

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2738 OF 2019**

V.R. Babu and ors	.. Petitioners
Versus	
Doraiswamy Gurumurthy and ors	.. Respondents

WITH

INTERIM APPLICATION NO. 3432 OF 2019
IN
WRIT PETITION NO. 2738 OF 2019

Doraiswamy Gurumurthy	.. Petitioner
Versus	
Mr.V.R.Babu and ors	.. Respondents
...	

Mr. Shriniwas Patwardhan with Rupesh Sohani, Bhakti Patwardhan i/b Subhash Pradhan & Co. for the petitioners.
Mr.Pradeep Rajgopal with Drushti Shah i/b Deepak Jamsandekar for respondent nos.1 and 2.Mr.

**CORAM: BHARATI DANGRE, J.
DATED : 23rd NOVEMBER, 2021**

P.C:-

1 The Petition is filed by the judgment debtor who has been pushed against a dead wall in the wake of the order issued by the Addl. Sessions Judge, City Civil and Sessions Court,

Corrected as per Speaking to the Minutes order dated 10/12/2021

Gr.Mumbai on 1st December 2018 in an Execution Application No.460 of 2015.

The decree holder filed the proceedings for execution of decree passed in Civil Suit No.2707 of 2001 before this Court on 10th December 2014. For enabling him to execute the decree, the decree holder sought issuance of attachment warrant against the judgment debtor in respect of the properties mentioned in the Schedule.

This takes me to the core of the dispute between the parties which was put to rest by consent terms drawn in the Suit filed for specific performance. I need not delve deep into the initial discord between the parties, but suffice it to say that the consent terms were drawn between the plaintiffs and defendant nos.1, 2, 4 to 8 and 19. Pertinent to note that defendant no.5 is the present petitioner Kartika Housing Development Co, the developer. Since there is no disagreement amongst the parties on the consent terms executed between themselves, with an exception to clause no.20, which provided for consequences to abide the arrangement between the parties, contained in form of clause no.8.

2 Briefly read, clause no.8 of the consent terms recorded as under :-

“(8) Agreed and declared that the Defendant No. 5 shall ensure that the occupants. Buildings Nos. 5B also

known as F2 and 1C also known as G3 including shops in these two buildings and the occupants of the new building/buildings which will be constructed on the suit land hereafter (i) will have separate entrance and exit to their respective buildings and shops from the public road so that they do not enter the said Portion of the Suit Land and (ii) will not have any right, title, interest or claim whatsoever in the additional F.S.I. of more than 1.00 in respect of the said Portion of the Suit Land. Further agreed and declared that the Defendant No.5 or their nominee or nominees with due approval from the Municipal Corporation will construct a compound wall separating the said Portion of the Suit Land from the said Building Nos.5B (F2) and 1C (G3) including the Shops in these buildings and the new building or buildings to be constructed on the other part of the suit land as shown surrounded by purple colour on the plan of the suit land hereto annexed and marked Annexure "1" within 6 months from the date of the receipt of the Occupation Certificate of the Municipal Corporation of Greater Mumbai in respect of the entire of the said new building/buildings and after full development of the suit land is complete in all respects. Further agreed and declared that the members of the Plaintiff No.2 shall also not hereafter enter any part or portion of the suit land other than the said Portion of the Suit land."

3 For the purpose of securing the undertaking contained in clause (8) of the Consent terms, in clause (20), the defendant and/or his nominee agreed as under and the agreement *in verbatim* is reproduced as under :-

