

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 25 OF 2021

IN

SUIT NO. 2285 OF 2006

Chembur Atur Park (Bungalows) ... Applicant
Co-operative Housing Society Ltd.

In the matter between

Chembur Atur Park (Bungalows) ... Plaintiffs
Co-operative Housing Society Ltd. & Ors.

vs.

M/s. Basantrai and Sons & Ors. ... Defendants

Mr. Ashish Kamat a/w. Mr. Kunal Mehta and Mr. Pritvish Shetty i/b. Vidhi Partners for the Applicant.

Mr. Chetan Kapadia a/w. Mr. P. K. Shroff, Mr. D. V. Deokar and Mr. Pinakin Modi i/b. M/s. Parimal K. Shroff & Co. for Defendant no. 7.

Mr. Kush M. Lahankar i/b. Mr. Shrikrishna Ganbavale for Defendant no. 2.

Mr. Sagar Patil for MCGM.

Mr. Milind More, Addl. GP for the State of Maharashtra

CORAM : A. K. MENON, J.

DATED : 10th MARCH, 2021

P.C. :

1. The Suit seeks a decree against defendant nos. 1 to 7 directing transfer of the suit property described in Exhibit C of the plaint to plaintiff no. 1. Alternatively a decree is sought against defendant nos. 1 to 7 or such of them who may be found liable, to transfer plot nos. 1 and 2 in favour of plaintiff

no. 1 and defendant no. 8 based on the respective entitlements of plaintiff no. 1 and defendant no. 8 to the said sub-plots 1 and 2 described in Exhibit C and D to the plaint.

2. In the interim application the plaintiff no. 1 seeks a part decree in its favour either on the basis of admission in the written statements of defendant nos. 1 to 7 or owing to lack of contest. The plaintiffs claim a decree is sought in terms of prayer clause (a), (b) and (d) of the plaint. Prayers (a), (b) and (d) do not take into consideration the alternative prayers that I have referred to above.

3. The plaintiff no. 1 therefore seeks a decree against defendant nos. 1 to 7 to transfer the entire property described in Exhibit C and for that purpose sign and execute a deed of conveyance and all other documents required. A perpetual injunction is sought against use and exploitation of FSI and FSI potential including entitlement to load TDR on the suit property described in Exhibit C to the plaint and sub-plot 2 described in Exhibit D to the plaint. The decree on admission sought is restricted to the aforesaid prayers.

4. The plaintiff no. 1 is a Co-operative Housing Society mainly consisting of bungalow plots. Plaintiff nos. 2, 3 and 4 are its members. Defendant no. 1 is a partnership firm. Defendant no. 2 is promoted by members of the Sangtani family who are also partners of defendant no.1. Defendant nos. 3 to 6 are the original promoters and /or legal heirs of such promoters. Defendant no. 7 is the present developer in whom certain rights vest and

defendant no. 8 is a different society by name Atur Park Shiv-Parvati Co-operative Housing Society Ltd.

5. Defendant no. 3 has contended that he had agreed to purchase a piece and parcel of land admeasuring 16,500 sq. yards on the Sion-Trombay Road, Chembur, Mumbai for setting up plaintiff's society and construct bungalows and other premises on the plot with the intention that the bungalows and the land would be leased to the members of the Society for 999 years. According to the applicants the internal roads shown on plot and are all for common use of the plaintiffs society and the proposed adjoining society.

6. Mr. Kamat appearing in support of the application submits that the 16,500 sq. yards forming the suit property was divided into three plots A, B and C. Plot B was sub-divided into further two plots being sub-plots no. 1 and 2 and the other sub-plots. The sub-plots no. 1 and 2 were admeasuring 16500 sq. yards. Defendant no. 3 had therefore issued a circular on 10th December, 1973 which according to the applicant discloses that he had intended to convey the 16,500 sq. yards to the Society.

7. The present application is fueled by an averment made by defendant no. 7 in paragraph 5 and 6(xiii) of the written statement. According to the applicant the contents of the circular dated 10th December, 1973 have not been denied in paragraph 20 of the written statement and therefore they are bound by it. Reference is made to a power of attorney executed in December, 1984 which sets out that the powers granted include the right for

construction of additional floors in future in the event of increase in FSI on the respective plots described therein as Bungalow Space Allottee and the construction of additional floors shall not to be disturbed by the attorney.

8. Reliance is placed on clause 14 of an agreement dated 14th December, 1984 at Exhibit 'O' to the plaint which states interalia that first confirming party namely M/s.Atur India (Private) Limited (defendant no. 2) has expressly agreed with the Bungalow Space Allottee that in the event of there being any increase in the existing FSI which was then 0.5%, the Bungalow Space Allottee would be allowed to construct an additional floor in their respective bungalows at their own cost and expense. The first confirming party therein contends that there were 30 bungalows which were constructed and completed during 1976-77 and their possession handed over. Based on this clause in the agreement the applicant has contended that the future FSI can be exploited by the bungalow owners.

