IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.3862 OF 2022
IN
SUIT NO.1001 OF 2019

Ashok S. Kothari and another … Applicants

In the matter between:

Ashok S. Kothari and another … Plaintiffs

Vs.

Vighnaharta Builders and Projects Pvt. Ltd.
and others … Defendants

WITH
INTERIM APPLICATION NO.524 OF 2023
IN
SUIT NO.1001 OF 2019

Kalindi Developers Private Limited … Applicant

In the matter between:

Ashok S. Kothari and another … Plaintiffs

Vs.

Vighnaharta Builders and Projects Pvt. Ltd.
and others … Defendants

WITH
INTERIM APPLICATION NO.470 OF 2020
IN
SUIT NO.1001 OF 2019

ALONG WITH

INTERIM APPLICATION NO.465 OF 2023
WITH
INTERIM APPLICATION NO.3864 OF 2022
WITH
INTERIM APPLICATION NO.467 OF 2020
IN
SUIT NO.708 OF 2019

Mr. Naushad Engineer a/w. Mr. Rohil Bandekar, Mr. Tejas Agarwal and Mr. Dev Tejnani i/b. I. C. Legal for Applicants / Plaintiffs in both the Suits.

Mr. Mayur Khandeparkar and Mr. Avishkar Sawant for Defendant No.1 in both the Suits.

Mr. K. H. Mastakar for Defendant No.2 in both the Suits.

Mr. S. B. Pawar a/w. Ms. Swati Sawant and Ms. Devyani Bafna i/b. S. K. Legal Associates LLP for Defendant No.3 in both the Suits.

Mr. Zal Andhyarujina, Senior Advocate a/w. Ms. Revati Desai i/b. Mr. Gautam Jain for Applicant in I.A.Nos.524 of 2023 and 465 of 2023.

CORAM : MANISH PITALE, J.
DATE : AUGUST 11, 2023

P.C. :

. Heard learned counsel for the parties.

2. By this order, two interim applications will be disposed of. One application bearing Interim Application No.3862 of 2022 is filed by the plaintiffs seeking interim reliefs and the other application bearing Interim Application No.524 of 2023 is filed for intervention on behalf of a third party, claiming to have vital interest in the present proceedings.

3. The plaintiffs in their application are pressing for interim relief in terms of prayer clause (a), thereby seeking to restrain the defendants from transferring in any manner the suit premises or creating third party rights therein during the pendency of the suit.

4. The plaintiffs have filed the suit on the basis of an allotment letter dated 09.07.2012, which according to them, amounts to an agreement, specific performance of which can be sought. It is contended that under the said letter dated 09.07.2012 issued by defendant No.1 developer in favour of the plaintiffs, specific premises admeasuring 40,000 sq.ft. have been allotted to them in the project in question, which is on a land owned by defendant No.2 municipal corporation and in respect of which defendant No.1 has been engaged for execution of the project. It is submitted that payment schedule is specified in the said letter, including a penalty in case of default on the part of defendant No.1. It is specifically contended on behalf of the plaintiffs that in the context of

the said allotment letter, the plaintiffs have already paid an amount of Rs.7.65 crores out of a total consideration of Rs.30.60 crores and this is specifically acknowledged by defendant No.1 in its letter dated 01.07.2014, which is at exhibit-G to the plaint.

5. It is brought to the notice of this Court that defendant No.1 filed a suit bearing Suit No.190 of 2016 in this Court against the municipal corporation i.e. defendant No.2 herein and the co-operative housing society i.e. defendant No.3 herein in the context of a termination order dated 26.11.2015 issued by the municipal corporation. It is brought to the notice of this Court that the plaintiffs had moved a chamber summons in the aforesaid suit to be added as party defendants therein and the said chamber summons were allowed by an order dated 14.09.2017. It is further brought to the notice of this Court that the aforesaid suit was disposed of on the basis of minutes of order placed before this Court in the aforesaid suit, whereby it was agreed that defendant No.1 would be recommencing the development of the suit property and on the basis of specific resolution passed by defendant No.3 society, the termination order was withdrawn by defendant No.2 municipal corporation. As a consequence, the development work was to be recommenced.

