

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 2382 OF 2021
IN
WRIT PETITION NO. 4255 OF 2011

M/s.Arun Bhoomi Corporation & Ors .. Applicants

In the matter between :

Jairaj Devidas and ors .. Petitioners

Versus

Hirabhai Shinwar Jadhav & ors .. Respondents

...

Mr. Navroz H. Seervai, Sr. Counsel with M.Shrinivas Bobde, Ms.Lizum Wangdu i/b Sandeep Maurya and Ms.Kavita Vishwakarma for the applicants in IA 2382/21 and for the respondent nos.1, 2 and 4a in CP No.186 of 2020.

Mr.Ashutosh Gole for the petitioner in CP 186/20 and for respondent no.3 to 20 in WP 4255/2011.

CORAM: BHARATI DANGRE, J.

DATED : 7th DECEMBER 2021

P.C:-

1 Interim Application is filed in Writ Petition no.4255 of 2011 which was dismissed under an order of this Court on 11th November 2020. A direction in form of a positive mandate coupled with an injunction restrain order, as contained in para 17 of the judgment of a learned Single Judge (Justice R.M.Savant as he was then) is the cause and reason for the interim application as

Tilak

well as the Contempt Petition which is listed along with the Interim Application. The applicants in the interim applications are respondent nos.21 and 22 in the Writ Petition, who have brought this application seeking its variance/modification, whereas the Contempt Petitioners are the original petitioners who had instituted the Writ Petition No.4255 of 2011.

2 Since the Interim Application was directed to be heard along with Contempt Petition, as both the proceedings emanate from an observation made in the Writ Petition, I have permitted the respective counsel to advance their submissions in support of their respective pleas.

3 If the events in the background are to be narrated in seriatim, it would be tedious and prolong exercise, and therefore, shorn of unnecessary details, it is sufficient to note that the contest is between the petitioners in Writ Petition No.4255 of 2011, on one hand who claim to be the owners of suit property situated at Mira, Taluka and District Thane from their predecessor in title one Kalyanji Lalji and on his demise, they claim to have acquired the ownership rights in respect of the suit property on obtaining the probate in respect of his last Will and testament and on the other hand, the respondent nos.1 to 20 assert their rights, in the suit property from one Somvarya Kolya Jadhav, who claimed to be a tenant in the suit property. Rounds of litigation between the two resulted in frequent alteration in the

mutation entries on various orders being passed by the Revenue authorities time and again. I need not go into these niceties, but it would be apposite to mention that the respondents claiming through Somvarya Jadhav had obtained a 32M Certificate under Bombay Tenancy and Agricultural Lands Act, (for short 'BTAL Act'), and based on the mutation entries claimed to be in possession of the property. The petitioner allege that the respondent nos. 1 to 20 along with the respondent nos.21 to 24, initiated construction work on the suit property, in November 2010, which constrained the petitioners to institute a Suit in February 2010 along with an application for injunction for restraining the respondents in interfering with the suit property. The Suit came to be numbered as Regular Civil Suit No.144 of 2010, wherein the plaintiffs sought a declaration as owners of the suit property and prayed that the defendants be directed to hand over vacant possession of the suit property by removing the piling work undertaken by the respondents, and an order of permanent prohibitory injunction was also sought, prohibiting the respondents from carrying out the work of construction or creating any third party interest in the proposed construction over the suit property, against defendant nos.1 to 24.

4 On 31st July 2010, an injunction was granted in favour of the plaintiff, which was assailed by respondents in Misc. Civil Appeal No.142 of 2010 filed before the District Court at

Thane and it is in these proceedings, the District Judge, on 9th March 2011, vacated the interim injunction in favour of the plaintiffs which prompted them to institute a Writ Petition in this Court, which came to be dismissed by the Judgment/order dated 11/11/2010.

5 The Writ Petition was heard on 11th November 2011 and the learned Single Judge after referring to a multiple round of litigations between the parties at the level of revenue authorities' recorded that in any case, revenue entries do not decide the title of the property as they only carry presumptive value. He was, however, impressed by the fact that the certificate under Section 32M has been issued in favour of the heirs of the protected tenant on 31st October 2002 and the said certificate has not been subjected to challenge by the plaintiffs and it continued to hold the field as on given date. The Appellate Court was, therefore, found justified in ruling in favour of the defendants, based on the said certificate as the order was found to be based on correct application of law and it came to be upheld. As far as the claim of the plaintiff against the defendants for handing over the vacant possession by removing piling work over the suit property was concerned, it was recorded that the plaintiffs were aware of the work being undertaken by the respondent nos.21 and 22, pursuant to an agreement, but they chose to keep mum from 2006 and instituted a Suit only in the year 2010.

