

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.582 OF 2018

Shelter Makers (India) Pvt. Ltd. .. Appellant
Versus
Shilpa Offset Pvt. Ltd. .. Respondent

Mr. Faran Khan I/b P.V. Nelson Rajan for appellant.
Mr. Rohitashwa N. Shetty for respondent.

CORAM : K.K. TATED, J.

DATED : MARCH 19, 2019.

P.C. :

1 Heard learned Counsel for parties.

2. By this Appeal from Order, the appellant/original defendant is challenging the order dated 12.02.2018 passed by Bombay City Civil Court, Bombay in Notice of Motion No.3180 of 2016 in S.C. Suit No.2435 of 2016 restraining them from creating any third party right in respect of the suit property Unit No.202, Building No.1, 2nd Floor admeasuring 825 sq. ft. and also appointed Court receiver to take the possession of the same.

3. The learned Counsel appearing on behalf of appellant submits that in the present proceedings, respondent/original plaintiff has filed Suit No.2435 of 2016 for specific performance of agreement. He submits that from time and again they informed the respondent/original plaintiff that it is not possible for them to complete the construction and hand over the possession of the

suit property. Therefore, they are ready and willing to refund their amount along with interest as per the terms and conditions of the agreement for sale dated 10.09.2004. He submits that though the agreement for sale was of 2004, the respondent/original plaintiff filed suit for specific performance in 2016 and moved for interim reliefs for appointment of Court Receiver. He submits that, admittedly, till today the completion certificate is not issued by the Corporation in respect of the suit property. He submits that the trial Court erred in coming to the conclusion that the respondent/original plaintiff has made out case for appointment of Court Receiver in respect of the suit property. He submits that the appellant specifically made a statement before the trial Court and also makes a statement before this Court that they will not create any third party right in respect of the suit property till the hearing and final disposal of the suit.

4. The learned Counsel for the appellant submits that, at the time of passing the impugned order dated 12.02.2018, the trial Court failed to consider the judgment of the Madras High Court in the matter of **T.Krishnaswamy Chetty Vs. C.Thangavelu Chetty & Ors.**¹ He submits that it is specifically held by the Madras High Court in that authority that Court Receiver can be appointed only in extreme cases and in circumstances, where the interest of the person seeking the appoint of a receiver is exposed to manifest peril. He submits that in the present proceedings, the plaintiff has failed to make out any case for appointment of Court Receiver. Therefore, the appellant has filed the present Appeal

1 AIR 1955 Madras 430

from Order challenging the said order to the extent of appointment of Court Receiver. He submits that in the interest of justice this Hon'ble Court be pleased to set aside the impugned order dated 12.02.2018 to the extent of appointment of the Court Receiver in respect of the suit property. He submits that if the said order is not set aside, irreparable loss and injury will cause to them.

5. On the other hand, the learned Counsel appearing on behalf of respondent/original plaintiff vehemently opposed the present Appeal from Order. He submits that in view of subsequent development nothing survives in the present Appeal from Order. He submits that pursuant to the order dated 12.02.2018 passed by the Court below, the Court Receiver took forcible possession of the suit premises with the help of police on 29.01.2019. On that ground, the present Appeal is required to be dismissed with cost.

6. The learned Counsel for the appellant submits that in the present proceedings the plaintiff agreed to purchase the suit property from the appellant as per the agreement for sale dated 10.09.2004. He submits that as per the said agreement, the total price of the suit property was 28,87,500/- out of that the plaintiff already paid a sum of Rs.27,74,000/- i.e. near about 96% of the total consideration is already paid by the plaintiff. In spite of that, the defendant failed and neglected to comply the said agreement for sale. The plaintiff filed the S.C. Suit No.2435 of 2016 before the trial Court on the basis of the letter dated

26.07.2016 received from the defendant. He submits that in the said letter, it was specifically stated by the defendant that they decided to refund the entire amount with interest as they are unable to complete the said project. He relies on the said letter, which reads thus :-

“ This is in reference to the booking for commercial space is our Project, “Poonam Plaza”, Manjrekar Wadi, Andheri (E), Mumbai.

