

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.275 OF 2022
ALONG WITH
INTERIM APPLICATION NO.1975 OF 2022

M/s. Swastik Real Estate Developers]
Through Partners] ... Appellant

Vs.

Mahindra Happinest Developers]
Limited.] ... Respondent

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Mr. K.S. Dewal i/b Mr. Yash K. Dewal for the appellant.

Dr. Milind Sathe, senior advocate with Mr. Bhushan Deshmukh,
Ms. Neha Mehta, Ms. Renuka Lele and Mr. Umair Merchant i/b
M/s. M.T. Miskita & Co. for the respondent.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 28TH APRIL, 2022.

ORAL ORDER :-

1. Heard Mr. Dewal, the learned counsel for the appellant and
Dr. Sathe, the learned senior counsel for the respondent.

2. The appeal is filed, being aggrieved by an order passed below Exh.-5 in Special Civil Suit No.2 of 2021 instituted by the plaintiff seeking specific performance of two Agreements i.e. Agreement for Sale dated 09/07/2018 registered with the Sub-Registrar of Assurances, Bhiwandi and the Supplementary Agreement dated 17/10/2019 by pleading that they are legal, valid, enforceable and binding upon defendant No.1.

3. The suit for specific performance seeking also a declaration and injunction came to be filed revolving around the suit property, which was agreed to be sold and which could be discerned from the Agreement dated 09/07/2018, titled as 'Agreement for Sale' entered into between the plaintiff, a partnership firm, constituted under the Indian Partnership Act, referred to therein, as 'the Vendor No.1' on the First Part and the defendant - Mahindra Happinest Developers Limited, referred to therein, as "the Purchaser".

The said Agreement for Sale sets out the property distinctly in three compartments, by referring to Property Nos.1, 2 and 3 and collectively referring it as '**the Property**' admeasuring in aggregate 37,750 square meters and more particularly delineated in red colour boundary line on the plan annexed to the said Agreement. All the three properties being adjacent and contiguous land parcels, the Agreement specifically sets out the manner in which it shall be conveyed in favour of the Purchaser, for lawful consideration. The exclusion in respect of certain parcel of land,

was however affected by road widening of the State highway, which was considered to be not part of the Property as per recital 'E' of the said Agreement.

4. The subject Agreement also stipulated a plan submitted by the Vendor to develop the Property and refer to a sanction received thereon, from the competent authority vide Approval dated 05/07/2017 wherein, total FSI of 1.95 was permitted to be utilized on the property comprising of base FSI of 0.95. The property was located in the residential zone under the development plan of MMRDA and Bhiwandi Surrounding Notified Area. A specific recital in the Agreement records as under:

"2. The Vendor hereby agree to sell, transfer, convey and assign in favour of the Purchaser and the Purchaser hereby agrees to purchase and acquire from the Vendors Property No.1, Property No.2 and Property No.3 (upon acquiring the same from the present owners pursuant to the Agreement for Sale dated May 22, 2018) along with all approvals obtained by the Vendors for the residential / commercial development of the Property till the date of entering into Deed of Conveyance and all other definitive documents (defined hereinafter) on the terms and conditions more particularly set out herein. The Vendors understand that the Property No.3 is a crucial and integral part of the present transaction. In the event the Vendors fail to acquire and convey the ownership rights in Property No.3 within the timelines contemplated herein, then the Vendors shall, within 30 days, refund the Consideration paid by the Purchaser to the Vendors under this

Agreement, the stamp duty and registration charges and expenses incurred by the Purchaser towards architect/design fees and liaison fee/cost of approvals, pursuant to this Agreement, along with simple interest at the rate of 12% per annum from the date of expiry of timeline within which the Vendors were required to acquire the ownership rights in and thereafter transfer the Property No.3 in favour of the Purchaser, till the refund thereof. Simultaneous with such refund, the Parties shall execute and register a Deed of Cancellation to record the cancellation of this Agreement and the Power of Attorney.”

5. It was incumbent upon the Vendor to obtain necessary sanctions and approvals with respect to the revised plans for residential / commercial development of the Property, from the competent authorities including, but not limited to amalgamation of various survey numbers in the Property, layout approval, building plan approvals, including IOD and CC, environmental clearances, MSRDC NOC, etc.

6. In consideration of the Vendor agreeing to sell, transfer, convey and assign the Property in favour of the Purchaser, the Purchaser has agreed to pay an aggregate consideration of Rs.90,20,00,000/- and the schedule of payment is set out, specifically in paragraph No.6 of the said Agreement.