6 In the given facts, the impugned order passed by the Appellate Court on 9th March 2011, vacating the order of temporary injunction passed below Exhibit 5 by the First Court was held justified in the background of facts and recording that it did not call for interdiction, in exercise of the writ jurisdiction for the Court under Article 227 of the Constitution.

The Writ Petition was accordingly dismissed.

7 Whilst the Writ Petition was dismissed, the following observation which has become a matter of controversy between the parties has been recorded and para-17 reads thus :

"However, it is made clear that the respondent nos.1 to 22 may proceed to develop the property in question. No further third party rights from today would be created by them. The third party rights already created would be subject to the result of said Regular Civil Suit No.144 of 2010".

More than a decade, from passing of the said order, I am being informed that the said Suit is still pending.

8 The defendant nos.21 and 22, in Suit No. 144 of 2010, by invoking the provision of Order 39 Rule 4 of the CPC, has taken out interim application in the disposed off Writ Petition, being I.A No.2382 of 2021 seeking modification of the order in form of grant of temporary injunction to be operating till the culmination of Suit, while dismissing the Writ Petition filed by the opponents.

The cause for taking out the application, as can be apparently ascertained from the reading of Application seem to be the applicants are the developers, who are developing the property and by operative para-17 of the order dated 11/11/2011, the applicants are restrained from creating third party interest in the property, and it continuation has put them into arduous and fiendishly difficulty, since down the line ten years, the Suit is still pending and as a developer, the inordinate delay coupled with the restrain order is posing undue hardship, causing financial distress and has subjected them to action under the RERA.

Another development which rendered a cause for the applicants to take out the application, is an order passed by the Maharashtra Revenue Tribunal on 30th September 2015, wherein the Tribunal has upheld the original owner's rights in the Suit property as protected tenants and owners and the claim of the predecessor of the applicants has attained finality. One more ground which is pressed into service for entertaining the application, seeking modification in paragraph no.17 of the order passed by this Court, is a further development, in a Writ Petition No.8420 of 2010, the final hearing of the plaintiff's Suit being No.144/2010 came to be stayed by the High Court and it permitted to decide all the interim and interlocutory applications therein. The third ground which justify the variation of the order in paragraph no.17 deleterious is the consequences of non-completion of development of suit property within the time-limit

stipulated by Real Estate Regulatory Authority (for short 'RERA Act').

9 These aforesaid reasons are pressed into service by the learned Senior counsel Mr.Seervai when he seek invocation of powers under Order 39 Rule 4 in varying/modifying the order of injunction, which is instituted by the change in circumstances or undue hardship.

It would therefore, be necessary to refer to Order XXXIX Rule 4 of the Code of Civil Procedure which read thus :

4. Order for injunction may be discharged, varied or set aside.—Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

[Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.]

10 The learned Single Judge of this Court while interpreting the principle underlined Order 39 Rule 4 in case of Manas Shelters Pvt.Ltd Vs. Madhavlal Pittie, 2017 SCC Online Bom 1796, has observed thus :-

"8. Whenever a prayer is made under Order 39 Rule 4, Civil Procedure Code, the Court has to pose itself with a question whether there is a change in the circumstances or whether the order of the Court is causing undue hardship to a party? The later part of the question, needless to say, would involve consideration of the order of the Court or which factors would be a consequence of the order of the Court itself. So is the case with the change in the circumstances. Exercising its jurisdiction under Rule 4 abovesaid, the Court may with advantage draw upon the principles revolving around Explanation IV to Section 11 of the Civil Procedure Code and ask itself whether the pleas raised in the application under Rule 4 might and ought to have been raised prior to the passing of the order? If the answer be 'yes', the Court may reject the application. If the answer be in the negative, the Court may very well entertain the application and dispose of the same on merits"

11 The principle for discharging/varying/setting aside an order of injunction under Order 39 Rule 4 can be well discerned to be whether the claim is instituted by change in circumstances or on account of undue hardship, caused to the applicant. The expression 'change in circumstances' is referable to the change/alteration in conditions or events which revolve around

the subject in respect of which an injunction is granted. It would thus contemplate change in the relevant circumstances in form of subsequent events when the exercise of the power would be justified and such circumstance which were not in existence or contemplation when an order of injunction was passed. "Undue hardship" contemplated under the said provision is the inconvenience being caused to a party on account of operation of an order of temporary injunction, which may justify the discharge/variance or setting aside an order of temporary injunction on an oppressive treatment or injunction being brought to the notice of the Court.