“For securing the construction of the Defendant No.5 and/or their nominee or nominees will create a charge over the flats having aggregate saleable area of 8750 Sq.ft. on the first floor of the new building or buildings to be constructed on the suit land in favour of the Plaintiff No.2 and that the Defendant No.5 and/or their nominee or nominees shall not sell such flats over which charge is created or any of them or part with possession thereof or deal in any manner with the same or any of them during the period when the said Flats are subject to the charge as aforesaid. It is specifically agreed and declared that the charge on the aforesaid area of 8750 Sq.ft. will be proportionately created on each and every buildings/wings to be constructed on the suit land. The Defendant No.5 will issue the Letters. of Allotment in respect of the flats covering the said. aggregate saleable area of 8750 Sq.ft. proposed to be kept aside by way of security in favour of the society within 15 days of approval of the plans by B.M.C. Further agreed and declared that upon completion of the construction of the aforesaid compound wall, the flats having the said aggregate saleable area of 8750 Sq. feet shall be released and. discharged absolutely from the charge to be created as stated in this clause and the said Letters of Allotment in respect thereof shall stand cancelled and rescinded and be of no effect and the Defendant No.5 and/or their nominee or nominees shall be free to sell such flats or deal in any manner with the same. If however the Defendant No.5 and/or their nominee or nominees fail to construct the compound wall as agreed hereinabove the flats having the said aggregate saleable area of 8750 sq.feet shall belong/vest absolutely with the Society.”

4 The decree holder did not pose any difficulty in executing the remaining terms and conditions which were converted into decree but for the issue of construction of the compound wall separating the portion of the suit land from the said building 5-B (F2 & 1C (G-3) including the shops in this building and the new buildings or the building to be constructed on other part of the suit land.

5 Opposing the Execution Application and the impugned order, the submission of the learned counsel Mr.Patwardhan is to the effect that the recital in clause no.8 was in form of a contingent contract, dependent upon a contingency, being the Municipal Corporation according its approval, the construction of compound wall as stipulated with clause no.8. His submission is to the effect that since it was a contingency, till its happening, security was ensured in clause 20 by creating charge over the saleable area of 8750 sq.ft on the first floor of the new building or the buildings to be constructed on the suit land in favour of plaintiff no.2. The agreement between the parties was to the effect that if defendant no.5 failed to construct the compound wall, the flats having aggregate saleable area of 8750 sq.ft shall vest absolutely in the Society, cannot be given effect to, unless and until the contingency stipulated in clause 8 occur.

 According to Mr.Patwardhan, though his client made a serious attempt to obtain permission for construction of the

wall, it was declined by the Corporation on the ground that the DCR do not permit its construction. According to Mr. Patwardhan, the attempts made on his part to obtain permission for erection of the wall yielded no positive results and he has reached a dead end.

Upon such a submission being made, learned counsel Mr. Rajgopal for the respondent/decree holder is justified in submitting that the defendant no.5 was aware of the consequences and still he has agreed to the terms as contained in clause 8 and 20 of the consent terms and he has bound himself by the same and merely on the specious ground that the Corporation has refused to grant permission, he cannot walk away from the binding effect of the consent terms. The submission of the learned counsel is to the effect that in any case, if there is no permission for construction of wall, the consequence as provided in clause 20 of the Consent Terms shall follow and this is what the impugned order has indicated.

6 Learned counsel has also submitted before me by placing reliance on the list of dates from which it is clear that the defendant no.5, in fact, parted with the area which was kept by way of security in column no.20 of the Consent Terms and the submission advanced is to the effect that in the compilation of documents, he has included documents in form of agreement of sale in respect of area admeasuring 192 sq.m and 115 sq.m in

favour of the third party and these agreements are dated 27th July 2015 and 10th March 2015 respectively. The submission advanced is when an application for execution was filed on 20.8.2016, agreement to sale was entered into by the defendant no.5 with third parties and as such, the entire portion which was directed to be kept aside by way of security for the act of construction of compound wall was already disposed of.

7 Pertinent to note that these facts were not placed before the Executing Court when it passed the impugned order and the Executing Court proceed on a premise that the properties mentioned in the schedule of properties are still available for attachment and since they were assured to be given in security for construction of wall on failure of the defendant no.5 to construct the compound wall, the decree can be executed by directing its attachment.

8 Pertinent to note that on 30th April 2019, this Court has passed the following order :-

“2. Mr.Patwardhan, learned counsel for the Petitioners state that the Petitioners are the owners and in possession of the premises which have been ordered to be attached by the impugned attachment warrant. He states that until the next date the Petitioners will maintain status quo and neither part with possession of said premises nor create any third party rights therein. By accepting this statement, warrant of attachment is hereby stayed till the next date”.

