Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2358 OF 2018

IN

SUIT NO. 1390 OF 2011

Rajesh S Sharma	...Applicant/ Org Defendant No.2
In the matter between	
Dinaz Avasia	...Plaintiff
Versus	
Aspy Captain & Ors	...Defendants
And	
The Court Receiver, High Court, Bombay & Ors	...Respondents

WITH

NOTICE OF MOTION NO. 707 OF 2018

IN

SUIT NO. 1390 OF 2011

Padmavati Megacorp	...Applicant/ Org Defendant No.3
In the matter between	
Dinaz Avasia	...Plaintiff
Versus	
Aspy Captain & Ors	...Defendants

None *for the Plaintiff.*
Mr P Ranjan, *i/b M/s Halai & Co, for Defendant No.1.*
Mr Deepak Shukla, *i/b Vinod Mistry & Co, for Defendant No.3/ Applicant in NMS/707/18.*

Mr Sanjay Jain, *with Kunal Bhange & Tejashree Parab, i/b TR Parab, for Defendant No.2/Applicant in NMS/2358/18.*
Mrs Kavita Ambekar, *1st Assistant to Court Receiver present.*

CORAM: G.S. PATEL, J
DATED: 14th March 2019

PC:-

1. This order will dispose of Notice of Motion No. 707 of 2018 filed by the 3rd Defendant, Padmavati Megacorp, a partnership firm, and Notice of Motion No. 2358 of 2018 filed by Rajesh Sharma, the 2nd Defendant.

2. In its Motion Padmavati Megacorp seeks an extension of time of two years or such other time as this Court allows to complete the construction of the building and leave to sell two flats 401 and 402 and seven car parking spaces to raise funds to complete the construction. The second prayer therefore itself admits that Padmavati Megacorp does not have independent funds to complete this work. The prayer also is that on sale of these two flats the funds be placed in a joint escrow account.

3. Sharma's Motion is principally directed against Padmavati Megacorp. Sharma asks that Padmavati Megacorp's receiver agency be terminated, and that the construction be completed by the Court Receiver. To Sharma's Motion there are three other Respondents. The first is the Court Receiver. The 2nd and 3rd are Ishit Jayesh Parekh and Bhavana Jayesh Parekh, apparently partners of Padmavati Megacorp, represented in court today by Jayesh Parekh.

4. I will take the facts for the purposes for following summary from the Affidavit in Support of Sharma's Motion. The Plaintiff, Dinaz, and the 1st Defendant, Aspy, are siblings. Dinaz brought suit in 2011 against Aspy claiming a half share in a property at Vile Parle. This is described as plot of land of about 717 sq mtrs in Vile Parle with a building known as 'Roshni Building' standing on it. While the suit was pending, Dinaz executed an agreement of sale of 28th February 2013 in favour of Sharma agreeing to convey her 50% right in this property to him. Sharma was thus impleaded to the suit. On 4th July 2013, the parties entered into Consent Terms. By these, Padmavati Megacorp stood appointed the construction contractor and, in that capacity, an agent of the Court Receiver to construct a new building on the property in accordance with those Consent Terms. There followed a conveyance of 22nd July 2014, duly registered, by which Dinaz conveyed her half share to Sharma.

5. On 17th October 2013, there were modified Consent Terms. Clauses 8 and 13 were changed. Pausing at this stage, I note that Sharma provided initial funding for the construction and invested an amount of Rs.4.5 crores. These two Consent Terms up to this point did not provide for the allotment of specific flats. That happened under a second modification dated 28th February 2017. This is when individual flats were allotted although even earlier the entitlement to flats had been decided in the following fashion. Initially, Padmavati Megacorp was to get three flats. Aspy was to get six flats. Sharma was to get 10 flats. Following the first modification of 17th October 2013, these numbers were changed. Padmavati Megacorp's entitlement went down to two flats. Aspy was then entitled to six flats and Sharma was entitled to 11 flats.

6. The Consent Terms required Padmavati Megacorp to complete construction in 24 months from the issuance of a commencement certificate. That commencement certificate was issued on 13th November 2014 and thus Padmavati Megacorp ought to have completed construction by 13th November 2016. Since it could not do so, Padmavati Megacorp through its partner requested an extension of time and this was led to the second modified Consent Terms of 28th February 2017. Time was extended for another 20 months taking completion to 30th October 2017, with time now being made of the essence.

7. This is important for a proper appreciation of what it is precisely that Padmavati Megacorp seeks in its Motion today. There cannot be any doubt that the construction that was to be completed in November 2016, and for which time was extended by a whole year to end-October 2017, is still nowhere near completion. Padmavati Megacorp's own prayer is for an extension of another two years i.e. another 24 months. As we shall see, it is extremely doubtful, to the point of being virtually impossible, that Padmavati Megacorp will be able to do anything of the kind. Padmavati Megacorp is not a party that acquired initial title to the property at all. It entered the picture in one capacity only, and that was as a contractor. If it has any entitlement to flats it is in that capacity and in that context, and not, as would be the case of both Sharma and Aspy, as co-owners with interest in the land and the building.

