

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 150 OF 2021

Mrs. Jagruti Rajesh Shah)
Mr. Devang Rajesh Shah)..Appellants

Versus

M/s. Mahek Developers & Ors.)..Respondents

WITH

INTERIM APPLICATION No. 1600 OF 2021

WITH

CONTEMPT PETITION No. 161 OF 2022

* * * *

**Mr. Zain Mookhi a/w. Kartik Tiwari a/w. Aditya
Kanchan i/b. Lakshyavedhi Legal for Appellant**

**Mr. Sanjiv Singh a/w. Samir Bhahmbhatt a/w. Ritesh
Singh for Respondent No.3**

**Mr. Manish Pabale i/b. Apurv Singh for Respondent
No.4**

**Mr. Amogh Singh a/w. Jeet Gandhi for Respondent Nos.
5 to 8, 10,12,13 and 15 and 25**

Mr. Deepan V. Dixit for Respondent Nos. 9,11 and 14

Coram : Sandeep K. Shinde, J.

Reserved on: 5th April, 2022

Pronounced on: 26th April, 2022

JUDGMENT:

1. Appellants- Plaintiffs, instituted suit, seeking enforcement of statutory obligations under the Maharashtra ownership Flats Act (MOFA for short). Pending suit, learned Trial Judge vide order dated 12th June, 2021 refused to restrain defendants from creating third party rights in the Suit Property. Feeling aggrieved by the above said order, this appeal is preferred under Order 43 Rule 1 (r) r/w. Section 104 of the Code of the Civil Procedure.

2. Heard learned counsel for the parties at length.

3. Foremost question, that arises for consideration, in this appeal is whether suit seeking enforcement of obligations under the MOFA, was maintainable, especially against the Defendant Nos. 3 and 4, who admittedly were not party to the suit agreement dated 3rd March, 2010.

4. Briefly stated facts of the case are like this:

Jaibharat Cooperative Housing Society (Proposed) vide development agreement dated 29th January, 2005 appointed M/s. Mahek Developers- Defendant No.1 to implement housing project under the Slum Rehabilitation Scheme in accordance with Development Control Regulation (DCR) No. 33(10), on a plot of land bearing CTS No. 471(Part) at Village Kandivali, Taluka Borivali, Mumbai - 400 067. M/s. Mahek Developers was a proprietary concern, of which Defendant No.2 was a proprietor. On 2nd March, 2010, M/s. Mahek, through its proprietor agreed to sell 6050 sq. ft. carpet area (Suit Property for short) in proposed, free-sale component of rehabilitation project known as 'Mahek Heights' to the plaintiffs, for total consideration of Rs.1.50 Crores. Plaintiffs paid entire consideration to Mahek Developers ('Mahek' for short) before July, 2010. In December, 2010, said Mahek, proprietary concern, was transformed into a partnership firm, consisting of Defendant Nos. 2 and 3. A year thereafter, on 9th February, 2012, Jaibharat Cooperative Housing Society, represented slum rehabilitation authority, seeking cancellation of appointment of M/s. Mahek as its Developer, reasoning being nearly for seven years project did not progress at all. Whereupon, the authority under the Slum Act, revoked the

appointing of Mahek, and in its' place appointed M/s. Raj Arcade - Defendant No.4, to implement the project. That order was passed in May, 2012. For whatsoever reasons, after appointing Defendant No.4 as a developer, Respondent No.3 retired from partnership in August, 2012. In the backdrop of these admitted facts, it is Plaintiffs' case that M/s. Mahek, in collusion with Defendant No.3, with an intention to wipe out its liabilities and obligations assigned development rights to Defendant No.4. Thus with ulterior motive, M/s. Mahek firstly admitted M/s. Sethia Estate Development Private Limited (Sethia for short) Defendant No.3, as a partner, of which Mr. Akshay Kothari was/is director. Likewise, executed a power of attorney in favour of Mr. Akshay Kothari, who happened, to be director of M/s. Raj Arcade Homes Pvt. Ltd. (Defendant No.4), a new developer. Whereupon, M/s. Mahek, received huge amount from M/s. Raj-new developer, before even issuing LOI in its favour.(see complaint to SRA). To put it differently, Plaintiffs' case is M/s. Mahek, directors of M/s. Sethia Estate (Defendnt No.3) through common person Mr. Kothari, in collusion with M/s. Raj Arcade (Defendant No.4), in planned manner assigned development rights to Defendant No.4 and thereby deceived the plaintiffs and

such other similarly situated persons, with sole intention to wipe out all liabilities of M/s. Mahek. As a result, complaint was filed by the Plaintiffs, against the Defendants with Slum Rehabilitation Authority. Even FIR was registered at the Kandivali Police Station. In the circumstances, Plaintiffs issued notice to all the Defendants, calling upon them to discharge their obligations under the suit agreement, dated 2nd March, 2010. After which, , Plaintiffs instituted Short Cause Suit No. 653/2015, to seek the, following reliefs:

- (i) Mandatory orders, directing Defendants to execute agreement for sale in respect of suit property i.e. Commercial Premises, admeasuring 6050 sq.ft. in the proposed sale component in the slum rehabilitation project (' Project' for short) known as M/s. Mahek Heights and to comply with statutory obligations under the Maharashtra Ownership Flats Act and perpetual injunction to restrain the Defendants from transferring, alienating and creating third party rights in the suit property.

