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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

NOTICE OF MOTION NO. **410** OF **2016**
IN
SUIT NO. 149 OF 2014
WITH
SUIT NO. 149 OF 2014

Siddhesh Builders & Developers & Anr. ...Applicants/Plaintiffs
vs
Atmaram Raghunath Kulkarni & Ors. ...Defendants

.....

Mr Pradeep Thorat for the Applicants/Plaintiff
Mr J D'silva for Defendant Nos.1 to 5.

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Digitally signed by Dhanappa I. Koshti Date: 2019.07.16 12:51:19 +0530 Dhanappa I. Koshti

CORAM : B. P. COLABAWALLA, J.
JULY 12, 2019.

P.C. :

This Notice of Motion has been filed seeking an order of injunction restraining the defendants from in any manner transferring the suit property, namely, the plot of land bearing F.P. No. 295 of TPS IV, C.S. No. 1508, Lower Parel Division, admeasuring 244.15 sq. meters situated at Portuguese Church Street, Dadar, Mumbai along with the building constructed thereon consisting of ground + 2 upper floors. When this Notice of Motion had been placed for ad-interim reliefs, this Court by its order dated 6th August, 2013 had directed defendant Nos.1 and 2 to deposit an amount of Rs.40 Lacs, and which was admittedly received by them, with the Prothonotary and Senior Master of this Court within a period of three weeks from the said date. It is not in dispute that this amount of Rs.40 Lacs has been deposited in this Court. At the ad-interim stage no other relief was granted in favour of the plaintiffs. This Notice of Motion has now come up for hearing and final disposal before me.

2 The reliefs sought in the above suit are for a declaration that the agreement dated 7th April, 2011 (a Development Agreement) entered into between the plaintiffs and the defendants for development rights of the suit property, is valid, subsisting and binding upon the parties and for a declaration that the defendants be ordered and decreed to specifically perform the said agreement. The alternative prayer sought is that the defendants be ordered and decreed to refund the moneys that have been paid by the plaintiffs to the defendants. I must mention here that according to the defendants, they have received only a sum of Rs.40 Lakhs from the plaintiffs whereas according to the plaintiffs, they have paid a sum of Rs.1.15 Crores to the defendants. It is the case of the plaintiffs that the sum of Rs.40 Lacs was paid by different cheques and the sum of Rs.75 Lacs was paid in cash. The cash component is vehemently disputed by the defendants not only in their affidavit-in-reply but also in their Written Statement.

3 Mr Thorat, the learned advocate appearing on behalf of the plaintiffs submitted that the agreement dated 7th April, 2011 is a Development Agreement that has been entered into between the plaintiffs on the one hand and the defendants on the other. Under this agreement, the plaintiffs for the consideration mentioned therein, were to develop the suit property. Under this agreement, the consideration payable to the defendants was a sum of Rs.2.05 Crores and in addition thereto, the plaintiffs were to handover two residential flats on ownership basis and free of cost in the newly developed building (on the 6th and 7th floor) each admeasuring 900 square feet (carpet area) with the latest and standard amenities. What was the carpet area has also been clearly mentioned in the Development Agreement.

4 Mr Thorat, submitted that clause 10 of the Development Agreement contemplates that upon the building plans being sanctioned and the Intimation of Disapproval (for short "IOD") and Commencement Certificate (for short "CC") being received by the plaintiffs, the defendants shall put the plaintiffs in possession of the suit property for its development. If within six months of the execution of this agreement, the plaintiffs were not able to obtain the approved building plans, IOD and CC, the defendants were entitled to

terminate this agreement and forfeit 15% of the sum received on the execution of the said agreement towards damages. Mr Thorat pointed out that even though this clause mentions a period of six months, the IOD and CC could not be obtained by the plaintiffs from the BMC, not for any fault of the plaintiffs, but because one of the tenants residing in the suit property, refused to give his consent for the said development. According to Mr Thorat the said tenant refused to give consent as he was in collusion with the defendants who wanted to somehow wriggle out of their obligations and terminate the said Development Agreement dated 7th April, 2011. Mr Thorat submitted that the plaintiffs have an excellent case on merits, and therefore, to ensure that the suit is not rendered infructuous, an injunction restraining the defendants from creating any third party rights in respect of the suit property, is absolutely just and necessary. He, therefore, submitted that the above Notice of Motion be allowed in terms of prayer clause (a) thereof.

