

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY AND ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION  
NOTICE OF MOTION NO.304 OF 2017  
IN  
COMMERCIAL SUIT NO.326 OF 2017**

Shri Sati Builders & Developers Pvt Ltd. ..Plaintiff/Applicant  
Vs.  
Garden View Co-operative Hsg Sty & Ors ..Defendants

Mr. Ravi Kadam, Senior Advocate a/w Mr. Ashish Kamat, Mr. I. J. Nankani, Mr. H. S. Khokhawalla and Ms T. D'souza I/b Nankani Associates for Plaintiff /Applicant

Mr. Aspi Chinoy, Senior Advocate a/w Mr. Vishal Kanade, Mr. Karl Tamboly, Mr. S. B. Pawar and Ms Swati Sawant I/b S. K. Legal Associates for Defendant Nos. 1 to 13,

Mr. Chirag Mody a/w Mr. Rishikesh Soni and Ms Raveena Yadav I/b Ashok Purohit and co. for Defendant No.14

Mr. Shirzas Shroff I/b M/s Mulla and Mulla and Craige Blunt and Caroe for Defendant No.15

**CORAM : K.R.SHRIRAM, J.  
DATE : 15<sup>th</sup> JANUARY, 2019**

**P.C.:-**

For the reasons separately recorded, the following order is passed:-

- 1 Notice of Motion dismissed.
- 2 Mr. Kadam seeks stay of the order.
- 3 Stay refused.

**REASONS**

- 4 This suit is for specific performance of a letter of intent dated 15<sup>th</sup> January, 2014, read with a letter of intent dated 21<sup>st</sup> October, 2014, by

holding that the termination of the letter of intent vide communication dated 5<sup>th</sup> March, 2017 by defendant no.1, is illegal.

5           Plaintiff is a developer. Defendant no.1 is a society. Defendant nos.2 to 13 are members of the society and residing in ground plus three upper floors of a building known as “Garden View” (the said building). This building is in plot no.44-C admeasuring 895 sq.yards bearing CTS No.1285 of Village Vile Parle, Taluka Andheri and situated at Sarojini Road and Baptista Road, Vile Parle (W), Mumbai – 400056 (said property).

6           By lease deed made between the then owner of the said property one Mr. George Veers and one Mr. Laxman Thakker, proprietor of M/s Harsha Builders (Lessee), the said property was leased for 98 years commencing from 29<sup>th</sup> March, 1978. One of the clauses of the lease deed, clause 2(n), reads as under:

*“2(n) Not at any time to pull down add or alter an buildings or other erections nor to erect the other erection or buildings on the land comprised in the demised premises without the written permission of the Lessor first had obtained and any demolition addition alteration or other erections or work which may be done or made with such permission shall be made or done in accordance with plans approved by the Municipality and not otherwise.”*

7           The said M/s Harsha Builders constructed the said building of ground plus three upper floors on the said property and sold the flats therein to defendant nos.2 to 13. The agreement for sale of flats were under

the provisions of MOFA and it required M/s Harsha Builders to assign its lease hold rights to the society (Defendant No.1) to be formed of flat purchasers. M/s Harsha Builders, however, did not do so.

Defendant Nos.2 to 13 formed defendant no.1 society sometime on or about 15<sup>th</sup> March, 1984. M/s Harsha Builders did not assign its lease hold rights to the society. Defendant nos.1 to 13 did not take any further steps for years together.

8            On or about 29<sup>th</sup> December, 2009, defendant no.15 addressed a communication to defendant no.1, that her mother's will was being probated and that thereafter the said property could be conveyed to defendant no.1, subject to approval of BMC and Collector, for consideration of Rs.30 lacs plus costs. Defendant no.15 is the legal heir of Mr. George Veers. Pursuant to an order dated 8<sup>th</sup> November, 2012 in Testamentary Petition No.1085 of 2010, defendant no.15 became successor of Mr. George Veers.

