IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 420 OF 2022

Shelters Makers (India) Pvt. Limited. ...Applicant.

Versus

Sumu Finvest Private Limited. ..Respondent.

Mr. Pradeep J. Thorat, Mr. Aneesh Jadhav, Ms. Sampada Junarre-Badar i/b Mr. Ajinkya Badar for the applicant.

Mr. Nausher Kohli, Mr. Abhay Jadeja, Mr. Snigdha Mankar i/b Jadeja & Satiya for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : July 7, 2023.

P. C. :

1. The revisional jurisdiction is invoked to challenge the order dated 5th August 2021 passed by the City Civil Court, Mumbai in Notice of Motion No.1477 of 2021 in Suit No.634 of 2021, rejecting the application filed under Order-VII Rule11(a) and (d) of CPC seeking rejection of the plaint.

2. The facts of the case are that in the year 2000, the applicant acquired development rights to develop a slum plot. In the year 2004, the respondent purchased a commercial unit, being Unit No.402, in

the sale component of slum rehabilitation project by a registered agreement dated 9th November 2004. As the applicant, in spite of repeated reminders, failed to hand over possession of the unit, in the year 2021, the aforesaid suit was instituted by the respondent seeking following reliefs :

> *"(a) That this Honourable Court be pleased to order and direct the Defendants to perform the statutory obligations under the provisions of Section 3(f) of the MOFA Act and hand over possession of the suit Unit namely Unit bearing No.402 in Building No.1, on the 2nd floor admeasuring 825 square feet built to the plaintiffs on as is where is basis;*
>
> *(b) That this Honourable Court be pleased to pass a permanent order and injunction restraining the Defendants or their Agents or servants or through any person or persons from through or under them from in any manner either alienating, encumbering, disposing off or creating any third party rights in respect of the 'suit Unit' namely Unit bearing No.402 in Building No.1, on the 4th floor admeasuring 825 square feet built up to any third party."*

3. In this suit, notice of motion came to be filed under Order-VII Rule-11 of CPC contending that the suit did not disclose a cause of action and is also barred by law of limitation, which application came to be dismissed by the impugned order dated 5th August 2021, giving rise to the present petition.

4. Heard Mr. P. J. Thorat, learned counsel for the applicant and Mr. Kohli, learned counsel appearing for the respondent.

5. Mr. Thorat, learned counsel for the applicant has taken this Court through the averments in plaint in detail and would urge that in respect of the agreement of the year 2004, suit has been instituted in the year 2021. He pointed out the pleadings in the plaint which notes the correspondence between the parties from 2005 till 2016 and would contend that as there was no response to the requisitions / notices issued by the petitioner in the year 2007 and 2008, the cause of action for filing the present proceedings arose in the year 2007/2008. Without prejudice, in the alternative he would claim that on 26th July 2016, a communication was addressed to the respondent by the Petitioner making it clear that the Petitioner had taken a decision to refund the amount paid to the respondent and, as such, according to him, the cause of action arose in the year 2016. Pointing out the said communication, he would urge that it is evident that that the respondent became aware in the year 2016 itself that the applicant is unable to complete the project. He would submit that as such the cause of action arose if not in the year 2007/2008, then, in 2016 and the suit filed in the year 2021 is clearly barred by limitation. He would further submit that although the reliefs sought in the suit was for the enforcement of obligations under the Maharashtra Ownership of Flats Act (Regulation of the Promotion of Construction,

Sale, Management and Transfer) Act, 1963 [*for short "MOFA"*], in fact it is a suit for specific performance of the agreement for sale executed in the year 2004 and the period of limitation for which, under Article 54 of the Limitation Act, 1963, is 3 years.

6. As regards the cause of action, Mr. Thorat, learned counsel for the applicant has invited the attention of this Court to the cause of action pleaded in paragraph 23 of plaint and would submit that the same is a false cause of action, as it seeks to lay foundation for filing of the suit when the Respondent became aware from the information received from another unit purchaser that the Petitioner is in the process of handing over the building to some third party. He would further submit that the Petitioner is incapable of completing the project and has not laid a brick on the site, which fact was brought to the knowledge of respondent in the year 2016 itself. Mr. Thorat would contend that the statutory obligation under the MOFA are restricted to Section 11 of the MOFA.

7. To support his arguments, Mr. Thorat relies upon the decisions of Apex Court in ***Shakti Bhog Food Industries Ltd v. Central Bank of India [(2020) 17 SCC 260]*** and ***Dahiben v. Arvindbhai Kalyanji Bhanusali [dated 9th July 2020 in Civil Appeal No. 9519 of***

2019].

