

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

EXECUTION APPLICATION NO. 99 OF 2011

IN

SUIT NO. 2824 OF 1985

M/s. Mahendra Builders Pvt. Ltd. & Ors. ... Plaintiffs

vs.

Smt. Padmabai w/o. Ranchhoda V. Uka & Ors. ... Defendants

WITH

CHAMBER SUMMONS NO. 695 OF 2011

IN

EXECUTION APPLICATION NO. 99 OF 2011

Mohamed Tahir Mohd. Yusuf Khan & Anr. ... Applicants

In the matter between

M/s. Mahendra Builders Pvt. Ltd. & Ors. ... Plaintiffs

vs.

Smt. Padmabai w/o. Ranchhoda V. Uka & Ors. ... Defendants

CHAMBER SUMMONS NO. 877 OF 2011

IN

EXECUTION APPLICATION NO. 241 OF 2011

Mr. Abdul Rehman Mohd. Yusuf Khan & anr. ... Applicant

In the matter between

M/s. Mahendra Builders Pvt. Ltd. & Ors. ... Plaintiffs

vs.

Smt. Padmabai w/o. Ranchhoda V. Uka & Ors. ... Defendants

and

Rajnikant Devidas Shroff ... Respondent

CHAMBER SUMMONS NO. 334 OF 2019
IN
EXECUTION APPLICATION NO. 241 OF 2011
IN
SUIT NO. 2824 OF 1985

Rajnikant Devidas Shroff ... Applicant/Org. Def no. 16

In the matter between

M/s. Mahendra Builders Pvt. Ltd. & Ors. ... Plaintiffs

vs.

Smt. Padmabai w/o. Ranchhoda V. Uka & Ors. ... Defendants

and

Anand Bipin Shroff & Ors. ... Respondents

Mr. Yatin R. Shah a/w. Mr. Shivam Bhagwati and Mr. Shahzad Khajotia for the Applicants in EXA/99/2011.

Dr. Veerendra Tulzapurkar, Senior Advocate a/w. Mr. Sandeep Parikh, Mr. Prakash Shah and Mr. Durgaprasad Poojari i/b. PDS Legal for Respondent / Defendant no. 16 in EXA/99/2011 and EXA/241/2011 and for Applicant in CHS/334/2019.

Mr. Priyank Daga i/b. M/s. Jayakar and Partners for Respondent nos. 10 and 11.

CORAM : A. K. MENON, J.

DATED : 13th OCTOBER, 2021

P.C. :

1. These two execution applications seek to execute a decree passed in terms of the consent terms dated 2nd December, 2003. Two Chambers Summonses being Chamber Summons no. 695 of 2011 and Chamber

Summons no. 877 of 2011 are now required to be considered pursuant to the order passed by the Supreme Court on 24th July, 2018 whereby the Supreme Court had requested the High Court to dispose the execution proceeding expeditiously. These two Chamber Summonses were then pending. Initially these Chamber Summonses were disposed on or about 9th October, 2014. They have since been restored by the judgment of Division Bench in two Appeals being Appeal Nos. 278 of 2015 and 279 of 2015 dated 15th July, 2016.

2. Aggrieved by this judgment the respondent no. 16 filed SLP (C) 35874 and 35876. of 2016. Those were disposed by common order on 24th July, 2018 requesting the High Court to

- (a) Frame a time schedule for completion of construction; and
- (b) To consider the question as to amount of Security that should be furnished to ensure that construction is completed as per time frame.

Later Miscellaneous Application no. 1095 of 2021 came to be filed, which the Supreme Court disposed on 26th July, 2021 once again requesting the High Court to draw a time schedule for early disposal of the Execution Application. The applicants have thus been heard in the Chamber Summonses and the time frame for completion of construction has been worked out by consent of parties and as recorded in my order dated 7th October, 2021. The parties having agreed on the time period for construction, what remains to be now considered is the aspect of security as

referred to in my order of 7th October, 2021 and residual prayers in these three Chamber Summons. I propose to deal with the Chamber Summonses first.