8. Sharma's Affidavit in Support of his Motion states that Padmavati Megacorp is grossly delayed. It had more than five years to complete construction. This is a building of only 19 flats spread over 10 floors in addition to car parking and there is a considerable amount of work yet to be done. That there is work pending is not in dispute. There is also no dispute that the completion is going to require a significant infusion of funds. How much exactly is uncertain. The estimates range between Rs 6 and 8 crores. Having regard to conditions in this city, these costs will only go in one direction. There is no possibility of construction being completed or the project being brought to completion ahead of that time.

9. Jayesh was not present in Court yesterday when I briefly heard parties. I therefore stood the matter over to the supplementary board today. This also enabled Mr Shukla for Padmavati Megacorp to take better instructions. Specifically I asked Mr Shukla to take instructions on how Padmavati Megacorp proposed to fund the completion of the building. His statement on instructions is that other than the mechanism in prayer clause (b) i.e. by sale of the two flats, Padmavati Megacorp has no other immediately available resources to do so. There was some talk about finding a purchaser within 90 days, depositing an amount to Court and, in my view, a half-hearted attempt to say that Padmavati Megacorp has other projects "in the vicinity". These generalities will not do. Mr Shukla agrees, as does his client instructing him, that other than selling flats 401 and 402, there is no possibility whatsoever of Padmavati Megacorp completing the construction. That is precisely the nub of the problem. If those flats are sold, Padmavati Megacorp has no incentive to complete the work, and every reason not to, but to divert those funds. Funding the construction independently and then selling the flats would have enabled Padmavati Megacorp to take advantage of market conditions. If those sale proceeds are to be spent in the construction then there is no reason at all to believe that Padmavati Megacorp, given its utterly dismal track record so far, will move effectively towards completing this project. That answers the question of equity, and it answers it against Padmavati Megacorp.

10. Mr Jain for Sharma also points out that this mention of an unnamed and unknown purchaser is the same that was made 2018 at some point between April and July of that year. Several months, and the better part of a year later, we have moved no further. It is the same discussion again. Only the Court Room is different.

11. I can see no reason in equity or on any consideration of balance of convenience to grant Padmavati Megacorp the relief that it seeks.

12. The structure itself is partly complete. The super-structure is ready. For some reason I am unable to understand, the six flats allotted to Aspy have been brought to the level of fit-out readiness. The 11 flats that come to Sharma's share are entirely unready and in no condition to be delivered. How this is happened is unclear since Sharma's allotted flats are both below and above the flats allotted to Aspy. It therefore seems that Padmavati Megacorp has done the work in his building not in any intelligible, phased or structured manner, but has left unfinished the whole of Sharma's in-between allotment, and proceeded only with the completion of the flats that come to Aspy's share, though these are sandwiched between Sharma's flat. There are no lifts provided in the building. Water tanks are to be constructed. There is to be a separate parking structure. The utilities lines for water, sewage down-take and electricity are not yet in place. The building is clearly a distance from completion both in terms of time and money. The only question therefore now is how best to complete the construction and who should be asked to fund it.

13. Mr Jain states that Aspy has entered into agreements for sale for all six of his flats and appears to have realised about Rs.11 crores. Aspy denies having received any considerations. There are complaints filed before the RERA authorities to which Padmavati Megacorp, Aspy and Sharma are parties.

14. Sharma's 11 flats are in no state to be sold and Mr Jain confirms that not a single one has been sold. Equally it is Sharma who has put in the bulk of the investment into the project. Sharma purchased Dinaz's 50% share for about Rs.11 crores plus stamp duty. The property was under a mortgage to a bank. Sharma cleared that mortgage by paying an amount of Rs.3.5 crores. This released the charge on the property. The direct beneficiaries of this release were of course the two original co-owners Dinaz and Aspy. In addition, and as required by the Consent Terms, Sharma funded the construction to the extent of Rs.4.5 crores as agreed in the first set of Consent Terms in 2013. Totalling all this means that Sharma has invested roughly Rs.20 crores in the venture but is yet to realise anything from it. I do not see how he can be further prejudiced by considering Padmavati Megacorp's Motion. As Mr Jain says, each day's delay hurts Sharma more than it hurts anybody else involved in this. Dinaz has received a consideration and has exited the frame.

Aspy is said to have received consideration from third party flat purchasers (although he disputes this). In any case, he made no direct financial investment towards the construction. Padmavati Megacorp has undoubtedly made some investment in bringing in the construction up to this stage but it is now not in a position to discharge its obligations under Consent Terms that it signed. Indeed, other than saying Padmavati Megacorp is sincere about completing the building, I am given nothing. As has been famously said, sincerity demands proof.