5 On the other hand, Mr D'silva, the learned advocate appearing on behalf of the defendants submitted that this Development Agreement has been correctly terminated by the defendants vide their letter dated 18th March, 2013. He submitted that this was necessitated in view of the fact that despite entering

into the Development Agreement as far back as on 7th April, 2011, for almost 20 months, nothing progressed in relation to the same. The plaintiffs were unable to obtain the IOD and CC from the BMC for development of the suit property and it is in these circumstances that the defendants were constrained to terminate the Development Agreement. Mr D'silva submitted that looking to the conduct of the plaintiffs it was clear that they were not ready and willing to perform the Development Agreement as per its terms, and therefore, are not entitled to any decree of specific performance. If this be the case, Mr D'silva submitted that there was no question of granting any interim injunction in the present matter.

6 I have heard the learned counsel for parties at some length and have perused the papers and proceedings in the present Notice of Motion as well as the Suit. It is not in dispute that clause 10 of the Development Agreement clearly puts the onus on the plaintiffs to obtain the IOD and CC within a period of six months from the execution of the agreement. This clause clearly provides that if the plaintiffs are unable to obtain the approval of the BMC within the aforesaid period, then the defendants shall be entitled to terminate this agreement and forfeit the amount as mentioned therein. It is not in dispute that even till date, no IOD and CC has been obtained by the

plaintiffs for the development of the suit property. In fact, it has been brought to my notice that the defendants, after terminating this Development Agreement, have entered into a fresh Memorandum of Understanding with Shri Gupte Buildarch for the redevelopment of the suit property. Looking to the conduct of the plaintiffs and considering that they have admittedly not obtained the IOD and CC for a period of over 20 months (i.e. till the date of termination of the development agreement) and even till date, I find considerable force in the arguments canvassed by Mr D'silva. Apart from forwarding the plans to the BMC for their sanction on 26th April, 2011, no other follow up has been brought to my notice that was taken by the plaintiffs. Even the tenant who was occupying one of the tenements on the ground floor of the building situated on the suit property, also called upon the plaintiffs to share with the tenant all the necessary details of the redevelopment project including -

(1) the plans of the entire project;
(2) Floor plan of the building proposed to be constructed;
(3) area which would be made available to the tenant in the project;
(4) The interim temporary alternate accommodation that would be provided to the tenant and his family;
(5) The corpus that would be provided to the tenant etc.

Once this information was furnished, the tenant would be in a position to review or approve the draft of the permanent alternate accommodation agreement, and which accommodation was to be provided by the plaintiffs to the said tenant. It is important to note that all this information was called for by the tenant as far back as on 4th April, 2012. Despite this, no action whatsoever was taken by the plaintiffs in relation to the same. In fact not even a letter has been addressed to the tenant disputing the tenant's right to inspect the aforesaid documents.

7 Looking at the conduct of the plaintiffs, *prima facie,* I am not convinced that the plaintiffs are entitled to any reliefs as claimed in the Notice of Motion. This is more so, considering that at the ad-interim stage this Court has adequately secured the amount paid (cheque payments) by the plaintiffs to the defendants and which have been deposited in this Court. This being the position, I find that no further reliefs can be granted, other than what was ordered at the ad-interim stage. The Notice of Motion is accordingly disposed of. However, there shall be no order as to costs.

8 Considering that the present suit was lodged in 2013 and the pleadings are complete, place the suit on board for '**framing of issues**' on 2nd August, 2019.

(B.P.COLABAWALLA, J.)