

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 4677 OF 2007

IN

SUIT NO. 2000 OF 2006

WITH

NOTICE OF MOTION NO. 4034 OF 2008

WITH

NOTICE OF MOTION NO. 1181 OF 2017

IN

SUIT NO. 2000 OF 2006

Rizvi Land Developments Pvt Ltd

...Plaintiff

Versus

Housing Development & Improvement Pvt Ltd
& Ors

...Defendants

Dr Birendra Saraf, with Mr Anirudh Hariani, Rhishikesh Bidkar & Suchita Uppal, i/b Hariani & Co., for Defendant No. 5 – Applicant in NMS/1181/2017.

Mr Sanjay Jain, with Dr Abhinav Chandrachud, i/b Udwadia & Co., for the Plaintiff.

Mr Sanmish Gala, i/b M/s. Markand Gandhi & Co., for Defendant No. 1.

CORAM: G.S. PATEL, J

DATED: 29th November 2018

PC:-

1. Having heard Mr Jain for the Plaintiff for some time and Dr Saraf for the Defendant No. 5, I am unable to see how I can address the present Notice of Motion on merits in view of the order dated 4th August 2016 of KR Shriram J.

2. The Learned Single Judge had before him three motions, i.e. Notice of Motion No. 3082 of 2009, the present Notice of Motion No. 4677 of 2007 and Notice of Motion No. 4034 of 2008. This is the order that he passed:

"1. I am told that when the plaintiff/applicant moved for ad-interim relief in this notice of motion, the court declined to grant any ad-interim relief. For 07 years the parties have lived with the same situation. There is no change in circumstances between 2009 and today, which warrants any consideration on the reliefs sought in the notice of motion.

2. The notice of motion is, therefore, dismissed.

3. The counsel for the defendant No. 1 and defendant no. 5 state that they will file their written statement and serve a copy thereof within four weeks from today.

4. The counsel for the plaintiff is unsure as to whether the other defendants have been served the writ of summons or not. The counsel for the plaintiff requests that the matter be kept tomorrow, i.e., on 5th August 2016 to answer whether the writ of summons has been served or not on the other defendants.

5. The defendant nos. 1 and 5 are hereby granted four weeks time to file their written statement and serve a copy thereof.

6. As regards the other defendants and other notices of motions, stand over to 5th August 2016 for directions."

3. This order was carried in Appeal. On 28th July 2017, the Division Bench disposed of the Appeal with the following observations:

"Parties through their counsel.

2. Challenging the order passed by the learned Judge of this Court on 4th August 2016 in Notice of Motion No. 3082 of 2009 filed in Suit No. 2000 of 2006, the appellant/plaintiff has filed this appeal. By the impugned order the learned Single Judge has declined to grant interim relief to the appellant by observing that the ad interim relief was declined about seven years back and thereafter much progress had taken place.

3. We find no infirmity in the order of the learned Single Judge as we have been informed that during this period the IOA and CC has already been issued and the eligible slum dwellers have been put in possession in the rehabilitation building. We have also been appraised by the learned counsel for respondent No. 5 that a Writ Peittion No. 2373 of 2011 was filed by the appellant itself and in the said petition, interim relief was declined by observing thus:

"4. The Petitioner contends that in view of its alleged rights as a lessee, it would have been entitled normally to priority to obtain permission for redevelopment under DCR 33(1) and that it was deprived of this right due to the illegal act of respondent Nos. 4 and 7 developers. The petitioner contends that it would be entitled to damages for this reason.

5. *Whether the petitioner is entitled to any reliefs or not would be decided in appropriate proceedings. It is however, not possible now to set the clock back. Even after the work commenced, the plans were amended on 08.07.2009. Pursuant thereto, a further IOA and CC were issued on 15.07.2009. The rehabilitation buildings have been completed and eligible slum dwellers have been put in possession. The petitioner contends that they were put in possession illegally, as the occupation certificate is still not given. The free sale component is also substantially completed in all respects."*

4. In view of the aforesaid order passed in Writ Petition also we are of the view that this appeal has no merit. In the circumstances, we dismiss this appeal."

4. Dr Saraf points out that even if the order by KR Shriram J disposed of only Notice of Motion No. 3082 of 2009 and kept the other Motions (including the present Notice of Motion No. 4677 of 2009) pending for directions, it is not possible to grant the Plaintiff any interim relief for the simple reason that the prayers in the Motion that KR Shriram J rejected are identical to, or at least indistinguishable from, those sought in the present Notice of Motion.