12 In light of the aforesaid parameters, it would thus be necessary to test the application, which seek a relief of variance of paragraph no.17 of the order/judgment dated 11/11/2011. The grounds pressed into service for pointing out the change in circumstances are two fold; i.e. the order dated 30/9/2015 passed by the Maharashtra Revenue Tribunal, wherein the rights of the respondent nos.1 to 20 to the Suit, being heirs of the original tenant, Somvarya Jadhav, received recognition as owners of the suit property and their status as such is crystallized by the Maharashtra Revenue Tribunal. Since the respondent nos.1 to 20 - original owners were in legal and actual possession of the Suit property, subsequent event is pleaded as 'change in circumstance' on a declaration as owner. Though the respondents argue that

the order of Maharashtra Revenue Tribunal is subjected to a challenge in a Writ Petition, in absence of any stay to the same, the position which stand as on day is the owner of property, is the predecessor in title of respondent nos.1 to 24.

Another change in circumstance which is pleaded as a basis for bringing variance in the order of injunction, result out of a prior antecedent event, being RCS No.530 of 2004 filed by the plaintiffs against respondent nos. 1 to 20 – the original owners, seeking a declaration that they the absolute owners of the suit property and the defendants had no right, title and interest in the same and the Court by an order of permanent injunction, shall restrain the defendants, or any other persons claiming through them from creating third party interest, in respect of the suit property. Pending the said Suit, the plaintiffs filed Regular Civil Suit No.144 of 2010, seeking an identical relief as was sought in the Suit filed earlier in the year 2004. In Suit No.144 of 2010, the applicants filed an application under Section 10 of the Code of Civil Procedure, praying for its stay in the wake of pendency of a Suit instituted in the year 2004 by the plaintiffs seeking identical relief. When the matter reached the High Court in Writ Petition No.840 of 2010, final hearing of the 2010 Suit was stayed, categorically permitting the interim and interlocutory applications to be decided. This order passed on 9th February 2011 is pleaded to be a subsequent event amounting to change in circumstance.

13 The hardship which has been pressed into service by the applicants is pleaded to be the inability to develop the full potential of the property in the teeth of the injunction order. The applicant no.1 purchased and acquired the development rights in the suit property from the original owners, being respondent nos.1 to 20, and a development agreement was entered on 6th February 2006 which was registered on 13th February 2006 for a valuable consideration of Rs.18 lakhs. Accordingly, the applicant no.1 was put in exclusive use, occupation and physical possession of the suit property. In furtherance of the development agreement, the applicants made substantial progress in the construction of the suit property by carrying out a fencing and installing electric meters. The applicants retained the possession of the suit property and continued its development despite some differences with some distinct parties, resulting into institution of some proceedings. The order of injunction, is causing undue hardship to the applicant no.1 who is registered as a sole promoter under the RERA Act on 31st August 2017 and the learned senior counsel has made a reference to the sub-development agreements with Jagruti Constructions, but according to him, the agreements are now terminated and upon being designated and on being recognized as sole promoter under the RERA Act, the multiple allottees, to whom Jagruti Construction had allotted units filed complaints against the Applicant no.1 before the Real Estate

Regulatory Authority (RERA) seeking handing over of the units and also claiming compensation and interest. Pleading that the applicants were given complete responsibility of carrying out the construction of the suit property under the order passed in Section 9 Petition by this Court which revolve around the dispute between the applicants and Jagruti Developers, the responsibility is now to be shouldered by the applicant no.1 exclusively. While disposing of Section 9 Petition, a direction came to be issued that the interim reliefs restraining the applicants from carrying out construction and restraining them from creating third party rights with respect to the suit property, were not open for being pressed in any Arbitration that may ensue in future. This fastened the responsibility of completing the construction of the units on the shoulders of the applicant and if the RERA timelines are not adhered to, it is pleaded that the applicants will have to take serious consequences under the Special Enactment intended to protect the interest of consumer in real estate Sector. It is argued by Mr.Seervai that RERA specify registration of Real Estate Project and deadline for completion of a project and an extension can be granted only upto one year. Further apprehension expressed is, that if the project is not completed within the stipulated framework, allottees of the project on the suit property can claim cancellation of the allotment and refund with interest and/or compensation with interest for delayed possession and apprehending that if this stage arrive, the applicants shall be

responsible for an obligation/responsibilities under the RERA Act.

14 When the learned senior counsel was specifically asked to give the details of the project and its current status, he has placed on record a chart reflecting the list of premises which are available in the on-going construction of suit property in form of Wing A to E, which cover 34 units. The status of the project as given by the learned senior counsel as under :-

"RCC structure upto 13 slabs completed for D and E Wing, RCC structure upto sixth slab for A, B and C wing and other internal work completed as per norms".