9            Sometime in August 2013, defendant no.1 issued notice / tender inviting proposals for redevelopment of their building with the condition that the property was still in the name of the owner and the developer would have to obtain a conveyance. Clause 29 of the Request For Redevelopment Proposal Notice provided as under:

*“29 At present the Property Register Card stands in the name of original owner instead of society. The Developer will have to get Conveyance, PR Card in the name of Society.”*

10 Various bids were received and plaintiff was the successful bidder. On 15<sup>th</sup> January, 2014, defendant no.1 issued letter of intent to plaintiff. Clause (3) reads as under:

*“3. You are also aware that the society does not have any conveyance/assignment of land or building in their favour and you will assist in procuring conveyance from the Owner of the land in favour of the Society and update the Property Register Card in the name of the Society and you will not raise any requisition or objection on the title of the Society to the said land and building on that count.....”*

11 On 18<sup>th</sup> June 2014, defendant no.1 filed an application for deemed conveyance seeking unilateral deemed conveyance of the said land and building, before the competent authority as against M/s Harsha Builders and defendant no.15.

12 On or about 26<sup>th</sup> June 2014, it came to light later, that defendant no.15 had sold the said property / reversionary rights in the said property vide a deed of conveyance dated 26<sup>th</sup> June 2014, in favour of defendant no.14. Armed with the deed of conveyance, defendant no.14 filed intervention application in the application for deemed conveyance filed by defendant no.1. Defendant no.15 filed a reply dated 16<sup>th</sup> September

2014, to the deemed conveyance application confirming that defendant no.15 had conveyed / transferred reversionary rights to defendant no.14 and that her predecessors had leased the property for 98 years to M/s Harsha Builders.

13           On or about 21<sup>st</sup> October, 2014, a fresh letter of intent containing revised terms and conditions was issued by defendant no.1 to plaintiff, in which, once again the importance of the said property being conveyed / assigned to defendant no.1, was spelt out. Clause 2 of the revised / second letter recording intent dated 21<sup>st</sup> October, 2014 reads as under:

*..... Since the society does not have any conveyance / assignment of land or building in their favour, the Developer has agreed and assured the society that it will assist the society in procuring conveyance from the owner and/or the erstwhile developer of the land in favour of the society, by way of deemed conveyance or otherwise and update the property Register Card in the name of the Society and will not raise any requisition or objection on the title of the society to the said property or any part thereof.....”*

14           On 22<sup>nd</sup> January 2015, the competent authority passed an order holding that defendant no.1 was eligible to lease hold rights w.e.f. 29<sup>th</sup> March, 1978, for 98 years, and was entitled to a deemed deed of assignment. On 12<sup>th</sup> February, 2015, defendant no.14 issued a legal notice pointing out that (a) there was no assignment for transfer of demised premises and at no time can the buildings or other erections can be pulled

down, (b) add or alter any other erections on the demised premises can be erected without a written permission of the lessor first had and obtained and (c) any demolition, addition, alteration or other erections or work which may be done or made with such permission shall be made or done in accordance with plans approved by the municipality and not otherwise. Defendant no.14 also required payment of lease rent for the period after 2013-2014, failing which defendant no.14 threatened to terminate the lease and file proceedings for eviction.

15 Defendant no.14 also challenged the order dated 22<sup>nd</sup> January, 2015, passed by the competent authority by filing a Writ Petition No.8864 of 2015. The writ court granted an interim stay on 20<sup>th</sup> July 2015, in which, the court was pleased to observe as under:

*“However, the conveyance which is sought to be executed pursuant to the impugned order exfacie discloses that it is a conveyance of the ownership rights. It is well settled that in so far as the entitlement of a Co-operative Housing Society in terms of Section 11(1) of the said Act is concerned, it would be in terms of the agreement entered into by the flat purchasers with the developers. In the instant case, the developers i.e. M/s Harsha Builders/Developers had only a lease hold right with a right to develop from the original owners. Hence prima facie the Respondent No.3 society would be entitled to only the lease hold rights to which the developers were entitled to. The execution of the document of conveyance of ownership rights is prima facie beyond the entitlement of the Respondent No.3. Hence Rule to issue. In the meantime there would have to be interim relief in terms of prayer clause (e).”*

16 Defendant no.14 also filed a suit for eviction against defendant no.1 in the Small Causes Court. Small Causes Court in its order dated 8<sup>th</sup>

March, 2016, held that it was obligatory on the part of defendant no.1 to take prior permission of lessor / defendant no.14, for pulling down or making any alteration to the building on the said property. Defendant no.1 is also restrained from demolishing or redeveloping the said property.

