IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

NOTICE OF MOTION NO. 1423 OF 2013
IN
SUIT NO. 632 OF 2013

Shyamsunder Radheshyam ..Plaintiff/s

v/s.

Navkar Estate & Ors. ..Defendant/s

Mr. Sandesh Patil I/b. Pavan S. Patil for the Plaintiff/s
Mr. Shreepad Murthy a/w. Abhishek Patil I/b. Anand Nikhal for the Defendant No. 7.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 22nd APRIL, 2019.

P.C.

1. This Notice of Motion is taken out by the Plaintiff herein seeking to restrain the defendants from selling, alienating, encumbering, developing, transferring, and or submitting any plans for development to the authorities in respect of the suit property, more particularly described in Exhibit A to the plaint.

2. Heard Shri Patil, the learned Counsel for the Plaintiff and Shri Murthy, the learned Counsel for the Defendant No.7. I have perused the records and considered the submissions advanced by the

learned Counsel for the respective parties.

3. The case of the Plaintiff is that by an agreement dated 5th May, 2010 the Defendants no.1 through its partners, Defendant nos.2 to 6 herein assigned to him Development rights in respect of the suit property and conferred exclusive rights to sell the premises/flats in proposed "C" Wing of the Building of the Defendant No.7 Society.

4. Undisputedly, a partnership firm namely M/s. Raut Dadarkar and Associates were the owners of the property admeasuring 3000 sq. meters situated at CTS No.22B of Village Shimpoli. The said property shall be hereinafter referred to as the "larger property". M/s. Raut Dadarkar & Associates constructed two buildings in the said larger property. The first being Mugdha Co-operative Housing Society Ltd, consisting of Ground + 4 floors and the second being Shiv Sai Co-op. Housing Society Ltd., consisting of Ground + 5 Floors. The partnership firm M/s. Raut Dadarkar & Associates was dissolved on 4th May, 1995 and one of its partners, Ms. Sujata R. Raut became the sole and absolute owner of the said larger property along with the buildings standing thereon i.e. Mugdha Co-op. Hsg. Society and Gopinath Terrace, now known as Shiv Sai Co.op. Hsg.

Soc. Ltd., (Defendant No.7 herein).

5. Sujata Raut entered into a Development Agreement dated 11th March 2003 with Mukesh Shah. The said Agreement states that Sujata Raut had partly developed the said property by constructing two buildings viz. Gopinath Terrace and Mughda Apt. and that portion of the property was available for development. The aggregate FSI available for development of the said property was about 13200 sq. ft. By the said Agreement dated 11th March, 2003 Sujata Raut, granted in favour of Mukesh Shah Development right to develop the balance area i.e. "C" Wing of the Building Gopinath Terrace with aggregate FSI of 13200 sq. feet. Under the said Agreement, Sujata Raut conferred powers on Mukesh Shah to dispose of in his own name on ownership basis the tenements, flats, stilt, car parking spaces etc to be constructed in the said building to the person of his choice. The agreement further empowered and authorized the Developer Mukesh Shah to sell FSI admeasuring 13200 sq. ft., or the flat/tenements/ stilt car parking spaces etc on ownership basis in the open market, and that the owner Sujata would have no share right or claim in the consideration to be received by the Developer. The agreement states that the Developer Mukesh

Shah had paid full consideration to the owner Sujata Raut, except Rs.45 Lakhs, which was to be paid in the manner specified in clause 23 of the agreement.

6. It is not in dispute that said Mukesh Shah and Defendant Nos. 1 to 6 entered into a Development Agreement dated 31st December, 2004. By this agreement, the Defendant Nos.1 to 6 agreed to acquire the Development rights to the extent of 10200 sq. ft. area or any additional area which is a balance FSI available to be consumed on the said property. By the said agreement, Defendant nos.1 to 6 agreed to acquire from said Mukesh Shah the Development rights of 10200 sq. ft area or any additional area for total consideration of Rs.50 lakhs as per the details specified in clause (3) of the Agreement, subject to the Vendor Mukesh Shah complying with the obligations spelt out at Clause 2(a) to (h) of the Agreement. Upon payment of the entire consideration, Defendant Nos.1 to 6 were entitled to proper conveyance in their favour or the Co-operative Society of the flat purchasers in the proposed building to be constructed on the larger property.