3. In Chamber Summons no. 695 of 2011 filed by the original plaintiff they seek the following reliefs :

(a) that this Hon'ble Court be pleased to direct the Respondent to complete the redevelopment of property bearing old Survey No. 5, C.S. No. 525 and 1/525, admeasuring 4813 sq.yds respectively of Malbar Hill and Cumballa Hill Division, situate, lying and being at 30, Gowalia Tank Road (August Kranti Marg) in the Registration District of Mumbai City and Island within a stipulated time of 6 months to 1 year. And to thereafter handover the possession of premises to the Applicants so as to allot Two residential or commercial premises admeasuring 1267 sq.ft carpet area in the Sale wing on 5th, 6th or 7th floor of the Taj Building along with two stilt car parking spaces in the same building;

(b) that this Hon'ble Court be pleased to appoint Court Receiver, High Court or any other fit or proper person as Receiver in respect of property bearing old Survey No. 5, C.S. No. 525 and 1/525, admeasuring 4813 sq.yds. respectively of Malbar Hill and Cumballa Hill Division, situate, lying and being at 30, Gowalia Tank Road (August Kranti Marg) in the Registration District of Mumbai City and Island and be pleased to direct the Court Receiver, High Court to takeover possession and collect the rent from the

tenants/occupants of the said property and to apply for redevelopment on the said property within a stipulated time;

(c) or in the alternative this Hon'ble Court be pleased to direct the Court Receiver, High Court to handover possession of the old Survey No. 5, C.S. No. 525 and 1/525 admeasuring 4813 sq.yds respectively of Malbar Hill and Cumballa Hill Division, situate, lying and being at 30, Gowalia Tank Road (August Kranti Marg) in the Registration District of Mumbai City and Island and allow the Applicants to complete the project of reconstruction of Taj Building so as to allot Two residential or commercial premises admeasuring 1267 sq. ft carpet area in the Sale wing on 5th, 6th or 7th floor of the Taj Building along with two stilt parking spaces in the same building to the Applicants.

(d) that pending the hearing of the execution application, this Hon'ble Court be pleased to direct the Respondent to give Temporary Alternate Accommodation to the applicants in the Taj building and Compound from the premises/flats vacated by the Respondent in the said building.

4. In Chamber Summons no. 877 of 2011 filed by the plaintiff nos. 3 and 4 also seek similar reliefs. Prayer clauses in this application are set out below :

(a) that this Hon'ble Court be pleased to direct the Respondent to complete the redevelopment of property bearing old Survey No. 5, C.S. No. 525 and

1/525, admeasuring 4813 sq.yds equivalent to 4023.87 sq.mtrs respectively of Malbar Hill and Cumballa Hill Division, situate, lying and being at 30, Gowalia Tank Road (August Kranti Marg) in the Registration District of Mumbai City and Island within a stipulated time of 6 months to 1 year, and to thereafter handover the possession of premises to the Applicants so as to allot two residential or commercial premises admeasuring 500 sq.ft carpet area in the Sale wing above Fourth Floor and below Eight Floor of the Taj Building Compound.

(b) that this Hon'ble Court be pleased to appoint Court Receiver, High Court or any other fit or proper person as a receiver in respect of property bearing old Survey No. 5, C.S. No. 525 and 1/525, admeasuring 4813 sq.yds. Equivalent to 4023.87 sq.mtrs., respectively of Malbar Hill and Cumballa Hill Division, situate, lying and being at 30, Gowalia Tank Road (August Kranti Marg) in the Registration District of Mumbai City and Island and be pleased to direct the Court Receiver, High Court to takeover possession and collect the rent from the tenants/occupants of the said property and to apply for redevelopment on the said property within a stipulated time;

(c) or in the alternative this Hon'ble Court be pleased to direct the Court Receiver, High Court to handover possession of the old Survey No. 5, C.S. No. 525 and 1/525, admeasuring 4813 sq.yds. equivalent to 4023.87 sq.mtrs respectively of Malbar Hill and Cumballa Hill Division, situate, lying and being at 30, Gowalia Tank Road (August Kranti Marg) in the Registration

District of Mumbai City and Island and allow the Applicants to complete the project of reconstruction of Taj Building so as to allot Two residential or commercial premises admeasuring 500 sq.ft carpet area in the Sale wing on above Fourth Floor and below Eight Floor of the Taj Building Compound in the same building to the Applicants.

(d) or in the alternative, that pending the hearing of the execution application, this Hon'ble Court be pleased to direct the Respondent to give Temporary Alternate Accommodation to the applicants in the Taj building and Compound from the premises / flats vacated by the Respondent in the said building till the time the redevelopment takes place, and in the case if Respondent not give Alternative Accommodation to the Applicants in the Taj Building & Compound then this Hon'ble Court be pleased to direct to the Respondent No. 16 to pay a sum of Rs. 1,00,000/- (Rupees One Lakh Only) to the Applicant / Plaintiff No. 3 and 4 respectively to each Applicant per month till handing over of possession of their respective premises to the applicants;

(e) If the Respondent is not in a position to redevelop the property, then in that event this Hon'ble Court be please to put back the parties to their position prior to the filing of the consent terms dated 02/12/2003.

