IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5160/2018

Yogesh B. Galande ... Petitioner

V/s.

ARK Prem Constructions & Ors. ... Respondents

Mr. S. C. Wakankar for the Petitioner
Mr. Piyush Raheja, Ms. Vinodini Srinivasan, Mr. King D. I/b. Keystone Partners for the Respondents.

CORAM: K.K. TATED, J.

DATED : JANUARY 23, 2019

P.C. :

1 Heard. By this petition under Article 227 of the Constitution of India, the Petitioner – Plaintiff challenges the order dated 20.01.2018 passed by the Civil Judge, Junior Division, Pune below Exhibit- 23 in Regular Civil Suit No. 695/2015 allowing the Application made by the Respondent - Defendant under Order 7 Rule 11 of the Code of Civil Procedure, 1908 directing the Petitioner - Plaintiff to correct the valuation of the suit as per section 6(xi) of the Maharashtra Court Fees Act, 1959 (Court Fees Act) and pay deficit court fees on or before the next date.

2 In the present proceedings, the Petitioner - Plaintiff filed Regular Civil Suit No. 695/2015 for directing the Respondent - Defendant to comply with the provisions of section 4 of the

Maharashtra Ownership of Flats Act, 1963 (MOFA Act) and handover the possession of the flat to him. The Petitioner filed the suit on the basis of the oral agreement. In support of this contention, he relied on two receipts for payment of Rs.2 lacs dated 06.05.2009 and receipt dated 08.06.2009 for Rs. 1 lacs. The Trial Court, in para 7 of the impugned order recorded that those receipts were in respect of the interest free deposit. Therefore, the Trial Court held that the suit filed by the Petitioner is to be treated as suit for specific performance and he has to pay court fees as the suit is for specific performance.

3 The learned counsel for the Petitioner submits that the court below erred in coming to the conclusion that the Petitioner is liable to pay full court fees, as the suit was filed for specific performance. He submits that if the suit was filed under the MOFA Act, they have to pay court fees as per section 6(iv)(j) and not as per section 6(xi) of the Court Fees Act. In support of this contention, he relied on the judgment of this court in the matter of ***Kiran Suresh Bhagiya Vs. M/s. Kakade Constructiion Co. Pvt. Ltd. & Anr. 2018 0 Supreme (Mah) 50***. He relied on paragraph 12 to 18 of the said judgment.

> *"12. Thus, both these clauses of the agreement dated 20.11.2006, the specific performance of which is sought by the plaintiff, in the suit, make it clear that by this suit, the petitioner is 901 cra 483 of 2017.odt seeking performance of the statutory obligation arising out of the agreement executed under Sections 3 and 4 of the MOFA Act. Even assuming that prayer clause in the plaint is not drafted in the proper way, as contended by learned counsel for respondent, the reading of the plaint in its entirety leave no room for doubt that the suit is filed for enforcement of*

statutory obligation on the part of the respondent.

The law is well settled that for deciding the correct valuation of the suit claim,this Court has to consider the real and effective relief, which the petitioner is claiming in the suit and said relief leaves no manner of doubt that the relief, which the petitioner is claiming, is of the spefific performance of the obligation arising under Section 3 and 4 of the MOFA Act.

13. This Court, has in the case of Vrindavan (Borivali) Co-opertive Housing Society Ltd -vs- Karmarkar Brothers and ors, (supra), considered this very aspect and held that such suit is not a suit simpliciter for specific performance, but it is a suit to enforce the compliance with a statute.

14. In paragraph No.20 of the judgment it was further held that, "when the suit is filed seeking to enforce the statutory obligations which are arising under the MOFA Act, such a relief being 901 cra 483 of 2017.odt incapable of monetary valuation, the valuation made by plaintiff in the said case relying on clause No.6(iv)(j) of the Court Fees Act is correct".

15. In paragraph No.21 of the judgment it was further held that "the intention of the Legislature in enacting the Maharashtra Ownership Flats Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 was not to impose any such burden on the respective parties governed by the provisions of said Act, if they are involved in litigation because of non-compliance with the provisions of Act".

16 Paragraph NO. 22 of the Judgment makes position further clear and it reads as follows:-

"22. The subject-matter of the suit being of right to compel the performance of statutory obligation and the plaintiff who is asking assistance of the Court to compel the promoter to perform his statutory obligation, such a right to compel to perform the obligations provided by the statute being incapable of monetary valuation and there being no provision in theCourt Fees Act for such a suit, the provisions of section 6(j) of the Court Fees Act are

attracted and they are applicable to this suit. As the Court Fees were paid relying on the provisions, the valuation of this suit is quite proper and the plaint will have to be accepted and the suit will have to be proceeded with as the 901 cra 483 of 2017.odt valuation of the plaint is proper. ... ..."

17 This legal position was once again considered by this Court and confirmed in the judgment of Maria Philomina Pareira -vs- M/s Rodrigues Constructions (supra). In paragraph No.6 of the judgment, it was held that "when the agreement of sale was registered under the provisions of MOFA Act, and plaintiff wants the defendant to comply with the terms and conditions of the said agreement and in compliance thereto, when the suit is filed to enforce such obligation arising out of the agreement as such, such a suit would not fall within the scope of section 6 (xi) of the Bombay Court Fees Act. It is a statutory obligation, which is being enforced and a notional valuation under Section 6(iv) (j) of the Court Fees Act, would be proper"

It was further held that, "in all such agreements, if they are enforced by the flat purchasers individually, there can be no conveyance in favour of the flat purchasers individually, as ultimately conveyance has to be in favour of the society of all flat purchasers. If the promoter does not comply with the obligations under the Act, there are serious consequences to follow. 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 901 cra 483 of 2017.odt Court Fees Act, 1959".