You are well aware that the aforesaid scheme was being developed under the Slum Rehabilitation and involved various procedural legal niceties and intricacies the expected date by which the scheme was supposed to be completed in all respects wholly depended upon the said circumstances and the situation existing at the relevant and particular point of time. Any schedule to complete this Project was not possible to reach, because this being a Slum Rehabilitation Project, there were several legal obstructions, court proceedings, time taken to deal with the frivolous complaints made by some disgruntled elements, delay in issuance of requisite clearances, NOC's, certificates and changed situations and scenario and above all Slum Dwellers infact many people were involved directly and indirectly and we had met you several times and had appraised the factual positions time to time. Even today, this scheme could not be completed due to the above said reasons.

Secondly you are also well aware that there are 2 DP roads and the main entrance of our building is through the Slum area and these roads have still not started there construction work. In this situation we cannot further wait for indefinite time and finally Company has taken decision that in the interest of the prospective buyers, the Company shall request them not to wait for indefinite time and we shall according to Clause. no.10 of the Agreement executed between us act accordingly and refund the amount paid by along with interest.

We hope you will understand our helplessness in this issue and shall agree that this shall be a fair proposal for both of us. Infact, we would like to inform you that on the same terms some of our valuable buyers have already agreed and settled their matter.

Kindly expedite the above so as to enable us to proceed in this matter.”

7. The learned Counsel for the plaintiff submits that on the basis of the said letter, plaintiff filed the S.C. Suit No.2435 of 2016 in the Bombay City Civil Court, Bombay for specific performance of the agreement.

8. The learned Counsel for the plaintiff submits that to protect his interest in respect of the suit premises, plaintiff preferred notice of motion No.3180 of 2016 for an order of injunction and also for appointment of Court Receiver in respect of suit premises along with other reliefs. He submits that the trial Court at the time of passing impugned order dated 12.02.2018 specifically considered the fact that the plaintiff already paid more than 96% consideration of the suit property to the defendant. He submits that if third party interest is created by the defendant, then it is very difficult for the plaintiff to execute the decree for specific performance if passed by the Court. Considering these facts, the trial Court passed the impugned order appointing the Court Receiver to take the possession of the suit premises. He submits that even the Madras High Court in the matter of **T.Krishnaswamy Chetty Vs. C.Thanga-velu Chetty & Ors.(Supra)** specifically held that Court Receiver can be appointed to protect the interest of the parties. In the case in hand, when the plaintiff already paid more than 96% of the agreed amount to the defendant, the trial Court rightly appointed the Court Receiver on the suit premises. Therefore, there is no substance in the present Appeal From Order and same is required to be dismissed with cost.

9. I heard both the sides at length. Bare reading of the clause 10 of the agreement dated 10.09.2004 shows that it is dependent on the plaintiff to demand the refund of the entire amount. Clause 10 of the said agreement, reads thus :-

“10. The Developers hereby agree that in case of any default or failure on their part to give possession of the said Office/Shop/Garage/Other premises to the Purchaser/s by the date specified in clause 9(a) above, or the dates prescribed in sub-clause (b) of Section 8 of the said Maharashtra Ownership Flat Act, then the Developers shall on written request refund to the Purchaser/s the amounts already received by them from the Purchaser/s, with the simple interest at 9% (nine percent) per annum from the date the Developers shall have received the same till date the amounts so received with interest thereon are repaid. Till the refund or tender thereof by the Developers to the Purchaser/s, the same shall, subject to prior encumbrances, if any, be a charge on the said construction or building in which the said Office/Shop/Garage/Other Premises is situate or were to be situated.”

10. There is not a single letter of Plaintiff, which shows that plaintiff on his own called upon the defendant for refund of the consideration paid for suit unit. Not only that the photographs on page Nos.67, 68 and 69 of additional compilation of document, shows that construction of the building is almost completed. Apart from that the plaintiff has already paid more than 96% of compensation/price of the suit property. Considering these facts, and subsequent development that Court receiver is already taken possession of the suit property on 29.01.2019, I do not find any reason to interfere in the well reasoned order passed by the trial Court.

11. At this stage, the learned Advocate appearing on behalf of appellant submits that they already argued on the point

of arbitration clause in the agreement for sale, that to be consider at the time of passing this order. Admittedly, neither the defendant filed any application before the trial Court or placed any documentary evidence on record before this Court that they are filing application under Section 8 of the Arbitration Clause. Therefore, there is no question of this request in the present matter. Hence, oral request made by learned Counsel for the appellant is rejected. Hence, following order :-

- a) Appeal from order stands rejected with cost of Rs.5000/-.
- b) Cost to be paid to the original plaintiff within four weeks from today.

(K. K. TATED, J.)