6. It is in this backdrop that the plaintiffs filed the present suit and the instant application for interim reliefs was filed.

7. Mr. Engineer, learned counsel appearing for the applicants has submitted that in terms of the order passed by this Court, disposing of the suit filed by defendant No.1 developer, the termination order stands withdrawn and the project is to recommence. It is emphasized that the order passed by this Court specifically records that defendant No.1 would be undertaking the development work and the allotment letter having been issued in favour of the plaintiffs by defendant No.1, the

plaintiffs are entitled to press for reliefs against defendant No.1 as the developer undertaking development of the said project. It is submitted that substantial consideration was already paid to defendant No.1 and there is an apprehension that during the course of executing the development project, defendant No.1 may dispose of the suit premises that have been allotted in favour of the plaintiffs as per allotment letter dated 09.07.2012. It is specifically submitted that the plaintiffs are not concerned with the internal arrangement and shareholding of defendant No.1 and the manner in which it proposes to carry out development of the project, for the reason that the defendant municipal corporation has granted the order for carrying out the development project only in favour of defendant No.1.

8. The aforesaid submission is made in the context of the application for intervention filed by the third party. It is submitted that the third party, who is seeking intervention, claims to be a shareholder of defendant No.1 and therefore, it cannot be said that the third party is either a necessary or a proper party in the proceedings. It is submitted that there is no concept of intervention in a civil suit and since the third party is neither a necessary nor a proper party, the intervention application deserves to be dismissed and on the basis of material brought to the notice of this Court, interim relief in terms of prayer clause (a) deserves to be granted.

9. Learned counsel appearing for the applicants relies upon judgement of the Supreme Court in the case of *Kollipara Sriramulu Vs. T. Aswatha Narayana*, **AIR 1968 SC 1028** and judgement of this Court in the case of *Yusuf Mohamed Lakdawala Vs. Sudhakar Kashinath Bokade*, **2008 (2) Mh.L.J. 682**, to contend that in the facts of the present case, the allotment letter dated 09.07.2012 is enforceable and a binding agreement between the parties, specific performance of which can be

granted by this Court. As regards the application for intervention moved by the third party, reliance is placed on the judgement of this Court in the case of *Mukesh Banshilal Shah Vs. Mahesh Mithalal Trivedi*, **2018 SCC OnLine Bom 15451** and a recent order dated **26.06.2023** passed by this Court in the case of *Wellknown Textile Industries Pvt. Ltd. Vs. Neelkamal Realtors Tower Pvt. Ltd.* [**Interim Application (L) No.7232 of 2023 in Commercial Suit No.145 of 2021**].

10. On the other hand, Mr. Khandeparkar, learned counsel appearing for defendant No.1 has submitted that the interim reliefs in the present case cannot be granted for the reason that the suit premises, in respect of which interim relief is sought, are not defined. The relevant permissions from the authorities and certificates are yet to be issued, and therefore, in the absence of an identified property, there is no basis for seeking interim relief. It is further submitted that defendant No.1 may have been issued necessary authority by the municipal corporation to carry out development of the project in question, but in real terms, it is the third party which has filed the application for intervention who is implementing the project and therefore, any interim relief granted in the absence of the third party being joined in the present proceedings would amount to an ineffective interim relief in favour of the plaintiffs. Reliance is placed on order dated 07.10.2014 passed by this Court in Company Appeal (L) No.37 of 2013 and the consent terms on the basis of which the said order was passed. It was brought to the notice of this Court that there was an *inter se* dispute within the shareholders / directors of defendant No.1, which reached this Court in the form of the aforesaid appeal and consent terms were executed wherein the aforesaid third party was brought in as a 90% shareholder in defendant No.1 with specific stipulations for the entire project, which is subject matter of the present suit, being transferred in favour of the third party. It was submitted that the said party is in fact executing the project in question

and in such a situation, the prayer for interim relief cannot be granted unless the third party is joined in the present proceedings.

