

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****APPEAL FROM ORDER NO. 1074 OF 2022
WITH
INTERIM APPLICATION NO. 20195 OF 2022**

Shri. Machindra Laxman
Dabhade and Ors.

...Appellants

V/s.

M/s. Gagan Global Developers
and Ors.

..Respondents

Mr. Kishore Patil i/by. Mr. Nilesh Wable, for the Appellant.

Mr. G.S. Godbole, Senior Advocate i/by. Ms. Shruti Tulpule, for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Dated : 2 November 2023.

P.C. :

1. By this Appeal, the Appellants challenge order dated 14 November 2022 rejecting the application at Exhibit-5 for temporary injunction. By that application, Plaintiffs had sought temporary injunction to restrain the Defendant-Firm from carrying out construction and from selling any shops/offices in the commercial building being constructed on the suit property.

2. Plaintiffs have instituted Special Civil Suit No.1853/2022 seeking a decree for termination of Development Agreement and Power of Attorney dated 17 April 2015. They have also sought decree for possession of the suit property and to injunct the Defendant-firm from carrying out any construction in the suit property. Plaintiff also made alternate prayer for possession of commercial construction of shops and offices admeasuring area of 60,000 sq.ft in the road facing building constructed on the suit land as well as market value of residential building admeasuring 36,000 sq.ft at Rs.20 crores alongwith interest. Plaintiffs have also prayed for payment of Rs.26,88,00,000/- towards market value of the Defendant-firm.

3. As per the Development Agreement dated 17 April 2015, the Defendant-firm has agreed to grant constructed area admeasuring 60,000 sq.ft and constructed residential area of 36,000 sq.ft to the Plaintiffs. In addition to grant of such constructed area, the Plaintiffs have also been paid consideration of Rs. 2 cores at the time of execution of the Development Agreement. Plaintiffs have filed the Suit alleging that the Defendant-Firm has breached its obligations arising out of the Agreement by not letting them choose the shops/offices representing 60,000 sq ft in the commercial building which is constructed on the suit property, nor

have undertaken construction of residential building, in which Plaintiffs are entitled to receive flats admeasuring 36,000 sq. ft.

4. As of now, the Defendant-firm has constructed commercial building on the suit property. The Defendant-firm is planning to construct a residential building on the adjoining plot. However, as of now the Defendant-firm has not been able to commence any construction in respect of the residential building.

5. In so far as the commercial building at the suit property is concerned, the Defendant-Firm is willing to fulfill its obligations for grant of commercial constructed area of 60,000 sq. ft to the Plaintiffs.

6. I have heard Mr. Patil, the learned counsel appearing for the Appellant and Mr. Godbole, the learned senior advocate assisted by Ms. Tulpule for the Defendant-Firm. After hearing the rival submissions canvassed by the parties, I am of the view that the Trial Court ought to have made an attempt to balance the equities between the parties, rather than rejecting the application for temporary injunction altogether. In fact, at the request of this Court, Mr. Patil for Appellants and Mr. Godbole and Ms. Tulpule for Defendant Firm did make sincere efforts to settle the disputes amongst the parties. However non-availability of shops/offices desired by Mr. Patil's clients on account of third-party rights already

created by the Defendant-Firm ultimately couldn't yield successful results out of the efforts put in by the leaned counsels. Therefore, instead of leaving it to the parties, this Court has undertaken the excursive of balancing the equities amongst the parties during pendency of the Suit. Though the order is being passed not as a result of consent of both the parties, their counsel fairly agree that recording of detailed reasons would not be necessary for the order that is being passed.

7. Mr. Godbole has submitted a list of commercial shops and offices which are available for being allotted to the Plaintiffs. It appears that as of now, the Defendant-Firm has already sold 138 shops and offices and it has 183 shops and offices unsold, out of which commercial area admeasuring 60,000 sq.ft can be allotted to the Plaintiffs. There is some degree of debate between the Plaintiff and the Defendant-firm about selection of the flats and offices which can be allotted to the Plaintiffs. Mr. Patil would submit that the Defendant-firm has created third party rights in respect of the shops and offices which are more conveniently located and the defendant-firm is now offering inconveniently located shops and offices to the Plaintiff. He would submit that under the Development Agreement, the Plaintiffs had a right to choose Shops and Offices representing commercial area admeasuring 60,000 sq.ft and that the said right of the Plaintiffs is violated and what is now offered to them are inconveniently located Shops and Offices.