Pending, suit, plaintiffs moved Notice of Motion No. 523 of 2013, seeking temporary injunction to restrain the Defendants

from creating third party rights in the suit property. On 20th February, 2013, by ad-interim order, trial court restrained the defendants from creating third party rights in the Suit Property. Pending Notice of Motion, Plaintiffs filed complaints with the Slum Rehabilitation Authority (SRA) against the Defendants. Whereupon, on 28th January, 2016, CEO of SRA issued a stop work notice; however later, notice was withdrawn upon, M/s. Raj Arcade (Defendant No.4) new developer filed an undertaking, which reads as under:

”With reference to the matter bearing S.C. Suit No.653 of 2013, filed by one Mrs. Jagruti Shah & Anr. on 28/02/2013 the Hon’ble City Civil Court granted order of ad-interim *inter alia*, directing defendants not to sell, transfer, alienate or create third party right with respect to suit property described thereunder viz. Commercial premises of area admeasuring 6050 sq.fts. carpet area in manner prayed there under.

In this regard, as per the directions given on 01/02/2016 we are submitting our undertaking as under:

In true spirit of the Order passed by the Hon'ble City Civil Court, we undertake to abide by the final outcome of the matter under reference and shall also abide by its final adjudication to be done by Honourable Apex Court. We further undertake to make the provision of reserving commercial area of 6050 sq.ft. (Carpet area) in plot under reference and we will not create third party right with respect to 6050 sq.ft. (carpet area) till the final adjudication of matter under reference.”

5. On notice, Defendant Nos. 1 and 2 chose to remain absent. However, Defendants 3 and 4 appeared and resisted the notice of motion broadly on the following grounds.

- (i) That agreement dated 2nd March, 2010 ('suit agreement' for short) executed by Mahek being indefinite and uncertain, it was not capable of being enforced;
- (ii) defendant Nos. 3 and 4 were strangers to the suit agreement and thus was not enforceable against them;

- (iii) the suit agreement though was not one, under the MOFA, Yet, instituted seeking enforcement of statutory obligations under the MOFA; thus suit was not maintainable;
- (iv) the suit agreement was an "agreement to execute the agreement" therefore, suit itself was not maintainable;
- (v) since identity of the, suit property could not have been reasonably ascertained, the agreement was not enforceable in law;
- (vi) the agreement in question was not concluded contract;
- (vii) the entire consideration under the said agreement was paid to M/s. Mahek and not to Defendant Nos.3 and 4;
- (viii) the development agreement dated 29th January, 2005, did not empower M/s. Mahek, to sell property in free sale component of project being contrary to DCR 33.10;

- (ix) Suit agreement, on the face of it suggest, that it was executed, to secure amount of Rs.1.50 Crore paid by the Plaintiffs to M/s.Mahek;
- (x) the third party rights have been created in the suit property of which, respondents Nos. 5 to 25 are the bonafide purchasers.
- (xi) Defendant Nos. 3 and 4 being not 'promoters' within the meaning of Section 2(c) of MOFA, Plaintiffs could not seek enforcement of suit agreement against them;
- (xii) Appeal from Order No. 467/2017, that arose from order dated 16th January, 2017, filed by one Dinesh Dayala Vadadaria against the Defendants (respondents herein), relating to same project and, in similar facts and circumstances, has been dismissed by this Court vide order dated 2nd April, 2018.

6. The Learned Trial Court upon appreciating pleadings, evidence and subsequent events, dismissed the Notice of Motion on 12th June, 2021 by which temporary injunction as sought, was refused. This order is under challenge in this appeal from order.

7. Before advertizing to arguments of counsel, it may be stated, although the interim relief was refused to the Plaintiffs, the Learned Trial Court restrained Defendants from creating third party rights in the suit premises for a period of two weeks i.e. upto 27th July, 2021. During interregnum, Plaintiffs preferred this appeal before this Court and requested the Trial Court to extend the interim relief beyond 27th July, 2021;. However, trial court declined to extend the interim relief. Therefore, urgent circulation of appeal was sought. Accordingly, appeal was heard on 28th July, 2021. In the course of hearing, Defendant Nos. 1 and 2 did not remain present. However, counsel appearing for other Respondents informed the Court that in the morning of 28th July, 2021, third party rights were created in the suit property.