11. It was submitted that in the facts and circumstances of the present case, the third party applicant is a necessary party. If the plaintiffs are opposing the joining of the said third party as a party defendant in the present proceedings and this Court finds, as a matter of fact, that it is a necessary party then in terms of the law laid down by the Supreme Court in the case of *Mumbai International Airport (P) Limited Vs. Regency Convention Centre & Hotels (P) Ltd.*, **(2010) 7 SCC 417**, the suit itself is liable to be dismissed. It is further submitted that the plaintiffs have not been able to demonstrate any urgency in the matter and therefore, the interim relief ought not to be granted.

12. Mr. Zal Andhyarujina, learned senior counsel appearing for the applicant in the application for intervention filed by the third party - Kalindi Developers Private Limited submitted that the documents already referred to on behalf of defendant No.1 clearly make out a case for the application for intervention being allowed. It was submitted that it was only in the interest of the plaintiffs that the applicant was joined as a party in the present proceedings, particularly when the project in question is being executed by the applicant - third party and any interim relief granted in favour of the plaintiffs would directly affect the said applicant - third party. On this basis, it was submitted that the application for intervention may be allowed and the intervenor be heard for opposing the prayer for interim reliefs.

13. Heard learned counsel for the parties in the light of the material placed on record. As regards the application for intervention filed on behalf of Kalindi Developers Private Limited, the consent terms dated 07.10.2014 and the order passed by this Court on the same date in the company appeal are required to be perused. This Court finds that in the

consent terms, an arrangement was worked out between the existing shareholders of defendant No.1 and the said Kalindi Developers Private Limited, in order to settle what appears to be a family dispute within the shareholders of defendant No.1. Kalindi Developers Private Limited was made a shareholder and as per the internal arrangement specified in the consent terms, the project with which the present proceedings are concerned was agreed to be executed by Kalindi Developers Private Limited.

14. It is crucial that even in the consent terms, although by way of internal arrangement, it was agreed that Kalindi Developers Private Limited would execute the project in question, it would be executed in the name of defendant No.1, for the reason that it is only defendant No.1 that has been authorized by the defendant municipal corporation for executing the project. This is not even a case of a joint development agreement between two entities and the consent terms provided that Kalindi Developers Private Limited would only become a shareholder of defendant No.1. Much emphasis has been placed on behalf of defendant No.1 and the applicant - Kalindi Developers Private Limited on certain clauses of the consent terms, which specify that the project in question shall be managed, implemented and handled by Kalindi Developers Private Limited. This Court is of the opinion that a proper reading of the consent terms, on the basis of which this Court disposed of the company appeal, would show that shareholding of defendant No.1 underwent certain changes and significantly, one of the terms provides that the applicant - Kalindi Developers Private Limited would hold shares of the company only until completion of the project in question upon which all the shares held by Kalindi Developers Private Limited would be transferred to one of the shareholders and parties to the company appeal. There is substance in the contention raised on behalf of the plaintiffs that in such a situation, Kalindi Developers Private Limited is neither a

necessary nor a proper party in the present proceedings. The defendant municipal corporation has appointed only defendant No.1 as the developer in the context of the project in question and as a matter of law, the only recognized party for executing the said project is indeed defendant No.1.

15. This Court finds that the following clauses of the consent terms indicate that there is indeed substance in the contention raised on behalf of the plaintiffs:-