9. As far as the power of attorney is concerned it is Mr. Kamat's case that contents of the power of attorney are admitted in the written statement of defendant no. 7 and in this behalf reliance is placed on paragraph 25 of the written statement.

10. Mr. Kamat submitted that the aforesaid factual position has also been recognised by this Court while passing an order on the notice of motion filed by the plaintiffs which was disposed on 4th August, 2016 confirming the ad-interim order granted on 30th August, 2006 thereby restraining the defendant

nos. 1 to 7 from exploiting and consuming the FSI on the suit property in any manner from alienating or otherwise creating third party rights on the suit property till disposal of the suit. The order dated 4th August, 2016 is said to have attained finality.

11. Mr. Kamat further submitted that the written statement of defendant no. 7 contains important admissions in paragraph 5 and 6 (xiii) to the extent that the defendant no 7 has agreed that the applicant is entitled to conveyance of the suit land to the extent of ground area of 7450 sq. mtrs and constructed area of 42,196 sq ft. The admissions are stated to be made in the written statement and also recorded in the order dated 30th August, 2006 passed in the Notice of Motion. Mr. Kamat contended that defendant nos. 1 to 6 have not contested the plaintiff's claim and in that view of the matter and considering provisions of Order XII and Order XV read with Section 151 of the Code of Civil Procedure part of the suit claim has been admitted.

12. Alternatively, he submitted that there is no contest in relation to this part of the suit claim and therefore the applicants are entitled to a decree to the extent of directing execution of a conveyance of ground area of 7450 sq. mtrs. forming part of the suit property. The interim application therefore seeks a decree in part. Specific reference is been made by the applicants to the statement in the written statement of defendant no. 7 which refers to conveyance in respect of 36 row houses and the land married to the row houses. It is contention of the applicant that in view of this admission

defendant nos. 1 to 7 cannot use, exploit or consume any balance FSI or any FSI potential including right to load TDR in respect of the suit property admeasuring 7450 sq. mtrs. Thus under Order XII Rule 6 the applicants contend that the Court is empowered to pass a decree.

13. According to Mr. Kamat the admission is clear and unqualified and therefore there is no occasion to resile from the same. It is also contended that the defendant nos. 1 to 7 are under an obligation under the Maharashtra Ownership Flats Act (MOFA) to convey the property. In this manner the applicants seek a decree in the aforesaid terms in the interim application pending disposal of the suit which will then survive as far as remaining area is concerned.

14. In support of his contentions Mr. Kamat relied upon the decision of this Court in *SRL Limited vs Techtrek India Limited (2014) 2 AIR Bom R 339* in which a single judge of this Court has explained the concept of an admission under Order XII Rule 6.

15. On behalf of the defendant in particular defendant no. 7 Mr. Chetan Kapadia contended that no case was made out for passing of a decree on admission. Mr. Kapadia pointed out that the suit was ready for trial and in fact all pre-trial formalities have since been completed. He objected to the application being made at this belated stage. He submitted that on 4th August, 2016 at the hearing of Notice of Motion no. 2624 of 2006 the Court had clearly opined that it would be in the interest of both parties if the suit

proceeds to trial expeditiously and therefore appropriate directions were issued for completing pre-trial formalities. The order passed on 30th August, 2006 in the notice of motion at the ad-interim stage was thus confirmed. Thereafter the Court had on 14th January, 2019 heard parties in the suit and framed issues. Mr. Kapadia therefore submitted that no case was made out for grant of any relief at this stage.

16. Furthermore he submitted that the so called admission was not unconditional or unqualified. He invited my attention to the appropriate paragraph of the written statement to point out that the admission was not unconditional and unqualified as the plaintiffs make it out to be. In this view of the matter he submitted that the plaintiffs are now seeking to further delay the trial in the suit by filing the present application.

17. In support of his contention Mr. Kapadia relied upon the decisions in the case of *S.M.Asif vs. Virender Kumar Bajaj 2015 (9) SCC 287* which sets out that the words ‘may’ used in Order XII Rule 6 alludes to discretion vesting in the Court to pass such an order. Mr. Kapadia also relied upon decision of the Supreme Court in *Himani Alloys Limited vs. Tata Steel Ltd. (2011) 15 SCC 273*. In this respect Mr. Kapadia therefore submitted that the defendants were ready to proceed to trial and there is no question of grant of relief at this stage. He therefore submitted that the interim application is misconceived and ought to be dismissed.