7. Certain developments as regards the said Property resulted in execution of a Supplemental Agreement between the parties on

17/10/2019. The Supplemental Agreement has its genesis in the main Agreement dated 09/07/2018 and its recitals specify that the Property Nos.1, 2 and 3 referred to as the 'Property' was admeasuring approximately 37,750 square meters and pursuant to the said Agreement, the Vendor was supposed to transfer and convey all right, title and interest in the Property in favour of the Purchaser as per the terms and conditions agreed in the said Agreement on or before 31/03/2019 and, at the request of the Vendor, this deadline was extended to 31/10/2019. Noting that there was a litigation filed by the owners of the adjoining lands against the Vendors in respect of a portion of land admeasuring 1114.33 square meters, referred to as **'the Property in Discussion'**, out of the Property situated at Village Ranjnoil, Taluka Bhiwandi, District Thane, being R.C.S. Suit No.497 of 2019 instituted in the Court of Civil Judge, Junior Division, Bhiwandi, the Vendor agreed to convey the 'Property in Discussion' in favour of the Purchaser at a later point of time. The parties mutually agreed to record the revised understanding to the Agreement and, accordingly, executed the Supplemental Agreement.

8. Upon the aforesaid modification, the parties executed and registered Definitive Documents in respect of part of the Property admasuring 36,635.67 square meters, after excluding the Property in Discussion. Recital 4 of the said Supplemental Agreement reads thus:

“4. Since, the Property in Discussion will not be presently conveyed by the Vendors to the Purchaser, the Parties have agreed that, notwithstanding what is stated in the Agreement, the Vendors shall convey the Subject Property admeasuring 36,635.67 sq. mtrs. to the Purchaser for the full and final Consideration of Rs.56,50,00,000/- (Rupees Fifty Six Crore Fifty Lakh Only) upon execution and registration of the Definitive Documents in respect fo the Subject Property. Upon execution and registration of the Definitive Documents in respect of the Subject Property admeasuring 36,635.67 sq. mtrs. and upon receipt of consideration of Rs.56,50,00,000/- (Rupees Fifty Six Crore Fifty Lakh Only), the Vendors shall have no right, title and interest in the Subject Property admeasuring 36,635.67 sq. mtrs. and the Purchaser shall become the absolute owner and the possession of the Subject Property admeasuring 36,635.67 sq. mtrs. shall be handed over to the Purchaser.

The Definitive Documents in respect of the Subject Property admeasuring 36,635.67 sq. mtrs. shall be executed and registered by the Parties once all the condition precedents as agreed between the Parties in the Agreement have been complied with by the Vendors.”

9. In furtherance of the above development, the Supplemental Agreement recorded that the Vendor currently holds the title and possession of the Property in Discussion admeasuring 1114.33 square meters, more particularly described in the Fourth Schedule thereunder written, and are ready to convey the same in favour of the Purchaser, subject to the litigation filed by the owners of

adjoining lands against the Vendor in respect of the Property in Discussion and, therefore, the following a clause was specifically inserted in the Supplemental Agreement, as under:

“5. The Parties further agree that :

(A) It is agreed between the Parties that in the event, the Vendors enter into consent terms with the owners of adjoining lands and obtain a decree of the Hon’ble Court of Law confirming that the owners of adjoining lands have no rights, title, interest or claim whatsoever I the Property in Discussion thus get the litigation/claims of the owners of adjoining lands settled on or before 31st October, 2019 or if the owners of the adjoining lands unconditionally withdraw the litigation filed by them in respect of the Property in Discussion on or before 31st December, 2019, then the Parties shall execute and register and Conveyance deed for the Property in Discussion admeasuring 1114.3 sq.mtrs. for total, full and final consideration of Rs.8,50,00,000/- (Rupees Eight Crores Fifty Lakh only) subject to TDS (“Consideration for the Property in Discussion”). Incase, the Vendors fail to obtain consent terms as aforesaid and convey the Property in Discussion in the manner as aforesaid by 31st December, 2019 or if the owners of the adjoining lands do not unconditionally withdraw the litigation filed in respect of the Property in Discussion on or before 31st December, 2019, then neither the Purchaser shall be liable to pay Consideration for the Property in Discussion or any part thereof to the Vendors nor the Vendors shall be entitled to claim the Consideration for the Property in Discussion or any part thereof.”

10. From a reading of the aforesaid clause, it is apparent that in respect of the portion of land admeasuring 1114.3 square meters, which was the subject matter of litigation between the owner of the adjoining lands and the Vendor, an arrangement was arrived at between the parties, that if a settlement is effected with the owners of the adjoining lands, who had filed the suit, the Property in Discussion will be made available to the Purchaser on or before 31/12/2019 and the said portion contemplated a full and final consideration of Rs.8,50,00,000/- subject to TDS.