8. It must also be borne in mind that the Trial Court has rejected Plaintiff's application for temporary injunction. However since the Defendant-Firm is willing to offer constructed commercial area of 60,000 sq.ft to the Plaintiffs and in view of debate emerging between the parties about location of the exact shops and offices, in my view, interest of the Plaintiffs can be secured atleast to some extent by directing the Defendant-firm to keep the unencumbered commercial shops and offices admeasuring 60,000 sq.ft during pendency of the suit. This would take care of the Defendant's obligation under the Development Agreement to allot constructed commercial portion to the Plaintiff.

9. So far as allotment of residential constructed area admeasuring 36,000 sq.ft to the Plaintiffs is concerned, there appears to be difficulty. Defendant-firm has not commenced construction of the building in which Plaintiff can be allotted residential flats admeasuring 36,000 sq.ft. To tackle this difficulty, Mr. Godbole has offered to pay rent at the rate of Rs. 8/- per sq.ft, which according to him will aggregate approximately to Rs.3,00,000/- per month. According to him this arrangement can secure the entitlement of the Plaintiffs in respect of the residential flats admeasuring 36,000 sq.ft.

10. Considering the fact that the Defendant-firm is unable to fulfill its obligation *qua* allotment of residential area admeasuring 36,000 sq.ft, interest of the Plaintiffs *qua* that obligation will have to be protected during pendency of the suit. Plaintiffs are already deprived of opportunity of selecting conveniently located shops and offices in respect of commercial area admeasuring 60,000 sq.ft. In my view, therefore the equities can be balanced by directing the Defendant-firm to pay to the Plaintiffs amount at the rate of Rs. 15/- per sq.ft in respect of residential area admeasuring 36,000/- sq. ft either till decision of the suit or till actual handing over of the residential area as agreed under the Development Agreement.

11. The present Appeal is accordingly disposed of by passing the following order:

- (i) The order dated 14 November 2022 passed by the 2nd Joint Civil Judge Senior Division, Pune on application at Exhibit-5 is set aside.
- (ii) The Defendant-firm shall keep the following unencumbered during pendency of the Suit:
 - a) Shop No.89 on the ground floor admeasuring saleable area of 340 sq.ft;
 - b) Shop No.107 on ground floor admeasuring saleable area of 19902 sq.ft;
 - c) Shop No.1107 with saleable area of 19902 sq.ft on first floor and

d) Shop No.1207 admeasuring saleable area of 19902 sq.ft on second floor

(iii) It shall be open to the Plaintiffs to get executed the deeds/agreements for assignment of the shops/offices indicated in clause (ii) above in their favour my making a request to that effect to the Defendant-Firm. Upon receipt of such request from Plaintiffs at any stage of the Suit, Defendant-Firm shall forthwith execute the deed/agreements for assignment of those shops/offices in Plaintiffs' favour and handover possession thereof to Plaintiffs.

(iv) The defendant-firm shall pay amount of Rs.15/- per sq. foot for residential area admeasuring 36,000 sq.ft either till the decision of the suit or till handing over possession of such residential area.

(v) In case the Defendant-firm makes a default in payment of amount indicated in clause (iv) above to the Plaintiffs as directed above, it shall be open for the Plaintiffs to file appropriate application before the Trial Court to seek such reliefs as may be necessary.

(vi) the above directions shall be without prejudice to the rights and contentions of the parties in the Suit.

12. With the above directions, the Appeal is **disposed of**. With disposal of the Appeal, Interim Application pending therein does not survive. The same also stands disposed of.

SANDEEP V. MARNE, J.