7. *Per contra*, Mr. Kohli, learned counsel for the respondent – original plaintiff submits that clause 10 which is sought to be pressed into service by the applicant in their communication of the year 2016 is in fact a clause which is operative at the option of purchaser and the purchaser had not exercised the option. He would further submit that the plaint seeks enforcement of obligations under the MOFA and, as such, there is continuous cause of action. He has invited the attention of this Court to the pleadings in plaint and would submit that the plaint discloses the cause of action inasmuch as in the year 2021, the respondent became aware upon information received from another unit purchaser that the Petitioner is in the process of creating third party right in the suit property. He would submit that till that time, there were meetings and correspondence which ensued between the parties and it is only upon a third party right being created in the suit property, the cause of action for filing the suit arose. He draws support from section 22 of the Limitation Act, 1963. Mr. Kohli would further submit that it is incorrect statement that not a brick has not been laid on the site as the photographs on record demonstrate that the building is on the verge of completion. In support of his submissions, he relied upon following decisions :

(I) Samruddhi CHS Ltd v. Mumbai Mahalaxmi Construction (P) Ltd [(2022) 4 SCC 103];

(ii) Madhuvihar CHS Ltd v. Jayantilal Investments [2006 SCC OnLine Bom 279]; and

(iii) Indirabai Baburao Kanade v. Matru Chayya CHS Ltd [2016 SCC OnLine Bom 6075]

8. Considered the submissions and perused the papers with the assistance of learned counsel for the respective parties.

9. It begs of no debate that for the purpose of considering an application under Order-VII Rule-11 of the CPC, it is only the averments in plaint which are required to be perused. There is no dispute that there was transaction of sale of office unit between the Petitioner and the Respondent which is recorded in the duly registered Agreement for Sale dated 10th September, 2004. The total consideration agreed upon has been duly paid by the Respondent, however the possession of the office unit has not been handed over by the Petitioner till date. It is the case of respondent that as per the agreement, possession of the unit was to be handed over on or before December 2005 and the said date was extended by the defendant through verbal communication. The plaint proceeds further and pleads about the communications which had been addressed by the respondent to the applicant since 2005 till 2016. Perusal of the

communications which are annexed at page nos. 130 to 143 of petition would indicate that by the said communications, the respondent sought possession of the premises and at no point of time, there was any termination of the agreement. As far as the communication of the years 2005, 2006, 2007 and 2008 are concerned, there was no response except the meeting which is claimed to have been called by the applicant in the 2nd week of March 2008 wherein it was assured that the possession would be handed over before December 2008. The plaint proceeds to state that in the 2nd week of February 2008, further assurance was given that the unit would be handed over in the month of January 2010, with subsequent assurances, upto the year 2013. Then, comes the letter of July 2016 on which substantial reliance is placed by Mr. Thorat, learned counsel for the applicant. If we take a look at the letter dated 26th July 2016, the said letter does not terminate the agreement and only makes an offer to the respondent to accept the refund of money, which offer has been refused by the respondent by his response dated 1st October 2016. In the communication dated 1st October 2016, once again a demand has been made for the possession of premises calling upon the applicant to comply with the requisition of notices within a period of 15 days, failing which the prosecution under the MOFA or Consumer Protection Act would be initiated.

10. Mr. Thorat, learned counsel for the applicant contends that upon failure to comply with the requisitions of notices, the cause of action accrued to the respondent to file a complaint and as per the provisions of Article 54 of the Limitation Act, 1963, the prescribed period of limitation is 3 years, i.e., for the specific performance of contract, or, if no such date is fixed, when the plaintiff has notice that performance is refused. In this context, it is required to be noted that the relief which is sought by the plaintiff is the enforcement of statutory obligation under the provisions of MOFA. The decisions which have been relied upon by Mr. Kohli, learned counsel for the respondent are squarely applicable to the facts of the present case. This Court in the case of ***Madhuvihar CHS Ltd v. Jayantilal Investments [2006 SCC OnLine Bom 279]*** and ***Indirabai Baburao Kanade v. Matru Chayya CHS Ltd [2016 SCC OnLine Bom 6075]*** has held that since promoter had avoided to convey the title and to execute necessary documents in favour of the society, there is breach of statutory obligation which gives a continuous cause of action to the society against the promoter and, as such, there is no question of the suit having been barred by limitation. I am respectfully bound by the decisions of this Court holding that the enforcement of a statutory obligation under the MOFA is a not barred by law of limitation.

11. The decision of the Apex Court in case of ***Samruddhi Co-operative Housing Society Ltd v. Mumbai Mahalaxmi Construction Private Limited (supra)*** sufficiently answers the submission canvassed by Mr. Thorat, learned counsel for the applicant that it is only the obligation under section 11 of the MOFA which constitutes the statutory obligation. The Apex Court in that case was considering the issue of maintainability and limitation in the context of consumer complaint filed seeking recovery of taxes and charges paid which was the obligation of promoter under MOFA and considered the provisions of Sections 3 and 6 of MOFA. The Apex Court held in paragraphs 18 and 21 as under:

> "18. A continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement. Section 3 of the MOFA imposes certain general obligations on a promoter. These obligations inter alia include making disclosures on the nature of title to the land, encumbrances on the land, fixtures, fittings and amenities to be provided, and to not grant possession of a flat until a completion certificate is given by the local authority. The responsibility to obtain the occupancy certificate from the local authority has also been imposed under the agreement to sell between the members of the appellant and the respondent on the latter."