18. I have heard the learned counsel for the parties on their respective pleas and I am of the view that no case is made out for grant of any relief in the present interim application. Firstly it is noted that the prayers in the suit itself were made in the alternative it is not as if the plaintiffs are giving up any part of their claim while seeking this decree in part.

19. Reliance placed by Mr. Kamat on the decision of *SRL Limited (supra)* is of no assistance to him inasmuch as that is a case where the court was concerned with passing a decree on admission to the extent of the principal amount and leaving the part of interest to be decided. The Court was concerned with what constitutes an admission in a case where two clearly severable and distinct portion of the claims were involved. The Court found that one part represented the principal amount claimed and the other part relating to interest. The defendant in that case had clearly admitted its liability to one portion of the claim namely the principal sum. The contest was on the aspect of interest. In those circumstances in the the Court found that a decree could be passed against defendant to the extent of the principal sum. At the hearing of the suit the alternate plea will also have to be considered since the plaintiffs have not given up this plea.

20. In *SRL (supra)* In that behalf the Court had placed reliance on the decision of this Court in *Ultramatix Systems (P) Limited vs SBI 2007 9 LJSOFT (URC)*. The Court also made reference to the decision of *Uttam Singh Dugal & Co. Ltd. vs. Union of India (2000) 7 SCC 120* in which the Supreme Court

observed that where a claim is admitted the Court has jurisdiction to enter a decree for the plaintiffs to the extent of the admitted claim. The object of the rule was to enable a party to obtain speedy judgment at least to the extent of the relief which according to the admission of the defendant, the plaintiffs were entitled to. This Court did observe that the meaning of the rule should not be unduly narrowed down since the object was to enable a party to obtain speedy judgment. It is in this context that Mr. Kamat submitted that the admissions of defendant no. 7 in their written statement to the extent of ground area of 7450 sq. mtrs married to the bungalows would require the area to be conveyed without awaiting trial.

21. In this background I had occasion to peruse the plaint and the written statements filed by the defendants. In the plaint in paragraph 3 the plaintiffs have referred to the larger area from which suit property has been identified. In paragraph 19 of the plaint the plaintiffs have set out that there is an obligation to execute a conveyance in respect of the suit property in favour of plaintiff no. 1. The entire beneficial interest in the FSI of the Suit property from 0.5% to the increased FSI is said to vest in plaintiff no.1 and its members. It is further contended in paragraph 20 that internal roads are being used by the plaintiff no. 1's members and by members of defendant no. 8 and other Co-operative Societies in the same lay out.

22. In the written statement the response to the aforesaid paragraphs is material. While the written statements of defendant nos. 1 and 3 to 5 are

unexceptional inasmuch as they all contend that those defendants did not acquire any right, title and interest in the suit property and therefore they submit to the orders of the Court. This includes the heirs of original defendant no.1. Defendant no. 2 however being a limited company does not appear to have filed any written statement. In paragraph 5 of the written statements of defendant no. 7, it is stated that the plaintiff no. 1 and their members are only entitled to the 36 row houses. Defendant no. 7 has contended that although relief is sought in respect of the suit property described in Exhibit C to the plaint, Exhibit C does not mention the ground area but refers to a plan at Exhibit E. In paragraph 3 it is contended that the plaintiffs have suppressed the material area which they claim since there is a total silence in relation to the ground area of the property. The plaintiffs ought to have mentioned the ground area of six buildings and the area of internal roads and common roads as well.

23. Without prejudice to the various defences taken up in the written statement the defendant no. 7 has in no uncertain terms stated that the rights of plaintiff no. 1 society is restricted to ground area of 7450 sq. mtrs and constructed area of 42,196 sq.ft. This is sought to be highlighted as an unclear and unequivocal admission on part of defendant no. 7. This however as correctly submitted by Mr. Kapadia is a without prejudice to the defences in the written statement. When one considers paragraph 27 and 28 of the written statement which are replies to paragraph 19 and 20 of the plaint to which I have adverted above, I find that the defendant has denied the

plaintiffs claim to entitlement of beneficial interest in FSI of the Suit property to the extent of the increase from 0.5. % to the increased FSI. Defendant specifically denies that the increased FSI vests in and belongs to plaintiff no. 1 and its members while the legal possession on this aspect of the defence will be the subject matter of contest at the appropriate stage of the suit.