It has to be noted that plaintiff was aware about these proceedings in High Court as well as the Small Causes Court.

17 On 2<sup>nd</sup> August, 2016, a consent order was passed in writ petition, in which, paragraph nos. 2 and 4 reads as under:

“1. ....

2. *The impugned order dated 22<sup>nd</sup> January, 2015 to the extent it grants deemed conveyance, if any, is set aside.*

3. ....

4. *The Deed of Assignment in favour of Respondent No.3 is subject to the outcome of T. E. Suit No.15 of 2016 filed in the Small Causes Court, Bandra.*

.....”

18 On 5<sup>th</sup> March 2017, defendant no.1 issued a letter of termination to plaintiff, on receipt of which, plaintiff approached this court by this suit. On 5<sup>th</sup> April 2017, this court was pleased to order status-quo, which has been since continued. Today this notice of motion is taken up for final disposal.

19           It is plaintiff's case that defendant no.14 is a rival bidder, who in collusion with defendant no.1 and its members, i.e. defendant nos.2 to 13, has acquired ownership rights in the said property and defendant nos.1 to 14 are colluding with each other to keep plaintiff away. The transfer of defendant no.15 to defendant no.14 of rights in the said property, is not bonafide. Defendant nos.1 and 14 have obtained a collusive order in the writ petition.

20           Mr. Kadam also submitted that defendant no.15 who had title to the said property, had not raised any objection to the redevelopment and since defendant no.14 is not a bonafide purchaser without notice of pre-existing vested rights of plaintiff and defendant no.14 has acquired the said property on as is where is basis without bothering to issue public notice and, defendant no.14 is, therefore, bound by the letters of intent issued. Prior to acquiring the said property inviting claims, defendant no.14 has induced and procured breach by defendant nos.1 to 13 of contract with plaintiff. Mr. Kadam submitted, termination of the letter of intent by defendant no.1 was not lawful and since there was a valid agreement between plaintiff and defendant no.1, plaintiff is entitled to the reliefs as sought. Coming to defendant no.15, Mr. Kadam submitted, that by writing the letter dated 29<sup>th</sup> December, 2009 expressed her willingness to convey the said property to defendant no.1 and defendant no.15 having stated in her affidavit in reply

that she was in talks with defendant nos.1 to 13 between 2009 to 2014, for conveying the said property in favour of defendant no.1 to facilitate redevelopment of the said property. Defendant no.15 should be considered to have not objected for redevelopment of the said property by plaintiff and she was on notice for the proposed redevelopment.

21           Mr. Chinoy appearing for defendant nos.1 to 13 submitted that lease agreement provided for the consent of the lessor and the lessor today is defendant no.14 if defendant no.1 wanted to go for redevelopment. Mr. Chinoy also submitted that the request for redevelopment and two letter of intents' expressly provided for conveyance of the said property in favour of defendant no.1 as a precondition, and that has not been done. Mr. Chinoy also submitted that there is no agreement with defendant no.15 that plaintiff can claim to have or for that matter with defendant no.14 and, therefore, there is also an impossibility of performance. Moreover, Mr. Chinoy submitted that under clause (3) of the first letter of intent and clause (2) of revised letter of intent, the obligation is that of plaintiff to have the property conveyed in favour of defendant no.1 and get property card standing in the name of original owner to be transferred in the name of defendant no.1. Mr. Chinoy submitted that plaintiff did not take any steps and in fact, plaint is totally silent on the steps that was taken by plaintiff to have the said property conveyed in favour of defendant no.1. Mr. Chinoy

states that it also shows a clear absence of readiness and willingness on the part of plaintiff to perform the obligation under the letters of intent. Mr Chinoy submitted that plaintiff did nothing to get the reversionary rights in favour of defendant no.1 and in fact, had even advised defendant no.1 to wait for the decision in the writ petition, so that parties will have a better chance as being lessees of the building. Mr. Chinoy submitted that when there is no likelihood of plaintiff getting any relief for specific performance because of absence of readiness and willingness and impossibility, the question of granting any interim relief does not arise.