5. As far as Chamber Summons 695 of 2011 is concerned Mr. Shah learned counsel appearing on behalf of the plaintiff had submitted that the development is required to be completed and the two residential flats are

required to be handed over along with car parking space and since respondent no. 16 had not taken any steps towards completing construction he was required to file this Chamber Summons. There is also prayer for appointment of Court Receiver and to provide temporary alternate accommodation.

6. At the hearing of the Chamber Summons Mr. Shah submitted that the applicants were not residents of the building. In that view of the matter the basis of which they claim temporary alternate accommodation is not understood. Today the matter has progressed and prayer (a), (b) and (c) are no longer relevant since parties have now agreed on the time schedule for completion of construction and in the spirit of the order of the Supreme Court. These reliefs in prayer clause (a), (b) and (c) therefore cannot survive. As far as prayer clause (d) is concerned, upon admission of the applicant they were not residents of the premises there is no occasion to grant temporary alternate accommodation since they were not tenants or occupants of the suit structure. Hence no relief can be granted in terms of prayer clause (d).

7. In Chamber Summons no. 877 of 2011 prayer clause (a), (b) and (c) are identical to those in Chamber Summons no. 695 of 2011 and for reasons recorded above these prayers cannot survive. These are infructuous. Prayer clause (d) while seeking temporary alternate accommodation also seeks payment of Rs. 1,00,000/- per month till handing over the respective

premises to the applicants. Having agreed that the construction will take four more years and in view of the fact that the plaintiff nos. 3 and 4 are also not tenants of the building to be redeveloped, there is no occasion to grant any relief in terms of prayer clause (d) either.

8. The last prayer is in the alternative viz. that the parties namely the applicant be put back in their position prior to filing of consent terms. This is not intelligible. The decree in terms of the consent terms is what is sought to be executed and this prayer cannot be granted since plaintiff and applicant are now proceeding in execution. It is not possible to put the parties to back in time prior to filing of consent terms. In fact having agreed to time schedule the occasion to canvas this prayer does not arise and Mr. Shah has fairly not pressed prayer clause (e). Thus these two Chamber summons are rendered infructuous. The prayer for temporary alternate accommodation also will not survive in this case.

9. That takes me to consider the third Chamber Summons being 334 of 2019 filed by respondent no. 16 – original defendant no. 16. This Chamber summons seeks appointment of Court Receiver in respect of certain tenements in the building which are believed to be in the occupation of respondent nos. 1, 2 and 3 being legal heirs of respondent no. 1 who is tenant and respondent nos. 10 and 11 who are in use and occupation of one flat together jointly. These reliefs cannot be granted in the present execution application since the

applicants – original defendant no. 16 would be required to adopt appropriate proceeding in accordance with law. No relief granted in this Chamber Summons since the parties against whom the respondent no. 16 is required to proceed are not parties to the Suit. Dr Tulzapurkar therefore fairly states that he is not pressing this Chamber Summons. The Chamber Summonses having been worked out as aforesaid, what remains for consideration is the request of the Supreme Court to consider the amount of security that would have to be furnished by the petitioner to ensure the time schedule that may be framed is duly complied with.

10. In this behalf as noted in my order dated 7th October, 2021 the defendant no. 16 has produced in Court a copy of the sanctioned plan of the proposed new building in which they have demarcated three flats which will not be alienated, encumbered or disposed in any way. The sanctioned plan is not in dispute. The fact that these flats are proposed to be constructed in the very building that the applicants seek to occupy is also not in dispute. What remains to be seen is whether the valuation that the defendant no. 16 has pegged at Rs. 17 crores would sufficiently safeguard the interest of the judgment creditor. Mr. Shah on behalf of the applicant / decree holders states on instructions that the value of the flats that the applicants expect to receive is collectively about Rs. 21 crores. There is no basis for this valuation that has been placed on record. Thus absent any evidence of valuation on behalf of the said applicant it is not possible to accept the figure of Rs. 21 crores as

sacrosanct and which represents the value of the four flats. Defendant no. 16 has already disclosed that it has invested about Rs. 96 crores in the project as stated in affidavit dated 3rd September, 2021. On 7th October, 2021 I have recorded in paragraph 2 that the fact that such a large amount is invested has not been disputed by the applicant. Even today there is no dispute on that. What really needs to be considered is whether the applicants are likely to be deprived of flats that they are entitled to.

