

ORDER:-

- 1) This Appeal is directed against an order dated 4th February, 2023, passed by the learned Judge, City Civil Court in Notice of Motion No.1936 of 2022 in Suit No. 6889 of 2003, whereby the Notice of Motion came to be partly allowed restraining the defendants-appellants from creating third party rights, title or interest or permitting any third party under any Development Agreement, Assignment Agreement and Sale Agreement under any rights doing any construction activity on the suit plot and also from interfering with the plaintiffs rights in the suit emanating from the agreement dated 7th July, 1993, supplemental agreement dated 3rd December, 1996 and the consent terms dated 20th October, 2000 filed in Suit No.4262 of 2000.
- 2) For the sake of the convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.
- 3) Though the litigation has chequered history peppered with sporadic settlements, the background facts can be stated in brief as under:-

(a) A building consisting of 40 tenements was situated at a plot of land bearing CTS No. 229 and 267, admeasuring 1392.12 sq. meters, Nehru Nagar Housing board colony, Kurla (E), Bombay. It was allotted to the defendant's Society by MHADA. On 7th July, 1993, the defendant society entered into a development agreement with the plaintiff for redevelopment of the suit property. A supplemental agreement dated 3rd December, 1996 came to be executed between the plaintiff and defendant. It was the claim of the plaintiff that the defendant society and its members committed breach in performance of the obligations under the development and supplemental agreement. Proceedings commenced.

(b) In Suit No. 4262 of 2000, instituted in this Court, the plaintiff asserted that the defendant society failed to pay the construction costs as agreed under the development agreement and supplemental agreement and instead threatened to forcibly take possession of the flats which were entrusted to the plaintiff. In the said suit, pursuant to the settlement arrived at between the plaintiff and defendant, a consent order was passed on 20th October, 2000. In the consent order, the defendant society confirmed to have executed the development agreement

dated 7th July, 1993 and supplemental agreement dated 3rd December, 1996 and agreed to allow the plaintiff to carry out the construction work and also accept the prospective purchasers of the flats sold by the plaintiffs as the members of the defendant society.

(c) The plaintiff asserts despite the consent order dated 20th October, 2000, in Suit No. 4262 of 2000 and having agreed to pay a sum of Rs.2,00,000/-, per member towards construction cost the defendant committed default in payment of the construction cost. Defendant also threatened to dispossess the plaintiff and obtain the possession of the flats forcibly. The plaintiff was thus constrained to institute Suit No.5732 of 2001 before the City Civil Court.

(d) Again a settlement was arrived at between the plaintiff and defendant. Consent terms were executed on 3rd December, 2001. Defendant agreed not to disturb the possession of the plaintiff over the flats, which were delivered on account of the failure on the part of the defendant to make the payment, and to surrender the rights of those members in favour of the plaintiff.

(e) Defendant again failed and neglected to perform the contractual obligations and the undertakings given in the

consent terms. Plaintiff was forced to institute suit No. 2498 of 2002. In the said suit Minutes of Order were passed on 16th May, 2002. The defendant conceded to an order that the defendant No. 1 and its members be restrained from interfering with the construction activity to be carried out by the plaintiff at the suit property by purchasing F.S.I. from MHADA.

(g) Eventually, the plaintiff was constrained to institute the instant suit with the allegations that the defendant and its members were in arrears to the tune of Rs.10,30,000/-. The plaintiff thus prayed for a decree of Specific Performance of the consent terms dated 20th October, 2000, development agreement dated 7th July, 1993 and supplemental agreement dated 3rd October, 1996 and, in the alternative, a money decree for the sum of Rs.3,00,000/-, by way of damages and a sum of Rs.10,30,000/-, towards the balance construction cost along with interest at the rate of 18% p.a. from 21st February, 2001 till payment and/or realisation.

4) During the pendency of the said suit, the plaintiff took out the instant Notice of Motion, on 2nd May, 2022, with the assertion that though the defendant failed to file a written statement yet, during the pendency of the suit, the defendant

has entered into a development agreement with some developers, who have demolished the suit building consisting of 40 flats. Upon being informed by the Secretary of the defendant, the plaintiff claimed to have visited the suit property and found that the building had been demolished and further development was being carried out. The plaintiff claimed to have registered the lis with Registrar of Assurances and yet instruments were executed by the defendant and new developer.

5) Hence, to protect the subject matter of the suit till the decision of the suit, the plaintiff took out the instant Notice of Motion seeking interim reliefs in the nature of appointment of the Court Receiver in respect of the suit property and temporary injunction restraining the defendant from creating third party interest therein of whatsoever nature.