22           Mr. Mody appearing for defendant no.14 submitted that the orders passed in writ petition as quoted above, clearly indicate that there can be no collusion as suggested by Mr. Kadam. Mr. Mody submitted that even in the consent terms filed in terms of which, the petition came to be disposed, defendant no.14 has reserved its right to prosecute the eviction suit filed in the Small Causes Court against defendant no.1. Mr. Mody submitted that if defendant no.14 succeeds in that suit, the question of redevelopment of the property by the plaintiff, for defendant no.1, would not arise. Mr. Mody also submitted that the prayer against defendant no.14 is only for injunction, whereas, the prayer for specific performance is only against defendant nos.1 to 13. Therefore, plaintiff are aware that there is no agreement with defendant no.14 or defendant no.15, for which, there

can be a specific performance. Mr. Mody in addition adopted submissions made by Mr. Chinoy.

23           In my view, the letters of intent are incapable of being specifically performed. Admittedly defendant no.15 and her predecessor was the erstwhile owner of the said property. The erstwhile owner had leased the said property, by a lease of deed dated 10<sup>th</sup> May, 1978, in favour of Mr. Laxman Thakkar, who was carrying on business in the name of M/s Harsha Builders. The said M/s Harsha Builders constructed ground plus three upper floors under the lease deed, which specifically provided in clause 2(n), i.e., not at any time to pull down add or alter any buildings or other erections nor to erect any other erection or buildings on the land comprised in the demised premises without the written permission of the Lessor first was obtained and any demolition addition alteration or other erections or work which may be done or made with such permission shall be made or done in accordance with plans approved by the Municipality and not otherwise.

24           Therefore under clause 2(n), there is an obligation that the existing structure cannot be pulled down or altered and no other erection

could be made on the land without written permission of the lessor. Admittedly the erstwhile lessor, namely defendant no.15 has not given any permission in writing to plaintiff to carry on any redevelopment activity on the said property. Mr. Kadam argued that reading letter dated 29<sup>th</sup> December, 2009 and paragraph 18 of the affidavit in reply of defendant no.15, it should be held that defendant no.15 had no objection to redevelopment. I cannot accept the submission of Mr. Kadam, because letter dated 29<sup>th</sup> December, 2009, does not speak of any redevelopment. Moreover, letter is dated 29<sup>th</sup> December, 2009, whereas, the notice inviting proposals for redevelopment was dated 9<sup>th</sup> August, 2013, the special general meeting of defendant no.1 approving plaintiff as developer is dated 1<sup>st</sup> December, 2013 and letter of intent is dated 15<sup>th</sup> January, 2014. It is impossible and inconceivable that a letter written in December, 2009, could ever have contemplated the redevelopment by plaintiff, by whom the letters of intent was received in 2014. Further, paragraph 18 of the affidavit in reply only mentions that defendant nos.1 to 13 were in talks with defendant no.15 for conveying the said property in favour of defendant no.1 to facilitate redevelopment of the said property. That cannot, by any stretch of imagination, be construed as a no objection to redevelopment of the said property by plaintiff. Moreover, averments in the affidavit of defendant no.15 sworn on 12<sup>th</sup> April, 2017, cannot be considered as a written permission of the lessor to redevelop. On the date affidavit was affirmed,

defendant no.15, is not even the lessor, having conveyed her right and title of the said property to defendant no.14. Defendant no.15 conveyed her right and title to defendant no.14, pursuant to a deed of conveyance dated 26<sup>th</sup> June, 2014. Moreover, defendant no.15 has in her affidavit in reply also stated “..... I have no contract, agreement and/or dealings with plaintiff.....”. This being the situation, it would be impermissible for plaintiff to carry on any redevelopment activity without the consent of the lessor and, therefore, the suit contract is incapable of being performed.

25           Further, even in the letters of intent issued in favour of plaintiff, plaintiff was to assist in obtaining the conveyance from the owner. Plaintiff could not obtain the conveyance from the owner. It is stated in the affidavit in reply of defendant no.1 that defendant nos.1 to 13 did not have financial resources or capability of obtaining the conveyance and, therefore, burden of obtaining the same was on plaintiff. Clause 29 of the request for redevelopment proposal notice and clauses 2 and 3 of the letter of intent as quoted above, clearly show that burden of obtaining the conveyance was on plaintiff and obtaining conveyance of the said property in the name of defendant no.1 was a pre-condition. Plaintiff failed to obtain the conveyance and in view of what is stated earlier, it was now impossible for plaintiff to even carry the construction work.