5. The Notice of Motion No. 3082 of 2009 disposed of by KR Shriram J had the following prayers (a) and (b):

"(a) That pending the hearing and final disposal of this suit, this Hon'ble Court by a temporary Order and

Injunction be pleased to restrain the Defendants, their Officers, Engineers, servants, labourers, workers, agents whomsoever to forthwith stop and refrain from carrying out any further construction of a building and construction activities whatsoever or howsoever on a part or portion of the suit property, namely, plot bearing CTS Nos. 58, 60 and 62 corresponding Final Plot Nos. 406, 404 and 402, admeasuring 1810 square metres situate at 15th Road, Bandra (West), Mumbai 400 050;

(b) that pending the hearing and final disposal of this suit, this Hon'ble Court by a temporary Order and Injunction be pleased to restrain the Defendants, their officers, servants agents and any other person whomsoever acting through and on behalf of them from dealing with in any manner, creating any third party right, transferring in any manner howsoever or entering in to any agreement or instrument of transfer of flat or shop or office or parking space or any structure constructed in the part or portion of the suit property, namely, plot bearing CTS Nos. 58, 60 and 62 corresponding Final Plot Nos. 406, 404 and 402, admeasuring 1810 square metres situate at 15th Road, Bandra (West), Mumbai 400 050 or in any manner alienating, charging or encumbering the same;"

6. In Notice of Motion No. 4677 of 2007 which is before me now, there are four prayers (a), (b), (c) and (d) as follows:

"(a) That pending the hearing and final disposal of this suit, this Hon'ble Court by a temporary Order and Injunction be pleased to restrain the Defendants, their Officers, Engineers, servants, labourers, workers, agents from carrying out any construction activities on the suit property especial plot bearing CTS Nos. F/58, F/60 and F/62 situate at Final Plot Nos. 402, 404 and 406,

admeasuring 1810 square metres situate at 15th Road, Bandra (West), Mumbai 400 050;

(b) that pending the hearing and final disposal of this suit, this Hon'ble Court by a temporary Order and Injunction be pleased to restrain the Defendants, their officers, servants agents and any other person whomsoever acting through and on behalf of them from dealing with in any manner, creating any third party right, transferring the suit property in any manner, alienating or encumbering the suit property, in favour of any third person in any manner;

(c) That pending the hearing and final disposal of this suit, this Hon'ble Court be pleased to restrain the Defendants, their officers, servants and agents and any other person acting through and on behalf of them from selling and/or transferring the flats on the building constructed on the suit property to the prospective buyers and/or third parties;

(d) That pending the hearing and final disposal of this suit, this Hon'ble Court by an Order and Injunction of this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay or any other fit and proper person to be the Receiver under Order XL, Rule 1 of the Code of Civil Procedure with all powers to take possession of the entire building constructed by the Defendants on the suit property, i.e., CTS Nos. F/58, F/60 and F/62 situate at Final Plot Nos. 402, 404 and 406, admeasuring 1810 square metres situate at 15th Road, Bandra (West), Mumbai 400 050;"

7. In my view, Dr Saraf is correct that prayer clauses (a) and (b) to the present Notice of Motion No. 4677 of 2007 are wholly

indistinguishable from those sought in Notice of Motion No. 3082 of 2009 that KR Shriram J disposed of. The other two prayers (c) and (d) in the present Notice of Motion for a further injunction and a Receiver are consequential.

8. In my view, having regard to the order of KR Shriram J, I cannot possibly grant the Plaintiff relief that was once refused. That would be so even absent the appellate order I have referred to earlier. In the present case, KR Shriram J's order has been confirmed in appeal and, therefore, there is absolutely no question of allowing the Plaintiff to press again for those very reliefs.

9. As to Mr Jain's submission what to put off putting in an Affidavit setting out circumstances that were not placed before Shriram J, this seems to me to be futile if as the reliefs that are sought are exactly the same as those previously rejected. I am not told, even across the Bar, of any change in circumstances between 2016, when KR Shriram J passed his order, and today. Any change in circumstances that may have existed or taken place *before* KR Shriram J passed his order cannot fall for consideration now. Indeed, the application to demonstrate a *pre-2016* change in circumstances ought to have been made before KR Shriram J and cannot be allowed to be made now. This would certainly constitute what Dr Saraf picturesquely describes as 'letting the Plaintiffs have a second bite at the cherry'. From my perspective, it is an invitation to sit in appeal over not only Shriram J's order, but the appellate order as well. That invitation, however elegantly presented, is, therefore, not so much an invitation to pass a judicial order as an invitation to submit myself to a jurisprudential beheading. Keeping a safe

distance from the tumbil, I dismiss the present Notice of Motion No. 4677 of 2007.

NOTICE OF MOTION NO. 4034 OF 2008:

10. For these very reasons, Notice of Motion No. 4034 of 2008 must also be dismissed. Here again the Plaintiff seeks substantially the same reliefs in prayer clauses (a) and (b). They have sought just one relief less than those sought in Notice of Motion No. 4677 of 2007 but that seems to be the only difference.

NOTICE OF MOTION NO. 1181 OF 2017:

11. This Notice of Motion is by the 5th Defendant to condone the delay in filing a Written Statement. There is undoubtedly a delay. The 5th Defendant is an Assignee of the original 1st Defendant's development rights in the Slum Rehabilitation Project. Dr Saraf for the 5th Defendant states that the Written Statement is ready. It is tendered and taken on file. However, this is subject to the 5th Defendant paying to the Plaintiffs costs quantified at Rs.30,000/- within a week from today.

12. List Suit No. 2000 of 2006 for framing issues on 13th December 2018.

(G. S. PATEL, J)