24. What I need to consider at the present stage is whether the admission is one of a nature that entitles the plaintiffs to a decree. Paragraph 28 of the written statement deals with the averment in paragraph 20 of the plaint and the defendants deny that internal roads are used by members of plaintiff no. 1 and that of defendant no. 8. The interim application seeks a decree on admission in relation to part of the suit claim. The plaintiffs do not intend to give up any part of the suit claim and the decree sought is only in respect of admission which in my view does not appear to me to be unqualified and unconditional. It is but a part of the defence of the defendant no. 7 viz. without prejudice to the denial of the plaintiffs claim in the suit.

25. It is defendants case that the suit claim is based on Exhibit F to the plaint namely the circular dated 10th December, 1973 and in the defendants interpretation thereof, the plaintiffs are not entitled to the relief in the suit. It must also be borne in mind that the admission on behalf of the defendant no. 7 being conditional is also to be viewed from the point of the practical effect of such a decree being passed. Defendant no. 7 has contended that the plaintiffs are entitled to only the bungalow and the land married to the

bungalow. There is a lack of material particulars in this respect in the admission stage itself. Mere reference to area of 7450 sq. mtrs without any specific demarcation would not entitle the plaintiffs to a decree inasmuch as there is no certainty to the exact measurement in the boundaries of this area of 7450 sq. mtrs. Absent such specific demarcation and with reference to a plan I am afraid that the plaintiffs have no case for decree on admission. No doubt Mr. Kamat has made reference to the plan annexed to the plaint at Exhibit E. However it is not possible in my view to have an executable decree to be passed on the basis of the qualified admission in the written statement which in any event is without prejudice to the main defence of defendant no. 7.

26. In any event in the affidavit in reply filed on behalf of defendant no. 7 by one Mohan Tolaram Kukreja the deponent has set out that written statement had been filed more than 10 years ago. Averments therein were always known to the plaintiffs and the fact that written statement had been filed some 10 years ago. It is only when the trial has commenced that the plaintiffs filed the present application with the obvious intention of delaying the trial of the suit. It is stated that the affidavit of evidence on behalf of the plaintiffs has been filed on 19th February, 2019 after issues had already been framed. The deponent has contended that the present application is nothing but abuse of process of the Court. Considering that the suit is now ripe for hearing issues have been framed and it is appropriate that we consider the issues to help understand whether there is a case made out for a decree in

admission. Issues were framed in the present suit on 14th January, 2019.

Issue no. 3 and 4 reads as follows :

(3) *Whether the 7th Defendant proves that the Plaintiffs and its members are entitled to the conveyance only in respect of 36 row houses and the land married to the said 36 Row houses?*

(4) *Whether the plaintiffs are entitled to perpetual injunction against defendant nos. 1 to 7 from exploiting and consuming the balance FSI or FSI potential including the entitlement of the loading of the TDR in respect of the Suit property described in Exhibit "C" to the plaint and sub-plot 2 described in Exhibit "D" to the plaint. ?*

Apart from these two issues issue no. 2 is also material that relates to

(2) *Whether alternatively the plaintiffs prove that the 1st Plaintiff and and 8th defendant are entitled to the transfer of Plot nos. 1 and 2 with such covenants inter se between the 1st Plaintiff and the 8th Defendant on their respective entitlement?*

These issues will have to be read along with issue no. 1 which requires the plaintiffs to prove that defendant nos. 1 to 7 are liable to execute a deed of conveyance for entire property at Exhibit C to the Plaint in favour of the 1st Plaintiff?

27. Read in the entirety therefore I am of the view it is not an appropriate case to pass a decree on admission. There is no unqualified and unconditional admission. The issues that are required to be gone into at the trial of the suit will enable this Court to arrive at a final decision even in respect of the partial decree being sought. The Supreme Court in the case of *Himani Alloys (supra)* has clearly observed that Order XII Rule 6 is only an enabling provision and it is not mandatory but purely discretionary. This has to be

considered in the light of the fact that a judgment on admission would be a judgment without trial and which permanently denies a remedy to the defendant by way of an appeal on merits.

28. Moreover the Supreme Court in *S. M. Asif (supra)* has stressed on the meaning of the expression “may” in Rule 6 of order XII to emphasise that the relief contemplated is not a matter of right and where defendant objections go to the root of the case are relevant. The use of the word 'may' indicates that there is certain amount of discretion that vests in the Court. In the present case the admission and the written statement in my view is not unambiguous or unconditional and I do not find it appropriate case to grant relief sought in the present interim application.

29. In my view considering the overall scope of the suit it will be necessary to go in for a trial. The suit being already set down for hearing the plaintiffs will have to proceed to establish their case at the trial. No case is made out to exercise discretion in favour of the plaintiffs in this application and in view of the above I am of the view that the application must fail. I pass the following order :

- (i) Interim Application no. 25 of 2021 is dismissed.
- (ii) List the Suit for directions on 25th March, 2021.
- (iii) No costs.