. The Plaintiff has thus, failed to prove the pre-requisites essential for grant of interim relief. Considering all the above facts and circumstances, the learned Trial Judge was perfectly justified in rejecting the notice of motion. The findings recorded by the learned Judge are neither arbitrary nor perverse and hence, do not warrant interference.

13. The Appeal has no merits and is therefore, dismissed with no orders as to costs.

(SMT. ANUJA PRABHUDESSAI, J.)