6) The defendant resisted the Notice of Motion by filing an affidavit-in-reply. Entitlement of the plaintiff to seek Specific Performance of the development agreement dated 7th July, 1993 and supplemental agreement dated 3rd December, 1996 was put in contest on the ground that those agreements were for execution of construction contract only and did not create any interest in the suit property. The delay in seeking the interim

reliefs, in view of the subsequent developments, was stated to be fatal to the tenability of the Notice of Motion. In any event, according to the defendant, the suit represented a money claim and the plaintiff was not entitled to seek the injunctive reliefs as well as appointment of the Court Receiver.

7) By the impugned order, the learned Judge was persuaded to allow the Notice of Motion holding *inter alia*, that the development agreement dated 7th July, 1993 was not a works contract simplicitor. The development agreement, coupled with the supplemental agreement, incorporated a contract, which could be specifically enforced and the plaintiff has been consistently pursuing the relief of specific performance as well. Therefore, the suit can not be said to be for recovery of money simplicitor. Opining that, having entered into the consent terms with the plaintiff, the defendant consciously entered into development agreement with a third party and thereby infringed the contractual obligations, the learned Judge considered it necessary to restrain the defendant from creating third party rights in the suit property. Resultantly, the Notice of Motion came to be partly allowed whilst rejecting the prayer for appointment of the Court Receiver and a direction for discovery.

8) Being aggrieved the defendant is in Appeal.

9) I have heard Mr. Karl Tomboly, the learned Counsel for the appellant-defendant and Mr. Vishal Kanade, the learned Counsel for the respondent-plaintiff. With the assistance of the learned Counsel for the parties, I have perused the pleadings, orders passed in the proceedings hitherto and the material on record.

10) Mr. Tamboly urged with a degree of vehemence that impugned order singularly lacks consideration on the aspect of the balance of convenience and irreparable loss. Though the plaintiff failed to make out a *prima facie* case also, according to Mr. Tamboly, even if it is assumed that the plaintiff succeeded in making out a *prima facie* case, yet the defendant could not have been restrained by order of temporary injunction without determining the aspects of balance of convenience and irreparable loss. On this count alone, Mr. Tamboly urged, the impugned order deserves to be interfered with.

11) Laying emphasis on the fact that the suit came to be instituted in the year 2003 and the Notice of Motion came to be moved in the year 2022, Mr. Tamboly would urge this time lag dis-entitles the plaintiff from claiming any equitable relief. The

learned Judge, City Civil Court did not adequately consider these aspects of the matter.

12) Mr. Tamboly further submitted that the learned Judge City Civil Court recorded an erroneous finding that the suit was also for specific performance of contract in the face of an order passed by a learned Single Judge of this Court in Notice of Motion No. 2159 of 2003 in Suit No. 2328 of 2003, wherein a categorical statement was made on behalf of the plaintiff that the claim was restricted to payment of money under the consent terms dated 20th October, 2000, came to be recorded. Mr. Tamboly strenuously submitted that the learned Judge, City Civil Court was not at all justified in restraining the defendant from creating third party rights, which has severe ramifications not only qua the defendant but the third parties. It was submitted that after demolition of the existing structure, the new construction has reached an advanced stage. Grant of injunction, at this stage, has the effect stalling the entire project for recovery of a sum of Rs.10,30,000/- i.e. the Suit claim.

13) Mr. Kanade, the learned Counsel for the plaintiff joined the issue by stoutly submitting that the learned Judge, City Civil Court has recorded a justifiable finding that instant suit is

also for a decree for Specific Performance of contract. Taking the Court through the recitals of the development agreement and the supplemental agreement as well as the consent orders, Mr. Kanade would submit that the agreement in question can not be said to be a mere construction contract. On the contrary, those agreements, coupled with the consent order, according to Mr. Kanade, unmistakably indicate that interest had been created in the suit land in favour of the plaintiff. The act of defendant society in surreptitiously demolishing the building, which stood over the suit property, and entering into a development agreement with a new developer *per se* reflects the oblique motive. In such circumstances, the learned Judge, City Civil Court was justified in restraining the defendant from creating further third party rights in the suit property, lest the plaintiff would be left in the lurch, urged Mr. Kanade.

14) Mr. Kanade would further urge that having regard to the history of litigation between the parties and the fact that the suit is ripe for hearing, it may be appropriate to expedite the hearing of the suit instead of interfering with a discretionary order.