11. In view of the consent order passed in terms of Minutes of Order dated 6th October, 2021, the applicants themselves now appear confident that construction will now proceed and in accordance with the schedule agreed by an between them and respondent no. 16. The outer date is 31st December, 2025 by which time they expect to receive possession of their respective tenements. I am of the view that the offer on behalf of defendant no. 16 to keep aside the three flats identified on the plan and which collectively admeasures 4502.15 sq.ft carpet area should suffice. In my view if the sanctioned plan is adhered to, these flats by ad-measurement are of a area larger than the four flats that the applicants are entitled to receive and these would sufficiently safeguard their interest. In any event, the flats proposed to be allotted to the applicants are on floors as agreed by the parties in the consent decree. It is submitted across the bar that the proposed building will be of minimum of 21 floors and that the three flats that are sought to be kept aside will be housed on 14th, 15th and 17th floor of the

building. The applicants have been given copy of this plan. They have not disputed the plan or the fact that the plan which has now been shared with them has been sanctioned.

12. In these circumstances I am of the view that the defendant no. 16 is to be put to terms in accordance with the statement made across the bar. This however leaves one aspect to be considered viz. if defendant no. 16 were not to proceed with construction or if defendant no. 16 were to enter into any arrangement / agreement with any other party for the purpose of redevelopment of the building the security offered in respect of the three flats must be protected and to that extent an undertaking will have to be filed on behalf of the defendant on oath to abide by this statement.

13. At this stage it is pointed out by the both the learned counsel that in accordance with the consent terms and in particular Exhibit A-1 thereto clause no 24(vii) records as under :

(vii) The party of the second part agree that in the event of his deciding to sell, transfer and dispose of the said property to any other builder/developer/MH & A.D./Government / Semi Government Body or transferring and assigning the benefit of the F S I of the said property to any other builder / developer or amalgamating the said property to any of the adjoining properties any such action that will be taken by the party of the Second part will be subject to this Agreement and party of the

Second part agrees to comply with and/or agree to fulfill the obligations undertaken by the party of the second part under this Agreement. The Party of the Second Part will inform the Party of the First Part in respect of the aforesaid by giving a written letter one week in advance.

14. This clause provides for defendant no. 16 to issue notice to the applicants requiring of any proposed transfer of bonafide to any other for some time when in other property so that would enable the applicants to seek further orders to secure their interest. This it is submitted, will sufficiently protect the interest of the applicants. However in the meantime it will be necessary to file a written undertaking of defendant no. 16 as aforesaid along with copy of the plan. This in my view will be sufficient security for ensuring that construction proceeds since if the plan sanctioned include the three flats offered as security which are situated at floor nos. 14, 15 and 17 it will be located at floors higher than floor no 6 and 7 and the flats which will be provided to the applicant would already have been constructed. In this view of the matter I pass the following order :

- (i) Chamber Summons no. 695 of 2011 and 877 of 2011 are dismissed.
- (ii) Chamber Summons no. 334 of 2019 is disposed as being infructuous.
- (iii) On the application of the original defendant no. 16 Chamber Summons no. 334 of 2019 is allowed to be withdrawn with liberty to adopt suitable proceedings against non co-operative . Tenants / occupants in accordance with law.

(iv) Defendant no. 16 shall file affidavit by way of undertaking to this court, Undertaking to ensure that the three flats demarcated on the floors 14, 15 and 17 in the sanction plan being A-1502 (1673.26 sq.ft) , B-1402 (1678.97 sq.ft) and A-1702 (1149.92 sq.ft) carpet area are kept unsold and kept unencumbered and that these flats will not be offered as security even in the event any loan for construction are obtained. The undertaking shall also provide that in the event of any negotiation with any third party for redevelopment of whole area or part of the building, these undertakings shall be brought to notice of such third parties and no negotiation shall be finalised without leave of the Court. Let such undertaking be filed along with copy of the sanctioned plan as tendered in court within two weeks from today.

(v) Execution Application no. 99 of 2011 and 241 of 2011 are disposed.

(vi) List for compliance on 25 October, 2021.

(A. K. MENON, J.)