Further, by paragraph No.8 of the Supplemental Agreement, the parties confirmed that all other provisions contained in the main Agreement shall continue to be applicable and binding upon the parties and the Supplemental Agreement shall constitute part of the main agreement and shall be so construed. It also contemplated that in the event of anything contrary between the main Agreement and the Supplemental Agreement, the provisions and the understanding recorded in the Supplemental Agreement shall prevail over the main Agreement.

11. With this understanding between the parties, it is not in dispute that the said area of 1114.3 square meters could not be made available to the Purchaser, before the date agreed in the Supplemental Agreement and it is only on 20/04/2022, the discord between the Vendor and the owners of the parcel of land came to be settled and the suit came to be withdrawn.

12. The learned counsel for the appellant would fall back upon the Conveyance Deed to submit that the entire property i.e. the land admeasuring 37,750 square meters was conveyed. However, on a careful reading of the Conveyance Deed dated 04/11/2019, it would reveal that the Property Nos.1 and 2 referred to as the Property admeasuring 36,635.67 square meters and delineated by a red colour on the plan annexed therein, is the subject matter of the said Conveyance. The Conveyance Deed specifically sets out a stipulation that the Vendor is seized and possessed of all that pieces and parcels of lands situate, lying and being at Village Ranjnoli, Taluka Bhiwandi, District Thane, admeasuring 28914.84 square meters and more particularly described in the First Schedule thereunder written and the title of the Vendor in respect of the Property referred to in clause 'C' of the Conveyance Deed is clear, marketable and free from encumbrances, is the subject matter of the Conveyance.

The learned counsel has placed reliance on recital 'Q' of the Conveyance Deed to submit that the plan, which was submitted by the Vendor and received sanction from the competent authority vide Approval dated 05/07/2017, is in fact, covered the entire area of 37,750 sq. meters, which permitted utilization of a total FSI of 1.95 on the Property comprising of base FSI of 0.95.

Based upon this clause, it is sought to be argued that the Conveyance was not restricted to 36,635.67 sq. meters but covers an area of 37,750 sq. meters. The learned counsel for the appellant has specifically asseverated that the building plan, which was

approved, was in respect of the larger parcel of land, and therefore, the effect has to be given to the same in that manner and it cannot be restricted to the smaller portion of 36,635.67.

13. I have considered the aforesaid argument in the light of the pleadings in the suit as well as the application seeking temporary injunction. Pertinent to note that in the suit filed by the plaintiff, the specific performance is sought of the main Agreement as well as the Supplemental Agreement. The Supplemental Agreement specifically sets out a recital to the effect that in case of any contradiction between the two Agreements, the Supplemental Agreement would prevail. Merely because sanction of the authorities was for a larger parcel of property, in any case, it cannot override the clear understanding between the parties, recorded in the Supplemental Agreement, which was dependent upon a contingency either happening or not.

14. The plaintiff is quite conscious of the fact that on account of the fact that the land admeasuring an area of 1114.3 square meters was decided to be conveyed subsequently, since it was embroiled in litigation and that on arriving at any settlement and on transfer of the said area, it would yield an additional consideration of Rs.8,50,00,000/-, provided it is conveyed before 31/12/2019. What are the circumstances, which compelled the plaintiff not to abide by the said stipulation and whether time was essence, is ultimately a matter of trial.

The plaintiff has filed a suit for enforcement of both the Agreements and in an application filed under Order XXXIX Rules 1 and 2 of the CPC, specifically sought a relief of injunction against the authorities from granting sanction or approval to the plan in respect of the larger plot admeasuring 36635.67 square meters. The learned Judge granted ad-interim order at the initial stage, but upon consideration of the facts, vacated the same, particularly, on reference to the Supplemental Agreement and observing that the area admeasuring the Property is 36,635.67 square meters and an area of 1114.33 square meters stands excluded from the main Agreement and in the absence the Property being made available to the Purchaser, before the specified date as stipulated under the Supplemental Agreement, the said area stands excluded and, therefore the Purchaser cannot be deprived of his right to enjoy the fruits of the remaining portion of area of 36,635.67 square meters for which he has paid the entire consideration and, therefore, there cannot be any restrain order for permitting residential or commercial development, by the concerned competent authority in respect of the said demarcated portion of land.

15. The learned Judge has rightly appreciated that the consideration of Rs.8,50,00,000/- was in respect of an area of 1114.3 square meters, which is the subject matter of the suit and depending upon the evidence that would be led before him, the relief of specific performance of the said Agreements can be

determined. However, recording that there is no *prima facie* case made out for injunction against the authorities for sanctioning the plans for an area of 36,635.67 square meters, the injunction has been rightly refused and the order impugned has refused to restrain the Purchaser / Developer from proceeding with the development.

16. Finding no legal infirmity in the said order, the same is upheld. The appeal is dismissed. No order as to costs.

[SMT. BHARATI DANGRE, J.]