15) To start with, it may be apposite to note the circumstances in which the jural relationship between the plaintiff-defendant emerged. The suit property was in a dilapidated condition. Defendant floated tender. The bid of the plaintiff to construct the building to house 40 members of the defendant society came to be accepted, leading to execution of the development agreement dated 7th July, 1993. The primary agreement was to construct the building to be paid for by the defendant at the rate of 375 per square. It was specifically agreed by and between the parties that the plaintiff would construct the building for and on behalf of the defendant after dismantling then existing old dilapidated building as per the building plan prepared by the Society's Architect M/s. Ranjit Naik and Associates. Certain provisions for sale of the area, which might become available, after accommodating 40 tenants/members were also made. In the event of sale of such additional area, which might become available, the society was to get credit at the specified rates. Yet, the development agreement was predominantly a contract to build.

16) Supplemental agreement dated 3rd December, 1996, came to be executed between the parties whereby and whereunder the

plaintiff was authorised to accept surrenders from those members who had no money to pay to the developer for construction of their tenement. The defendant also agreed to accept the incoming members to whom the plaintiff would transfer the surrendered tenement, as members of the defendant society without charging transfer fees. The plaintiff was granted right to sale balance un-utilised F.S.I. and sale newly constructed flats to the prospective purchasers. The defendant agreed to pay for the construction at the rate of Rs.511/- per square feat instead of Rs.375/-as originally agreed.

17) In the wake of the controversy, noted above, the plaintiff instituted Suit No. 4268 of 2000 and consent terms were executed on 20th October, 2000. Under the consent terms, the defendant acknowledged that the agreement for development dated 7th July, 1993, supplemental agreement dated 3rd December, 1996 and the power of attorney dated 30th June, 1997 executed by the defendant in favour of the plaintiff were valid, subsisting and binding. Defendant agreed to allow the plaintiff to carry out the reconstruction work as per the terms of the said agreement. Defendant agreed to make payment of balance consideration within a period of four months therefrom.

On account of the non-compliance of the said consent terms, two more suits came to be instituted.

18) In substance, what emerges from the material on record is that, by the year 2000, the plaintiff completed the entire construction work and claimed to have performed its part of contract. On account of the failure on the part of the defendant to comply with the obligations under the agreements and consent terms, the plaintiff was constrained to institute instant Suit No. 2328 of 2003, *inter alia*, seeking a sum of Rs.10,30,000/-, towards balance construction cost and Rs.3,00,000/- towards damages and interest thereon at the rate of 18% p.a. Undoubtedly, the plaintiff also prayed for a direction against the defendant to specifically perform the consent terms dated 20th October, 2000, development agreement dated 7th July, 1993 and supplemental agreement dated 3rd December, 1996.

19) The pivotal question that arose for consideration was whether the suit still retained the character of a suit for the specific performance of the contract contained in development agreement dated 7th July, 1993 and supplemental agreement dated 3rd December, 1996. The learned Judge, City Civil Court

was of the view that the suit was also for Specific Performance of the said contract.

20) The aforesaid question assumes significance. If the contract is construed as a contract to build simplicitor, ordinarily such a contract is not specifically enforceable. On the contrary, if the contract envisages creation of interest in the property to be developed, the Court would be justified in passing a decree for specific performance, if certain conditions are fulfilled.

21) A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of **Sushil Kumar Agarwal Vs. Meenakshi Sadhu and Others**¹, wherein the Supreme Court considered the question as to whether the Section 14(3) (c) of the Specific Relief Act, 1963, constitutes a bar to a suit by a developer for specific performance of a development agreement between the developer and the owner of the property. After advertent to the provisions contained in Section 14 of the Act, 1963 and the judgments which dealt with the enforceability of a development agreement, the Supreme Court expounded the various facets of development agreement, the conditions in which the development agreement may become

1 (2019) 2 SCC 241

enforceable and the principles which govern the exercise of discretion in granting the specific performance of development agreement, as under:

18. When a pure construction contract is entered into, the contractor has no interest in either the land or the construction which is carried out. But in various other categories of development agreements, the developer may have acquired a valuable right either in the property or in the constructed area. The terms of the agreement are crucial in determining whether any interest has been created in the land or in respect of rights in the land in favour of the developer and if so, the nature and extent of the rights.

.....