8. Taking note of this fact, the Learned Judge of this Court was pleased to observe that "it clearly appears to this Court that after granting circulation of the present appeal by this and with a view to defeat the filing of the present appeal, Respondent No.3 has created third party rights in the suit property. The act of Respondent No.3 is not appreciated by this Court. This

practice adopted by Respondent No.3 is highly deprecated and serious view has to be taken. Till then ad-interim relief granted by the trial Court vide its order dated 12th July, 2021 to continue till next date even against the persons in whose favour, Respondent No.3 has created the third party rights. Whereupon, Plaintiff filed a contempt petition against the Defendants being Contempt Petition No. 161 of 2022.

REASONS

9. Herein it is undisputed fact that M/s. Mahek, alone had executed suit agreement on 2nd March, 2010 and agreed to sell 6050 sq.ft. area in “proposed free sale component” building in rehabilitation project. Admittedly, entire consideration was paid to and received by M/s. Mahek. In essence, neither defendant No.3 nor defendant No.4 were party to the suit agreement. Yet, plaintiffs instituted suit against them, seeking decree to enforce the suit agreement, allegedly executed under MOFA. Primary evaluation of evidence, shows defendant Nos.3 and 4 were strangers to the suit agreement. Law is, any person entitled to any legal character or to any right as to property may institute suit against person denying or interested to deny his title to such

character or right. Thus let me ascertain, whether defendant Nos. 3 and 4, though not party to the suit agreement, were interested in denying Plaintiffs' right to Suit Property. Here, Defendant No.3 was admitted as partner by Mahek in December, 2012, i.e. nearly after two years from the execution of the suit agreement. On 10th of May, 2012, Slum Rehabilitation Authorities, revoked appointment of M/s. Mahek as a developer and appointed M/s. Raj Arcade- Defendant No.4 to execute the rehabilitation project. Soon thereafter, Defendant No.3 retired from the partnership, in August, 2012. Admittedly, it is not plaintiffs' case, that after converting M/s.Mahek, from proprietary concern to partnership firm, the Defendant No.3 had received any consideration from the Plaintiffs nor there is any material on record, suggesting that Defendant No.3 ratified the Suit Agreement. Therefore, evaluation of the pleadings and the evidence on record, does not prima facie establish *privity* of contract between the Plaintiffs and Defendant No.3 either by conduct or otherwise. As a general rule a contract cannot confer rights or impose obligations arising under it to any person who is not a party. In the circumstances, prima facie it is to be held, Defendant No. 3 had neither denied or was interested in denying

the right and title of the plaintiffs to the suit property. Insofar as M/s. Raj Arcade- Defendant No.4 is concerned, it may be stated that it was appointed as a developer by a statutory authority under the Slum Act, as a developer in May, 2012. That appointment has not been challenged by any one. Thus it is to be noted, M/s. Raj Arcade came into the picture two years after the suit agreement was executed, between the plaintiffs and M/s. Mahek. Therefore, appointment of Defendant No.4 as a developer in the place of M/s. Mahek, being made by authority under the Slum Act and with consent of Jaibharat Society, prima facie, it can't be said Defendant No.4 was interested in denying plaintiffs' rights in the Suit Property. Plaintiffs would assert and claim that M/s. Mahek in collusion with directors of Defendant No.3 assigned the development rights to Defendant No.4 upon receiving huge consideration, from Defendant No.4, to wipe out its own obligations and intentionally, to cause unlawful losses to the Plaintiffs. However, except the bare allegations, prima facie there is no evidence on record to show the Defendant No.4 had shared that intention of M/s. Mahek and thereby denied or was interested in denying Plaintiffs' right in the suit property.

10. Assuming, there was a *privity* of contract between the Plaintiffs and Defendant Nos. 3 and 4, yet, having regard to facts of the case, it is necessary to find out whether M/s. Mahek could have entered into suit agreement with the Plaintiffs. In that regard, I have perused Development Agreement, made between Jaibharat Society and M/s. Mahek and the Suit Agreement. Factual position emerges therefrom is as follows:

”Jaibharat Cooperative Housing Society, vide development agreement dated 29th January, 2005 appointed M/s. Mahek to execute slum rehabilitation project in accordance with Development Control Regulation 33.10. Whereby M/s. Mahek was entitled to sell flats in the sale component of the project after accommodating all the members of the society. This recital in development agreement was in consonance with Rule 2.5, DCR 33.10 VII, which says “on compliance with the terms and conditions, the building permission shall be given, in accordance with the provisions under section 45 of the MR & TP Act, 1966 to project under SRAS, first to the rehabilitation component and thereafter to free sale component”. Therefore, M/s. Mahek could not have entered into suit agreement with the Plaintiffs on 2nd March, 2010 to sell the suit property 'in free sale component'

project for consideration of Rs.1.50 Crores in absence of building permission. Thus prima facie, suit agreement counters the provisions of DCR. Now, let me advert to the suit agreement dated 2nd March, 2010. Under this agreement vide clause no. 4 it was understood, between the parties, that in the event M/s. Mahek Developers fails to commence work of construction of the sale component, building within two years, for any reason whatsoever, the plaintiffs were entitled to terminate the agreement and claim refund with interest @ 24% per annum. It also appears from the suit agreement that M/s. Mahek represented Plaintiffs that two buildings comprising ground plus twenty upper floors would be constructed, but had not obtained approval and commencement certificate in respect of any proposed sale or slum buildings. And further represented CC would be obtained within two years. In spite of representation of this kind, Plaintiffs agreed to purchase area 6050 sq.ft. commercial area in proposed sale component building for Rs.1.50 Crores, which was not existing at the relevant point of time. Law is that in case of an agreement to sell an immovable property, if property cannot be identified with certainty that could not be a concluded contract between a prospective purchaser and seller. In

the case in hand, the suit property was not identifiable with certainty, reason being at the relevant time neither plans were sanctioned nor M/s. Mahek was empowered to sell the area in the free sale component building. The next clause in the suit agreement is the clause No.5; by which, M/s. Mahek Developers, represented Plaintiffs that, 'usual and regular' agreement for sale under the MOFA in respect of carpet area admeasuring 6050 sq.ft. in the proposed building shall be entered in due course. The Clause 5 reads like this "parties agree that they shall enter into regular agreement for sale in respect of individual, commercial premises / units required under the provisions MOFA in due course".

Relying on this recital, learned counsel for the Respondents have correctly submitted that where in a agreement, reference to future contract is made, the said agreement does not create a right in favour of purchaser. In this case, vide the clause No.5 of the agreement M/s. Mahek agreed to execute the agreement with the Plaintiffs under the provisions of MOFA in due course. Thus, prima facie, neither identity of the suit property was reasonably ascertainable nor the suit agreement created enforceable right in favour of the plaintiffs. Further, two clauses 8 and 9 stipulate,

that if developers fails to give possession of the suit premises, in that event, developer shall be liable to pay to the plaintiffs' interest @ 24% p.a. till possession of the premises are handed over. Thus, in consideration of recitals in the suit agreement, apparently it is to be held that parties to the suit agreement never intended to sell or purchase the suit premises, reason being recitals of the agreement, in particular Clause 4, 8 and 9 (right to terminate and recover amount with interest @ 24% p.a.) imply Suit Agreement was executed on 2nd March, 2010, just to secure the amount of Rs.1.50 Crores advanced by the Plaintiffs to M/s. Mahek.

Thus having regards to facts of the case and upon taking into consideration the material on record prima facie I hold that:

- (i) the Defendant Nos. 3 and 4 were strangers to the suit agreement;
- (ii) the Defendant Nos. 3 and 4 were not interested in denying plaintiffs' right to Suit Property;
- (iii) the identity of the suit property was not reasonably ascertainable from the suit agreement, reason being at the material time no plans, were sanctioned by the Planning Authority and further M/s. Mahek was not

empowered to sell the free- sell component flats in view of the provisions under the DC Regulations and the Development Agreement;

- (iv) the suit agreement, prima facie does not create enforceable right in favour of the plaintiffs since it contains a express clause to execute agreement to sell in future under the MOFA; (emphasized)
- (v) the Defendant Nos. 3 and 4 were not promoters, within the meaning of Section 2(c) of the MOFA and therefore, suit seeking enforcement of statutory obligations could not have been instituted.

Besides, it may be noted that in Appeal from Order No. 467 of 2017 which arose from order dated 16th January, 2017 passed by the trial court in the suit instituted by Dinesh S. Vadadaria against the Respondents herein, in similar facts and circumstances has been dismissed by this Court vide order dated 2nd April, 2018.

11. For all that reasons, no interference is called for in the impugned order.

CONTEMPT PETITION

12. I have referred to circumstances, in which, the contempt petition has been filed against the Defendants. Whether agreement executed by the defendants in favour of respondent Nos. 5 to 25 was in breach of the interim protection or not is left open to be decided independently in the said contempt petition.

13. As a result the Appeal from Order is dismissed including all applications therein.

14. Contempt Petition No. 161 of 2022 be listed for admission on 28th of June, 2022.

15. In consideration of the facts of the case, appellants' request to continue interim relief is rejected.

(Sandeep K. Shinde, J.)