> "12. It is agreed that for the implementation of these Consent Terms and for running of the projects M/s. Kalindi shall be solely responsible for the act deeds done by the company in respect of Bhoiwada Project and M/s. Kalindi shall keep the Company and all its other directors fully indemnified in respect of any liability, loss, demand, action in respect of or arising out of the Bhoiwada Project. Kalindi shall have sole right to appoint / replace Directors on the Company Board.
>
> 22. By consent, the parties agree that the Bhoiwada Project of the Company shall be implemented in the following manner:
>
> > (iv) Any and all existing liabilities of whatsoever nature including but not limited to Income Tax, Property Tax, government dues, claims for settlement of third party rights created for unites sold for Bhoiwada project by Mr. Santush Mane, contractors bill, Bank Loans, Corporate Deposits, land dues pertaining to Bhoiwada project or other projects prior to execution of these consent terms shall be sole responsibility of Santush Mane except the settlement with respondent No.1 to 4 which shall be responsibility of Kalindi. All parties agree, declare and undertake to this Hon'ble Court to provide and extend all necessary support, assistance and co-operation as may be required / requested by M/s. Kalindi for implementation of the Bhoiwada Project and shall desist from doing all such acts, deeds and things either by themselves or through third parties which shall in any manner obstruct the implementation of the Bhoiwada Project.
> >
> > (vi) None of the other parties shall have any claim or

any rights to the Bhoiwada Project, its profits, its sales or any other area apart from as explicitly specified in these consent terms. Except as specified in these Consent Terms, all rights, assets, sale, etc. of the Bhoiwada Project shall belong to Kalindi alone and the said Kalindi exclusively shall be responsible to negotiate, settle and discharge the liability incurred by the Company towards Bhoiwada Project under diverse arrangements which have been recorded and disclosed to Kalindi and which liabilities Kalindi acknowledges and admits hereof and as such the said Kalindi shall indemnify and keep indemnified Mr. Santosh Mane, Mr. Sanil Mane and Mrs. Shivani Mane from any claims / demand arising out of the same at any time hereafter.

34. M/s. Kalindi has entered into the Company only for smooth completion of the Bhoiwada Project of the Company. Upon the completion of the Bhoiwada Project, that is to say one year after issue of full Occupation Certificate by MCGM in respect of the entire scheme including rehab and sale buildings of the Bhoiwada Project, M/s.Kalindi will exit from the Company as stated above. All the profits generated from the Bhoiwada Project shall be of M/s. Kalindi. A separate account will be operated by M/s. Kalindi. Bank Accounts of the other projects shall be operated by Mr. Santush Mane.

35. It is agreed by the parties that for Bhoiwada Project a separate bank account will be opened in the name of Vighnaharta Builders & Projects Pvt. Limited, which shall be operated only by M/s. Kalindi or its nominees. Separate bank accounts would be operated for Other Projects, which shall be operated only by Mr. Santush Mane and / or his nominees. Each party will independently operate the accounts i.e. by M/s. Kalindi and Mr. Santush Mane respectively."

16. It is also relevant to note that in the suit filed by defendant No.1 i.e. Suit No.190 of 2016, the defendant society had filed an affidavit specifically stating as follows:-

"4. I state that, in view of the aforesaid proposal of the Plaintiff, same is discussed in Special General Body Meeting of the Defendant No.2 society, the Defendant society and its members have agreed to accept the aforesaid proposal, agreed to give consent and support to the Plaintiff to complete the re-

> development and agreed to withdraw the termination of the Plaintiff.
>
> 5. Accordingly, the Defendant No. 2 society have passed the resolution in its Special General Body Meeting dated 22 March, 2022 for accepting the aforesaid proposal and supporting to withdraw the termination of the Plaintiff and allow the Plaintiff herein to continue and complete the re-development of subject property, which is delayed for many years.
>
> 6. I further state and submits that, considering the aforesaid facts and important facts that the re-development of the society and its members is delayed for almost 15-20 years and the Defendant No.2 society and its members are facing very serious hardship and prejudice to occupying the dilapidated Transit Camp building and structures tenements. Therefore, considering the aforesaid fact, the necessary order/direction required to be passed by this Hon'ble Court to continue and complete the re-development project by the Plaintiff and Defendant No.1 herein."