26 Defendant no.15 has conveyed the said property in favour of defendant no.14 and defendant no.14 has itself proposed to redevelop the said property. Defendant no.14 has not given any consent to defendant no.1 to redevelop the said property. Therefore, plaintiff's entitlement if any, is rendered incapable of performance.

27 I must also note that defendant no.1 cannot be blamed. Defendant no.1 is the assignee of lease hold rights of M/s Harsha Builders, pursuant to the consent order dated 2<sup>nd</sup> August, 2016, passed in Writ Petition. Defendant no.1 is bound by terms and conditions of lease dated 10<sup>th</sup> May, 1978. As it appears from the events that have happened, as stated in the plaint and the affidavits in reply to the notices of motion, it does appear that defendant no.1 was negotiating with defendant no.15, to seek conveyance of the land. Defendant no.15 had addressed a letter dated 29<sup>th</sup> December, 2009 in which defendant no.15 had stated that she would execute a conveyance in favour of defendant no.1 for a total sum of Rs.30 lacs, but the conveyance never came to be executed. Defendant no.1 also applied for deemed conveyance which was granted by competent authority on 22<sup>nd</sup> January, 2015. The said order of competent authority, however, came to be challenged by defendant no.14 in Writ Petition No.8864 of 2015, in which an order dated 2<sup>nd</sup> August, 2016, was passed, by which, the leasehold interest of M/s Harsha Builders was assigned to defendant no.1.

Defendant No.1 had, in the meantime, issued letter of intent dated 15<sup>th</sup> January, 2014, as modified by revised letter of intent dated 21<sup>st</sup> October, 2014, in which plaintiff was to assist in obtaining the conveyance of the land, as without the conveyance and without consent of the land owner, the development was not possible. Since neither the conveyance was obtained nor the consent of the land owner was obtained, it is now impossible for plaintiff to redevelop the said property. It has to be once again noted that, defendant no.14 has now filed a suit for eviction in the Small Causes Court, against defendant no.1 society.

28           I have to also note that, plaintiff did not fulfill or comply with its obligations under the letters of intent. Under the letters of intent, plaintiff was to assist defendant no.1 society in obtaining the conveyance from the owner. Plaintiff did not obtain any conveyance. The letters of intent provide that plaintiff to assist in procuring conveyance from the owner of the land in favour of society and update the Property Register Card in the name of the society and plaintiff will not raise any requisition or objection on the title of the society to the said land and building on that count. Plaintiff was not able to fulfill the said obligation. Even in the revised letter of intent, the said obligation continued to remain. The deemed conveyance application also ultimately was not permitted in law and defendant no.1 society was only granted an assignment. Therefore,

prima facie, the plaintiff has not performed its obligation. Defendant no.1, after terminating letter of intent also forwarded to plaintiff a cheque for Rs.10 lacs, which was the amount, that plaintiff had deposited with defendant no.1, as interest free security deposit. Plaintiff has neither returned the cheque nor encashed the same.

29           In these circumstances, plaintiff being entitled to seek specific performance, is impossible.

30           In affidavit in reply of defendant no.1, it is also stated that the members of defendant no.1 society essentially comprised of retired people, widows and senior citizens. The building is not in a good condition, and simply maintaining the status-quo would not be in the interest of the lives of occupants of the building. It is also stated that there is no lift in the building and it is difficult for the senior citizens to freely move in and out of their premises. In the rejoinder, this has not been denied.

31           In view of the above, notice of motion stands dismissed.

32           Mr. Kadam seeks stay of this order. For the reasons mentioned above and paragraph 31 in particular, I have refused stay. Plaintiff enjoyed an injunction for almost 2 years in such a hopeless matter. In my view,

greater prejudice will be caused to defendants than plaintiff, if stay of this order is granted to plaintiff.

33           Costs to be costs in the Suit.

**(K.R. SHRIRAM, J.)**