The said order continue to remain in force as on today.

9 It is true that the Executing Court cannot go beyond the decree. However, the decree will have to be carefully read and in this present case, it is in form of consent terms which contemplate the construction of compound in encircling the premises of the plaintiff by defendant no.5 and segregating it from the newly constructed building or the proposed constructed building. The construction of the building was over in 2006 and the buildings, as on date, are occupied including the new buildings have also been constructed. The submission of Mr.Patwardhan that all attempts were made to obtain the permission, is half truth. My attention is invited to a communication addressed to the Architect of the defendant no.5 where the Assistant Engineer has rejected the proposal dated 18th November 2010 on the ground that it is not in conformity with the D.C. Regulations, 1991. However, another letter dated 16th May 2011 addressed by the Assistant Engineer (Building Proposal) "M" addressed to the Architects of the defendant, however, project a different picture. The said communication read as under:-

“In this regard, your Architect Smt.Kusum Kalgutkar for Kalgutkar & Associates were informed by this office letter under No. Dy. CE/3667/BPES/Misc/M/E dated 14.12.2010 stating that the referred proposal is rejected, as the proposal is not in conformity with DCR 1991, as

the earlier buildings having different wings were approved touching to each other.

Moreover, if you desire to construct compound wall, you are requested to submit fresh proposal by keeping F.S.I of each building with respect to the plot area and required open spaces for individual building within 14 days, failing to which the referred proposal will be recorded without further correspondence which please note”.

10 Admittedly, no fresh proposal has been forwarded by the defendant no.5 to the Corporation in terms of this letter and on the contrary, the learned counsel Mr.Patwardhan placed reliance upon a communication in form of a message from Architect where he has expressed inability to process or present such a proposal by segregating the FSI of each building and open spaces, by reasoning that the buildings are already constructed as per plans approved by MCGM and have different wings touching to each other and further, FSI of each wing/building is different and govern the permissible FSI of the plot and the open spaces as provided by the D.C. Regulations.

11 It is thus apparent that no attempt was made by defendant no.5 to submit a fresh proposal as directed by the Corporation and since the Consent Terms primarily focused on construction of a compound wall as undertaken in clause 8 of the consent terms, clause 20 being merely the consequence of not abiding by it, the area to be carved out by way of security to

compel the defendant no.5 to carry out the construction. However, defendant no.5 has not exhausted all his remedies with the corporation, since a fresh proposal as directed by the Corporation is not processed, it is pre-mature to say that the area which is reserved by way of security is permissible for attachment.

In any case, the Corporation may offer any solution in the wake of the change in the D.C. Rules if any, or by any mode which is permissible so that the wall can be constructed. It is only when the Corporation would decline construction of a wall and not in a perfunctory manner in which it has done by merely saying that it reject the proposal since it is not permissible as D.C.Regulations, but immediately, thereafter, offered a new proposal, of submitting a fresh proposal by calculating the respective FSI of the distinct plots along with the open spaces. In my considered opinion, the decree can be still executed in the manner in which the parties intended it to be drawn.

The learned Judge has failed to take into consideration the two hurdles in execution of the decree as indicated above and has passed the impugned order, which in my considered opinion calls for inference.

It is however, made clear that the decree holders cannot be made to wait indefinitely and if the defendant do not obtain the necessary permission or the rejection of their proposal, in terms of the letter of the Corporation within a reasonable period of time, which can be approximated to be 3 months. The

decree holder will be at liberty to revive their application for attachment of the property and the learned Judge after referring to the subsequent events which have been highlighted in the present order would be at liberty to pass an appropriate order.

12 With the aforesaid direction, the Writ Petition is partly allowed by quashing and setting aside the impugned order subject to the compliance as directed above by defendant no.5 within a period of three months from today.

SMT. BHARATI DANGRE, J