15 Now, the difficulty posed by the applicants is that the applicant no.1, as a bonafide developer is undisputedly interested in completing the work in pipe line in a timely manner. On obtaining the commencement certificate on 7th November 2013 and the occupation certificate on 15th April 2019 from the Planning Authority, the construction ought to be completed, else applicants are liable for facing the harsh consequences, in case of a default under the provisions of RERA. The applicants will also have to take the consequences of refunding the entire amount paid by the allottee along with interest, if on non-completion of the project within the period scheduled in RERA and also to pay interest for delaying the project to those who intend to continue with the purchase. On account of the order passed on 11th

November 2011, the applicant no.1 is restrained from selling any further flat and/or shop constructed on the suit property and the time gap of 10 years from date of passing of the order, has aggravated the hardships to the applicants, as one can imagine a project of a builder/developer being lingering for 10 years.

16 The learned senior counsel Mr.Seervai has come up with a fair offer on his own accord of the applicants willingness to freeze six flats which are approximately worth Rs.Five crores, by way of security in favour of the petitioners, which according to him, would be equivalent to the 50% of the price of the land when the dispute arose, since at the relevant time, it was a non-agricultural property. The details of the flats which are offered as security, are given by Mr.Seervai to the following effect :

SR.NO.	UNIT NO.	CARPET AREA + ANCILIARY AREA/ UNIT TYPE
A WING		
1	1102	791 sq.ft + 194 sq.ft/3 BHK
B WING		
2	1301	638 sq.ft + 127 sq.ft/2 BHK
3	1303	638 sq.ft + 127 sq.ft/2 BHK
C WING		
4	1201	638 sq.ft + 127 sq.ft/2 BHK
5	1301	638 sq.ft + 127 sq.ft/2 BHK
E WING		
6	1402	413 sq.f. + 77 sq.ft.

17 On consideration of the proposal, I had called upon Mr.Gole to advance a submission, pursuant thereto, he submits that the price of the land as on today, is Rs.20 crores and therefore, the security in form of Rs.5 crores is of no consequence. Mr.Gole would further submit that the website of RERA reflect the commencement certificate being granted upto 3 floors, whereas the structure that is proposed by the applicants for D and E wings 14 storeyed, meaning thereby that there is no commencement certificate for the remaining floors.

18 Taking into consideration the prospects of the applicants engaged in Development of Property who are embroiled in a litigation between the plaintiff and the original defendant nos.1 to 20, their adversity and inconvenience as a developer/promoter can be just imagined. The development agreement is entered with the original owners in the year 2006 and the project is yet to see its culmination. The applicants have purchased and acquired the full and absolute development rights in the suit property from respondent nos.1 to 20 for a valuable consideration. They are now stuck in the litigation between the plaintiffs and respondent nos. 1 to 20 and the imposition of condition that no third party rights shall be created by them from 11/11/2011, has put them in a precarious situation. The suit has been stayed on an application moved by the applicants and consequentially, their fate is kept hanging.

19 The offer coming from the Applicants is fair, considering that the applicants are only the developers of the suit property and the contest is between the plaintiff and respondent nos.1 to 20. In any case, the Suit will have to be culminated in a time bound frame, but till then, for the discord between the plaintiffs and original defendant nos. 1 to 20, the fate of the applicant who is a developer and several other persons who have invested the amount with the developer, cannot be kept dangling, with no end in foresight.

 While dismissing the Writ Petition, being unconvinced in favour of the plaintiff, to grant the injunction, the learned Single Judge must have never contemplated that the Suit of 2010, would take more than a decade to be decided. But since the proceedings in the Suit are stayed, the Suit is at a standstill and one doesn't contemplate when the proceedings would culminate. The situation which has emanated from the sequence of events has put the applicants in grave hardship and it is the duty of the Court which has passed the order to relieve them of this. The pendency of the Suit is causing harm to the interest of the applicants when they have already parted with possession of several units before the passing of the order and this is a subject matter of the Contempt Petition instituted by Mr.Gole, alleging disobedience of para 17 of the judgment of this Court.

20 Interest of justice demand that the order passed on 11/11/2011 is varied since the Court had already granted permission to the respondents to develop the property in question but by putting fetters on creating third party rights, the project is in doldrums and so also, fate of several investors who have invested their amount in the project of the applicant no.1, with no fault of theirs are also pulverized. Subject to the security of six flats as mentioned above, being offered, I deem it fit to modify the order by permitting the applicants to transfer the units which have been constructed in different wings of the building constructed on the suit property, subject to the same stipulation that the third party rights which would be created at the risk and consequences of the applicants and would remain subject to the result of Regular Civil Suit No.144/2010. The applicants shall, however, not deal with the six flats as mentioned above, and an undertaking to that effect shall be filed by the applicant no.2 in this Court within a period of four weeks from today.

With the aforesaid direction, IA is disposed off.

SMT. BHARATI DANGRE, J