17. Similarly, in affidavit styled as a further affidavit filed on behalf of defendant No.1 society in a notice of motion in Suit No.190 of 2016, it was stated as follows:-

> "8. It is submitted that in view of the aforesaid facts, more particularly the proposal of the Plaintiff, which has been duly accepted by Defendant No.2 in the Special General Body Meeting dated 22nd March, 2022, it is necessary and in the interest of justice that necessary Orders or directions be passed to allow the Plaintiff to forthwith recommence the development of the subject property."

18. It is also significant that in the minutes of order filed in the aforesaid suit, it was specifically stated that the plaintiff therein i.e. defendant No.1 developer had agreed to commence and complete the development of the suit property within four years from the date of revised permissions being granted. Thus, in all the affidavits filed before this Court in the aforementioned suit of defendant No.1, categorical statements were made that it was only the defendant No.1 that was

responsible for execution and recommencing development activity concerning the said project. This Court is convinced that in the light of such material brought to the notice of this Court, it is only defendant No.1 that is responsible for the execution and development of the said project. What the defendant No.1 has agreed as an internal arrangement within its shareholders, cannot be a ground for the applicant - Kalindi Developers Private Limited to claim any right of being added as a party or being heard in the present interim application or the suit. This Court finds that the said applicant - Kalindi Developers Private Limited is neither a necessary nor a proper party in the facts and circumstances of the present case. The plaintiffs, if at all, would be entitled to seek specific performance only against defendant No.1 on the basis of the said allotment letter dated 09.07.2012 issued in their favour.

19. An attempt was sought to be made to claim that the applicant - Kalindi Developers Private Limited could be added as an intervenor in the proceedings. But, as correctly pointed out by the learned counsel appearing for the plaintiffs that there can be no concept of intervention in civil proceedings. It is specifically held in the judgement in the case of **Mukesh Banshilal Shah Vs. Mahesh Mithalal Trivedi** *(supra)* as follows:-

> "2. The first prayer in the application is for 'intervention' in the Testamentary Suit. This is thoroughly misconceived. There is no concept of intervention in civil proceedings. The litigant is either a party Plaintiff or a party Defendant. A Testamentary Petition for Probate when contested, is tried as a Suit. The applicants have no caveatable interest whatsoever in the estate of the deceased, and therefore cannot be impleaded as party Defendants in this Suit."

20. In similar circumstances, in the case of **Wellknown Textile Industries Pvt. Ltd. Vs. Neelkamal Realtors Tower Pvt. Ltd.** *(supra)*, this Court held as follows:-

> "8. Insofar as adding the two proposed defendants in the suits is concerned, it is not disputed that the project stands transferred in favour of the proposed defendant No.3, which has been created as a special purpose vehicle for completion of the said project. The documents on record do indicate that the proposed defendant No.2 is a shareholder in the proposed defendant No.3 and it is the proposed defendant No.3 that shall be undertaking further steps for completion of the incomplete project.
>
> 9. In these circumstances, this Court is of the opinion that only the proposed defendant No.3 can be added as a party defendant in these suits and that the prayer for adding proposed defendant No.2, deserves to be rejected."

21. In view of the fact that this Court has found that the applicant - Kalindi Developers Private Limited is neither a necessary nor a proper party in the present proceedings, reliance placed on behalf of defendant No.1 on the judgement of the Supreme Court in the case of **Mumbai International Airport (P) Limited Vs. Regency Convention Centre & Hotels (P) Ltd.** *(supra)* is of no consequence.

22. In view of the above, Interim Application No.524 of 2023 filed by the applicant - Kalindi Developers Private Limited is dismissed.

23. As regards the question of grant of interim relief in favour of the plaintiffs, this Court has perused the material on record, particularly the allotment letter issued by defendant No.1 on 09.07.2012 in favour of the plaintiffs. A strong *prima facie* case is made out by the plaintiffs in their favour that the said document is an agreement between the parties under which defendant No.1 agreed to transfer suit premises for specific consideration of Rs.30.60 crores. The letter issued by defendant No.1 to the plaintiffs on 01.07.2014 specifically confirms the contents of the allotment letter dated 09.07.2012 and further acknowledges receipt of amount of Rs.7.65 crores from the plaintiffs. This Court is of the opinion that the said documents do indicate *prima facie* that the plaintiffs are

indeed entitled to press for grant of interim relief in the application for interim reliefs moved on their behalf.