18. In the present case, as stated above, the specific performance of the agreement, which the petitioner is claiming, is executed under the provisions of Sections 3 and 4 of the MOFA Act . Thus, by this suit, the petitioner is seeking the compliance of the obligation cast upon the *respondent under the said Act. Therefore, it being a suit for compliance of statutory obligation, the valuation made by the petitioner on notional valuation under Section 6(iv) (j) of the Bombay Court Fees Act, is required to be held as just."*

4 The learned counsel for the Petitioner also raised several grounds in the petition which are as under:

GROUNDS

A] Ld. Lower Court ought to have rejected the application instead of allowing the same.

B] Ld. Lower Court failed to appreciate that though the suit was filed seeking the relief of Specific Performance of an Agreement, it was in fact a contractual obligations upon the Respondents.

C] Ld. Lower Court failed to appreciate that since there is no written agreement in compliance of Section 4 of the Maharashtra Ownership Flats Act, the application of statutory obligation as provided under Section 10 and 11 do not apply. Ld. Lower Court ought to have considered that it was the specific case of the Petitioner that the receipts were issued by the Respondents in furtherance of payments made by the Petitioner for booking of the flat in question.

D] Ld. Lower Court erred in holding that for the performance of ordinary contract the Plaintiff is required to value the suit as per Section 6(XI) of the Act. Ld. Lower Court ought to have considered the detailed pleadings of the Petitioner made in the Plaint and further ought to have considered that the transaction between the Petitioner and Respondents was in fact for the specific flat which was the subject matter of the suit.

E] Ld. Lower Court ought to have considered that the ratio laid down in the case of Vrundavan Co-op. Hsg. Society and in the case of Maria Pereira were squarely applicable to the facts in the present matter. As such, the Plaint was valued properly and the court-fees was properly paid by the Petitioner.

F] Ld. Lower Court ought to have considered that the Petitioner had notionally valued the suit and had paid requisite court fees since the scope of the suit and the prayers made therein were specifically for enforcement of statutory obligations as contemplated under Section 10 and 11 of the Maharashtra Ownership Flats Act. As such, the application filed by the Respondents ought to have been rejected on that count.

J] The impugned Judgment & Order is otherwise wrong in law and contrary to the facts on record."

5 On the basis of this submission, the learned counsel for the Petitioner submits that the impugned order is liable to be set aside holding that the court fees paid by the Petitioner as per section 6(iv)(j) of the Court Fees Act is proper. There is no question of the Petitioner paying court fees as per section 6(xi).

6 On the other hand, the learned counsel for the Respondent has vehemently opposed the Writ Petition. He submits that bare reading of the plaint itself shows that the Plaintiff has filed the suit for specific performance on the basis of two receipts dated 06.0.2009 and 08.06.2009. He submits that admittedly, in the present proceedings the suit is filed on the basis of oral agreement. If there is no agreement, there is no question of considering the suit, as it is filed by the Petitioner, under MOFA Act. In support of this contention, he relied on the judgment of this court in the matter of ***The Association of Commerce House Block Owners Ltd. Vs. Vishandas Samaldas and Ors. 1981 Bom CR 716.*** Paragraph 48 and 49 thereof read thus:

> *48 If we carefully read the provisions of section 4, it will be noticed that a negative language is used in respect of the amount of advance payment or deposit which the promoter is entitled to receive. At other places, the Legislature has used the word 'shall' and so far as the agreement is concerned the provisions will read that "a promoter......shall.......enter into a written agreement for sale......" and "the agreement shall be registered under the Indian Registration Act" and "such agreement shall contain the prescribed particulars."*
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> *49. Normally when in a statutory provision the word 'shall' has been used, it would be construed as a mandatory provision, but there may be cases where even though the word 'shall' has been used by the Legislature, on a proper construction the provision may be found to be directory in nature. It is true that so far as section 4 is concerned, there is no provision which sets out the consequence of non-compliance with the provisions of section 4. Section 13, which deals with the penalty for failure to comply with or contravention by a promotor of the provisions of the Act, provides as follows :---*
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>> *13. "Any promoter who, without reasonable excuse, fails to comply with or contravenes any provisions of this Act, or of any rule made thereunder shall where no other penalty is expressly provided for, on conviction, be punished with imprisonment for a term which may extend to one year or with fine which may extend to two thousand rupees, or with both; and a promotor who commits criminal breach of trust of any amount advanced or deposited with him for the purposes mentioned in section 5 shall, on conviction, be punished with imprisonment for a term which may extend to four years, or with fine, or with both."*

7 On the basis of these submissions, the learned counsel for the Respondent submits that there is no substance in the Writ Petition and same is liable to dismissed with costs.

8 Heard both sides at length. Admittedly, in the present proceedings the Petitioner has filed suit on the basis of oral agreement, that too, on the basis of two receipts dated 06.05.2009 and 08.06.2009. Both the receipts show Rs.2,00,000/- interest free security deposit. Apart from that if there is no oral/written agreement, there is no question of treating the suit filed by the Plaintiff under the MOFA Act. That is to be treated as a suit for specific performance as per section 4A of the MOFA Act.

9 In view of these facts, I do not find any reason to entertain the Writ Petition to set aside the well reasoned order passed by the Trial Court. Hence, the following order is passed:

a. The Writ Petition stands rejected.

b. No order as to costs.

c. At this stage, the learned counsel for the Petitioner submits that the ad-interim protection granted by this court on 19.10.2018 may be continued for a period of eight weeks.

d. Considering the submissions made by the learned counsel for the Petitioner, the impugned order dated 19.10.2018 to continue till 20.04.2019.

(**K. K. TATED, J.**)