7. The defendant nos. 1 to 6 have purportedly agreed to sell these

development rights to the plaintiff. The Agreement dated 5th May, 2010, however records that Defendant Nos.1 to 6 are absolutely seized and possessed and are sufficiently entitled to the land bearing CTS No.22-13 admeasuring 13500 sq. ft. situated at village Borivali, and that they are entitled to hold and possess undivided right, title and interest and share in the said property. In terms of the Agreement, the Plaintiff was required to pay to the Defendant No.1 to 6 a total consideration of Rs.2,07,00,000/- as per the terms of the payment stipulated in the Agreement. Clause (3) of the said Agreement indicates that out of the total consideration, the Plaintiff was required to pay to the Defendant Nos.1 to 6 a sum of Rs.1,07,00,000/- upon obtaining consent of the Defendant No.7 society within 60 days from the date of execution of the Memorandum of Understanding. The Defendant Nos.1 to 6 had agreed and undertaken to settle the claim of all the members of the society at their own cost and expenses. The Defendant Nos.1 to 6 had agreed and undertaken to obtain signatures of all the co-owners on the agreement and the other documents to be executed in favour of the Plaintiff. The agreement stipulates that in the event the Defendant Nos.1 to 6 were unable to obtain consent of the Defendant No.7 within 45 days from the date of execution of the Memorandum of Understanding, the Plaintiff herein would be entitled to cancel the Agreement and the Defendant Nos.1 to 6 would be liable to refund the amount.

8. The records thus indicate that by Agreement dated 31st December, 2004, Defendant Nos.1 to 6 were purportedly authorized to consume balance FSI of 13200 sq.ft. by constructing "C" Wing of Defendant No.7 Society, whereas by Agreement dated 5th May, 2010 the Defendant Nos.1 to 6, have agreed to transfer in favour of the Plaintiff part and parcel of the land admeasuring 13500 sq.ft. of CTS No.22 of 13. Defendant Nos.1 to 6 are not the owners of the property admeasuring 13500 sq. ft of the larger property and consequently, they are not competent to transfer the said area in favour of the Plaintiff.

9. It is not in dispute that the flat owners of A and B Wings have formed the Defendant No.7 Society. The Defendant No.7 society claims that it along with Mugdha Co-op. Hsg. Soc. are jointly entitled to conveyance of the land of 3000 sq. mtrs, which forms part of CTS 22 (B) in accordance with the layout and plan initially sanctioned by the MCGM. The said society has already filed a suit

against the Defendants being Suit No.858 of 2006 seeking various reliefs including the relief of execution of conveyance in their favour. The Defendants have stated that by an interim order passed in the said suit the Defendants nos 1 to 6 have been restrained from putting up further construction. The Defendants Nos. 1 to 6 have entered into an agreement with the Plaintiff during the pendency of the said suit. Apparently, it is for this reason that the Agreement dated 5th May, 2010 stipulates that the conveyance was to be executed in favour of the Plaintiff upon obtaining consent of the Members of the Defendant No.7 society. There is no prima facie material on record to indicate that the defendants have obtained consent of the members of the Defendant No.7 society and/ or they have complied with the other terms and conditions of the Agreement.

10. Furthermore, the Defendant No.7 has stated that the sanction granted by MCGM for constructing "C" Wing is illegal and fraudulent and that this Court has granted injunction against such construction. In the light of the above facts and circumstances, prima facie the Plaintiff is not entitled to utilize any FSI or any other benefit under the Agreement to which the Defendant No.7 is not a party. Under the circumstances, the Plaintiff has failed to prove the pre-requisites

essential for grant of interim relief. Hence, the Notice of Motion is dismissed.

(ANUJA PRABHUDESSAI, J.)