24. The apprehension of the plaintiffs is based on the subsequent event that has occurred after the municipal corporation on the basis of specific resolutions passed by the defendant society has withdrawn the termination order and defendant No.1 has been authorized to recommence the development project. If defendant No.1 creates third party rights to the detriment of the plaintiffs, they would suffer grave and irreparable loss considering the fact that they have paid huge amount of Rs.7.65 crores to defendant No.1 for allotment of the suit premises in terms of the allotment letter as confirmed by the subsequent letter dated 01.07.2014 issued by defendant No.1. There is no substance in the contention raised on behalf of defendant No.1 that specific property has not been identified. The contents of the allotment letter sufficiently indicate the extent of constructed property to be allotted to the plaintiffs in the project.

25. It is further brought to the notice of this Court that in the context of another project being developed by the very same developer i.e. defendant No.1, the plaintiffs were granted an order of *status quo* by this Court in Suit (L) No.232 of 2017 in the context of a flat booked by the plaintiff in the other project. Thus, in similar circumstances, interim orders have already been passed against the defendant No.1 developer and the prayer in the present application cannot be opposed on the basis that specific identified property is not brought to the notice of this Court.

26. It is further pointed out on behalf of the plaintiffs that clause 6 of the allotment letter dated 09.07.2012, specifies as follows:-

> "6. On plans being finalized and sanctioned by the MCGM, you shall have first right to select the said flats / penthouses from the sale premises. We agree and confirm that till such time you have selected the said flats / penthouses, we will not sell,

> transfer, assign and / or otherwise deal with or dispose off and / or enter into or execute any agreement or arrangement of any nature whatsoever in respect of remaining sale premises or any part thereof."

27. The above-quoted clause sufficiently demonstrates that till such time the plaintiffs select the flats / penthouses, defendant No.1 would not sell, transfer or assign remaining sale premises or any part thereof. In the light of this specific clause incorporated in the allotment letter, it cannot lie in the mouth of defendant No.1 that interim relief ought to be rejected as specified identified constructed property has not been brought to the notice of this Court.

28. The learned counsel appearing for defendant No.3 society sought to raise a grievance about the delay in execution of the project. The said aspect of the matter cannot be of relevance while considering the application for interim relief moved on behalf of the plaintiffs in the present proceedings. Defendant No.3 society is at liberty to take such steps as available in law to raise its grievance in that regard.

29. In view of the above, this Court finds that the plaintiffs have not only made out a strong *prima facie* case in their favour for grant of interim relief but the balance of convenience also lies in their favour, for the reason that if such interim relief is not granted, defendant No.1 may proceed to create third party rights, which would be detrimental to the interest of the plaintiffs and also in the teeth of clause 6 of the allotment letter, quoted hereinabove.

30. In the light of the findings rendered hereinabove, the application for interim reliefs is allowed and interim relief is granted in favour of the plaintiffs as per prayer clause (a), which reads as follows:-

> "a. Restrain the Defendants and / or their agents, servants, employees, Directors, nominees, assigns and person acting under and through them including any other developer,

> contractor, builder or agency appointed for redevelopment of the Bhoiwada Project from in any manner transferring, selling, alienating, encumbering, mortgaging, disposing off, parting with possession of and / or in any manner creating third party rights in respect of suit premises (as defined in Exhibit B to the Plaint);"

31. Both the applications i.e. Interim Application No.3862 of 2022 and Interim Application No.524 of 2023 are disposed of in above terms.

<u>I.A. No.465 of 2023 with I.A. No.3864 of 2022 with</u>

<u>I.A. No.467 of 2020 in Suit No.708 of 2019</u>

. Stand over to 29.08.2023, H.O.B.

(MANISH PITALE, J.)

Minal Parab