24. Various High Courts have interpreted the requirements under Section 14(3)(c) of the Act and opined on the maintainability of a suit by the developer for Specific Performance against the owner of the property for a breach in the conditions of the development agreement. A common thread that runs through the analysis in decided cases is the following:

24.1. The courts do not normally order Specific Performance of a contract to build or repair. But this rule is subject to important exceptions, and a decree for Specific Performance of a contract to build will be made only upon meeting the requirements under law;

24.2. The discretion to grant Specific Performance is not arbitrary or capricious but judicious; it is to be exercised on settled principles; the conduct of the plaintiff, such as delay, acquiescence, breach or some other circumstances outside the contract, may render it inequitable to enforce it;

24.3. In order to determine the exact nature of the agreement signed between the parties, the intent of the parties has to be construed by reading the agreement as a whole in order to determine whether it is an

agreement simpliciter for construction or an agreement that also creates an interest for the builder in the property. Where under a development agreement, the developer has an interest in land, it would be difficult to hold that such an agreement is not capable of being specifically enforced; and

24.4. A decree for Specific Performance of a contract to build will be made if the following conditions are fulfilled:

24.4.1. the work of construction should be described in the contract in a sufficiently precise manner in order for the court to determine the exact nature of the building or work;

24.4.2. the plaintiff must have a substantial interest in the performance of the contract and the interest should be of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

24.4.3. the defendant should have, by virtue of the agreement, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed..... ”

(emphasis supplied)

22) Mr. Kanade would urge that in the case at hand not only the agreements provide for the right of the plaintiff to construct additional floors and sale the units but the defendant has incurred a decretal obligation. Attention of the Court was invited to consent order dated 16th May, 2002, passed in S.C. Suit No. 2498 of 2002. In the said suit, on the basis of the Minutes of Order it was recorded that the defendants have no objection if

prayer clause “a” of the said Suit was granted in favour of the plaintiff. The suit thus came to be decreed in terms of the prayer Clause “a”. It was submitted that in view of the aforesaid consent decree in Suit No. 2498 of 2002, it can not be disputed that interest was created in the suit property.

23) Mr. Tamboly countered by submitting that under the said consent decree, the defendant had agreed not to restrain the plaintiff from utilising the F.S.I., at the suit property, which the plaintiff may acquire. However, the plaintiff never acquired additional F.S.I. nor performed the rest of the contractual obligations, and, therefore, the defendant had terminated the contract by notice dated 18th June, 2002.

24) Prayer Clause “a” in Suit No. 2498 of 2002, reads as under:-

“a) For permanent injunction order restraining the defendants, their servants or agents or any one claiming through them from obstructing the plaintiff from using the F.S.I. on the suit property Viz. Building No. 45, situated on plot of land bearing S. No. 229 and 267, C.T.S. No. 12(part) at Nehru Nagar Housing Board Colony, Kurla (E) Mumbai-400 024 from the adjoining plot of land belonging to MHADA authorities on his complying with requisite conditions of the MHADA Authorities....”

25) Evidently, the suit was instituted to restrain the defendant from causing obstruction to the plaintiff from using F.S.I. on the

suit property from adjoining plot of land belonging to MHADA Authorities. It clearly implied that the plaintiff had to first acquire additional F.S.I./T.D.R. and then load the same on the suit property.

26) At this juncture, the fact that by notice dated 18th June, 2002, the defendant terminated the development agreement and supplemental agreement assumes importance. Ordinarily, a suit for Specific Performance without seeking a declaration that the termination of the contract is illegal and bad in law, does not deserve to be entertained. Since the contract can not be said to subsist, in view of the termination, a declaration that contract is still subsisting and binding on the parties is necessarily required to be sought, if a prayer for Specific Performance is to be sustained. In the instant suit, there is no prayer for a declaration that the termination is illegal and bad in law and the suit agreements still subsist.

27) What was the nature of the suit claim, in the contemplation of the plaintiff himself, also assumes significance. In Notice of Motion No. 2159 of 2003 in the instant Suit, while the suit was still on the file of this Court on Original Side, the plaintiff had purportedly moved for attachment before judgment.

On 8th December, 2005, this Court was persuaded to dismiss the said Motion. The order reads as under-

“1. The learned counsel for the plaintiff states that the only relief which the plaintiff claims is payment of money under the Consent Terms dated 20.10.2000. No case for attachment before judgement is made out. It is submitted that under the Consent Terms, the plaintiff is entitled to the same. That is a money claim which must be decided at the final hearing of the suit.

2. The Notice of Motion is, accordingly, dismissed. This order will not prejudice the plaintiff's rights to apply for execution of the Consent Terms, in accordance with law....”

28) It thus appears that, even in the contemplation of the plaintiff, the suit was primarily for recovery of the amount which under the terms of the contract and the consent terms dated 20th October, 2002, the defendant and its members were enjoined to pay to the plaintiff. The fact that there was a stipulation in the contract that in future the plaintiff would acquire additional development rights and construct additional floors was clearly in the nature of an executory contract. *Prima facie* such a stipulation can not operate in infinity.