15. Mr Shukla has instructions to state that the construction so far has cost about Rs.10 crores. In fairness he accepts that of this, Rs.4.5 crores was funded by Sharma. He claims that the remaining Rs.5.5 or 6 crores was funded by Padmavati Megacorp. I have no doubt that some provision will have to be made in this regard but, these are only statements made without supporting documents, and it is not possible to accept a statement like this made across the Bar. While on the one hand Padmavati Megacorp claims to have spent these amounts, what it does not say is that there is a claim of about Rs.19 lakhs allegedly owed to subcontractors and workmen, and an undisputed amount of approximately Rs.80 lakhs in unpaid municipal dues and taxes. At least the statutory dues put the entire project and property at risk.

16. Aspy has not thought it necessary to give instructions as to whether he is sufficiently in funds to contribute to any part of this completion costs.

17. The provisions of the Consent Terms of 4th July 2013 in Clause 24 are material. The parties contemplated a possible default by Padmavati Megacorp, and they agreed that if it defaulted in this construction, it would have no claim for the area equivalent costs of the remaining construction not completed by it, and the area would be calculated as per the market rate. Padmavati Megacorp would not make any claim and would not be able to sell any part of the area if the occupation certificate was not received. However this may have been worded the effect is clear. The three flats initially provided, later reduced to two, were to come to Padmavati Megacorp;s entitlement conditionally upon it completing the sale. On its default, it would lose its entitlement to this fractional allotment. There is no other way of looking at it and there is no dispute about this either.

18. The suggestion from Mr Jain for Sharma, the only person who seems to have the wherewithal to proceed, is that if he is permitted to take over flats 401 and 402 and the seven car parking spaces as part of his share, thus making his total allotment one of 13 flats (and corresponding car parking spaces), then he will fund the completion of the building and also address the question of property tax dues. Mr Jain does not accept liability to any unpaid contractor. Any such claim can only be to Padmavati Megacorp's account. That is correct and is accepted. Padmavati Megacorp incurred the liability, and it is to Padmavati's Megacorp's account alone, if any such liability is proved. The property tax dues, however, on a proper computation and a resolution with the municipal authorities will be taken over by Sharma. The reason is plain. The property tax and municipal dues claim attach to the property and the construction.

The contractor's claim cannot and does not attach to the property in specie. It is a claim against Padmavati Megacorp.

19. The result of this is that Padmawati Megacorp's Motion will stand dismissed with no order as to costs.

20. Aspy claims that he has some stake of 15% in flats 401 and 402 and the seven car parking spaces. It is unclear where he gets this percentage from. But Aspy cannot have it both ways. The flats allotted to Padmawati Megacorp were from Aspy's share so that he would not have to contribute in cash to the cost of construction. Aspy still does not want to contribute to the cost of construction or, at any rate, has failed to instruct his Advocates in a timely manner about that. It simply cannot be that Aspy does not contribute anything at all to the cost of construction yet retains a right to claim the sale value of the flats which have been adjusted precisely against that cost of construction. It is yet open to Aspy to arrive at any sort of understanding separately with Sharma as to a contribution to the cost of construction between the two of them or to the division of these two flats 401 and 402 but Sharma is not bound to accept any suggestion or offer that Aspy may have to make in this regard. The one thing that is, after all, clear is that there is absolutely no financial contribution yet forthcoming from Aspy and, from the date of the first Consent Terms there never has been.

21. Accordingly, on Sharma's Notice of Motion 2358 of 2013 there will be an order in terms of prayer clauses (a) and (b).

22. Further, as regards the costs of completion of the construction, the foregoing statements made on instructions by Sharma, who is present in Court and conveyed through Mr Jain, are accepted as understandings to the Court including the commitment to fund the completion of the construction in all respects and to pay the property tax dues. I am clarifying yet again that there is no commitment by Sharma to pay any amount to any alleged contractor and that any such contractor cannot claim any rights in the building, either to any part of it, or to claim an injunction on completion. Padmavati Megacorp, and it alone, will deal with any such claim appropriately as and when and if it is made.

23. As between Aspy and Sharma, it is as yet open to them at any time before the project is completed to arrive at mutually acceptable terms in regard to the two flats and seven car parking spaces and shared costs of construction.

24. Neither the Court Receiver nor Sharma are required to continue the appointments of any architects, contractors or consultants appointed by Padmawati Megacorp. It will be open for them to do so or to engage any other architects as they deem fit. Any claims by these consultants will be only against Padmawati Megacorp and not against the Receiver, Sharma or Aspy.

25. In clarification of prayer clause (a), on the termination of the agency of Padmawati Megacorp, Sharma, Defendant No. 2 is appointed as an agent of the Receiver and will execute the necessary agency agreement within a period of three weeks from today.

26. The Motions are disposed of in these terms. There will be no order as to costs.

(G. S. PATEL, J)