> "21. Based on these provisions, it is evident that there was an obligation on the respondent to provide the occupancy certificate and pay for the relevant charges till the certificate has been provided. The respondent has time and again failed to provide the occupancy certificate to the appellant society. For this reason, a complaint was instituted in 1998 by the appellant against the respondent. The NCDRC on 20 August 2014 directed

> the respondent to obtain the certificate within a period of four months. Further, the NCDRC also imposed a penalty for any delay in obtaining the occupancy certificate beyond these 4 months. Since 2014 till date, the respondent has failed to provide the occupancy certificate. Owing to the failure of the respondent to obtain the certificate, there has been a direct impact on the members of the appellant in terms of the payment of higher taxes and water charges to the municipal authority. This continuous failure to obtain an occupancy certificate is a breach of the obligations imposed on the respondent under the MOFA and amounts to a continuing wrong. The appellants therefore, are entitled to damages arising out of this continuing wrong and their complaint is not barred by limitation."

12. It will be worthwhile to note that sub-section 2(f) of Section 3 of the MOFA which deals with the general liabilities of promoter imposes the liability of specifying the date by which possession of the flat is to be handed over and that he shall hand over such possession accordingly. Failure to do so, in my opinion, constitutes a continuing wrong and the plaint seeking enforcement of the obligation of handing over the flat is not barred by limitation. Reliance placed on Article 54 of the Limitation Act, 1963, is completely misplaced.

13. As regards the contention of Mr. Thorat that the suit is liable to be rejected under Order-VII Rule-11(a) of the CPC, the application filed under Order-VII Rule 11 contends that the plaint states a false cause of action dated 11th February 2021. There is a distinction

between the absence of cause of action and a false cause of action. The provisions of Order-VII Rule-11(a) comes into play when plaint does not disclose cause of action and cannot be invoked in case when the plaint discloses a cause of action, which according to the defendant is a false cause of action. In the present case, the respondent has come with a specific case that the cause of action arose when the rights of respondent in the suit property came in jeopardy by reason of the Petitioner attempting to alienate the suit property in favour of third party.

14. As regards the decision in ***Shakti Bhog Food Industries Ltd v. Central Bank of India [(2020) 17 SCC 260]*** relied upon by Mr. Thorat, learned counsel for the applicant is concerned, the apex Court in the facts of that case had held that ordinarily the *factum* of suit barred by limitation would be a mixed question of fact and law. There is no quarrel with the proposition stated by the Apex Court. Applying the law laid down by the Apex Court in ***Shakti Bhog (supra)***, as indicated above, averments in the plaint disclose that the right of respondent – plaintiff was threatened to be infringed when it came to the notice of respondent that the applicant is in the process of alienating the suit property. Till that time, there was communication by the respondent to the applicant as well as assurance to the respondent that the

possession would be handed over. It is only when there was threat to the respondent's right in the suit premises that the present proceedings came to be filed.

15. As regards the decision in ***Dahiben (supra)*** relied upon by learned counsel for the petitioner, in the facts of that case, the application was filed seeking the rejection of plaint contending that the suit filed by the plaintiff was barred by law of limitation and no cause of action has been disclosed in the plaint. In those proceedings, the sale deed of the year 2007 was sought to be challenged in the year 2014 and the Apex Court considered the provisions of Articles 58 and 59 of Schedule to the Limitation Act, 1963 and held that the suit was clearly barred by limitation as per Article 59 of the Limitation Act. In the present case, considering the discussion above, as the plaint seeks enforcement of the obligations under the MOFA, there is no question of the suit being barred by limitation and, as such, the decision in ***Dahiben (supra)*** is clearly inapplicable to the facts of this case.

16. The trial Court after considering the averments in plaint, has observed that there is no specific statement of the defendant about cancellation of agreement and even if the communication of 2008 is

taken into consideration, subsequently by a communication of 2016, the applicant has sought to refund the money in accordance with clause 10, which was not invoked and as such the trial Court held that the agreement is valid and subsisting. The trial Court also negated the contention of applicant that there is no cause of action and has considered the specific pleadings of plaintiff that one of the prospective purchasers was informed about handing over the property to third party which forms part of the plaint.

17. In the light of discussion above, there is no reason to interfere with the well reasoned order of the trial Court. The revision application being devoid of merits, stands dismissed.

[Sharmila U. Deshmukh, J.]