29) At this stage, the time lag comes into play. The jural relationship between the plaintiff and defendant started when the original building was in a dilapidated state. After another 20 years of construction of the building by plaintiff, the building

again warranted re-development (in the contemplation of the defendant society). Admittedly, the building erected by the plaintiff has since been demolished. A development agreement with another developer has been executed. A multi-story structure has already been erected.

30) It is in the context of the aforesaid developments, the prayer for grant of interim reliefs deserves to be appreciated. The parameters for grant of temporary injunction are well settled. In the case of **Seema Arshad Zaheer and Others Vs. Municipal Corporation of Greater Mumbai and Others²**, the essential requirements to be satisfied by the plaintiff for grant of temporary injunction were postulated by the Supreme Court as under:-

“(i) Existence of a *prima facie* case as pleaded, necessitating protection of plaintiff’s rights by issue of a temporary injunction;

(ii) When the need for protection of plaintiff’s rights is compared with or weighed against the need for protection of defendant’s right or likely infringement of defendant’s right, the balance of convenience tilting in favour of plaintiff; and

(iii) Clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff’s conduct is free from blame and he approached the court with clean hands.”

2 (2006) 5 SCC 282

31) If the facts of the case are appraised on the aforesaid touchstone, it would be difficult to draw an inference that the plaintiff has succeeded in making out a *prima facie* case, especially in the context of the nature of the suit claim. In any event, the time of 20 years, which has elapsed, seems to have taken a toll on the plaintiffs case.

32) A profitable reference in this context can be made to a judgment of a learned Single Judge of this Court in the case of **Ambalal Maganlal Patel and Another Vs. Indumati Narayan Mohile and Others**³, wherein, in the facts of the case, the learned Judge had observed as under:-

“.... Interim reliefs such as those claimed in the present motion by the plaintiffs are basically in the discretion of the Court. Though discretion is expected to be exercised fairly and reasonably, this, in my judgment, is not a case for exercising the same in favour of the plaintiffs. Even assuming that the plaintiffs had initially, when the suit was filed, made out a case for interim relief, the same stood virtually destroyed by their utter silence all these long years. Third party rights have intervened. The old building has been demolished. A new construction has come up to third floor level.....”

(emphasis supplied)

33) Reliance placed by Mr. Tamboly on a Division Bench judgment of this Court in the case of **Ferani Hotels Private**

3 AIR 1990 Bombay 187

Limited and Others Vs. Nusli Neville Wadia and Others⁴ also appears to be well founded. In the said case, the aspect of delay in seeking the interim relief on the entitlement for interim relief was adverted to by the Division Bench. It was observed that the fact that the equities have intervened and third party rights have been created and the work under the project was continue must weigh with the Court in deciding to grant stay on construction at the interim stage.

34) The aforesaid factor also bears upon the determination of the balance of convenience. As noted above, the suit predominantly represents a money claim. The building which the plaintiff had constructed has already been demolished and given way to a multi-storey structure housing far more units than the tenements in the original building. Equities and third party rights have incontrovertibly intervened. Restraint of the nature ordered by the learned Judge City Civil Court, in the circumstances of the case, would not balance the equities between the parties.

35) I am, therefore, persuaded to hold that the learned Judge, City Civil Court did not adequately advert to the parameters of

4 2013 (3) Bom.C.R.669

balance of convenience and irreparable loss. The exercise of discretion by the learned Judge thus deserves to be corrected.

36) Undoubtedly, the interest of the plaintiff also deserves to be protected. Having regard to the nature of the suit claim, in my view, restraining the defendant-appellant from alienating and/or otherwise creating third party rights in three 2BHK flats till the disposal of the suit would meet the exigency of the situation and also equip the Court to work out the equities at the stage of determination of the suit.

37) The Appeal thus deserves to be partly allowed.

38) Hence, the following order.

:-ORDER:-

(i) The Appeal stands partly allowed.

(ii) The Notice of Motion No. 1936 of 2022 stands dismissed, subject to the defendant and the developer furnishing an undertaking, on an affidavit, before the City Civil Court that they would keep aside three 2BHK flats (to be described with reference to number, area, floor and wing, if any) and would not dispose of and/or

alienate and otherwise create third party rights in those three flats till the final decision of the suit.

(iii) The undertaking be filed within a period of two weeks from today.

(iv) The impugned order shall continue to operate as an ad-interim order till the filing of such undertaking.

(v) Upon filing the undertaking this order will come into force and the impugned order shall stand quashed and set aside.

(vi) In view of the disposal of the Appeal, the Interim Application also stands disposed.

(vii) No costs.

[N. J. JAMADAR, J.]