

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.601 OF 2021

IN

NOTICE OF MOTION NO.1516 OF 2011

IN

SUIT NO.1108 OF 2011

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Lokhandwala Infrastructure Private Limited ...Applicant/
Plaintiff

In the matter between

Lokhandwala Infrastructure Private Limited ...Plaintiff

vs.

Dhobighat Compound Rahiwasi Seva Sangh
and Others ...Defendants

Ms. Shaista Pathan a/w. Ms. Gyanika Kochar i/b. Y & A Legal, for
the Applicant.

Mr. Karl Tamboly a/w. Mr. Hrushi N., Ms. Alya Khan, Ms. Shikha
Dharia i/b. Vashi & Vashi, for Defendant No. 26.

CORAM : N. J. JAMADAR, J.

DATE : FEBRUARY 23, 2023

P.C.:

1. The plaintiff/applicant has taken out this interim application in Notice of Motion No. 1515 of 2011 seeking, inter alia, directions to defendant No. 26 M/s. Om Omega Shelters to produce the development plans sanctioned by the Slum Rehabilitation Authority clearly demarcating the area of 15% of the free sale component, and restrain the defendant No. 26 from selling, transferring, alienating, encumbering or otherwise creating any third party interest in respect of 15% of the free sale area earmarked for the plaintiff in

pursuance of the order dated 7th May, 2011 passed by the Division Bench in Appeal (L) No. 235 of 2011.

2. The applicant/plaintiff avers that by the said order in Appeal (L) No. 235 of 2011 dated 7th May, 2011 the Appeal Bench directed respondent No. 23 (defendant No. 26 herein) not to sell, transfer, alienate, encumber or otherwise deal with or part with possession to the extent of 15% of the area of free sale component i.e. 15,000 sq.ft. in the free sale area. Thereupon, the Notice of Motion No. 1516 of 2011 came to be disposed of by the learned single Judge by order dated 10th August, 2015 in terms of the aforesaid order dated 7th May, 2011.

3. In the meanwhile, according to the applicant, the defendant No. 26 created third party interest in the suit property and assigned its rights in favour of M/s. Parinee Realty Private Limited. The defendant No. 26 also started allotment of free sale area to third parties. The applicant called upon the defendant No. 26 to forthwith demarcate and furnish details of the 15% free sale component of the suit property which the Division Bench restrained defendant No. 26 from alienating or otherwise creating third party rights.

4. As defendant No. 26 did not respond to the applicant's letter dated 4th July, 2016 the plaintiff called upon M/s. Parinee Realty Private Limited, ECL Finance Limited and Catalyst Trusteeship Limited in whose favour the defendant No. 26 created third party rights to furnish the details. However, those entities also chose not to respond. The plaintiff/applicant thus apprehends that with a view to frustrate the aforesaid order of the Appeal Bench, in terms of which Notice of Motion came to be disposed of, the defendant No. 26 would dilute or dispose of 15% free sale area and the plaintiff/applicant would be left in the lurch. Hence, this application.

5. An affidavit in reply is filed on behalf of defendant No. 26.

6. The defendant No. 26 contends the order passed by the Appeal Bench nowhere contemplates demarcation of 15% of the free sale area as sought by the applicant. In fact, according to defendant No. 26, the order passed by the Appeal Bench only restrained defendant No. 26 from creating third party interest over 15,000 sq. ft area. The applicant is seeking to expand the scope of the said order. Since the project is under construction, it is not possible for the defendant No. 26 to demarcate the said area inasmuch as any such demarcation would necessarily undergo a change due to

modification of the plans submitted to the authorities from time to time which would result in the number of units and/or the area of units being changed from time to time. The defendant No. 26 further contends that the order passed by the Appeal Bench has not been interfered with by the Supreme Court in SLP Nos. 15090 of 2011, 15091 of 2011 and 15935 of 2011, after expressly noting that the Appeal Bench had directed the respondent/defendant No. 26, not to sell, transfer, alienate, encumber or otherwise deal with or part with possession to the extent of 15% of the area of the free sale component i.e. 15,000 sq.ft. Despite having not succeeded up to the Supreme Court, the plaintiff has been trying to put hindrances in the project by addressing communication to the authorities and issuing and publishing notices, and the instant application is a part of the same modus operandi. Therefore, the application deserves to be dismissed in limine.

7. I have heard Ms. Shaista Pathan, learned counsel for the applicant and Mr. Karl Tamboly, learned counsel for defendant No. 26.

8. The applicant/plaintiff instituted the suit for specific performance of the contract entered into by the plaintiff with slum

dwellers for development of property consisting of a censused slum on the land owned by the MCGM asserting, inter alia, that after the plaintiff made substantial progress in execution of the slum rehabilitation project expending huge time and money, the defendant No. 1 association and defendant No. 2 society (proposed) professed to terminate the agreement and sought to appoint defendant No. 26, for implementing the slum rehabilitation scheme.

9. The learned single Judge declined to grant ad-interim relief in Notice of Motion No. 1516 of 2011 taken out by the plaintiff. In the appeal the Appeal Bench by the aforesaid order dated 7th May, 2011 was persuaded to protect the interest of the applicant. The observations of the Appeal Bench, in paragraphs 8 and 9, bear upon the prayers in the instant application. They read as under:-

8] In our view, it is also not necessary to rule upon the other contentions urged by the parties as mentioned above because of law of jurisdiction under section 42 of the Slum Rehabilitation Act and also in the light of the view that we are inclined to take on the balance of convenience. A scheme for redevelopment of the slum is essentially for the benefit of the slum dwellers and for their rehabilitation. They are entitled to a free accommodation in the redeveloped buildings. Of course, the developer is entitled to recover the cost incurred by him for the redevelopment by sale of flats available in the free sale component. Yet the main object and focus of the scheme is the occupiers of the slums and not the developers who pursues a venture for profit through sale of flats in the free sale components. The main object is rehabilitation of the slum dwellers, though in the process invariably the

developer would earn good deal of profit by sale of flats in the free sale components of the scheme. In fact, the good part of the arguments in the present case revolved around the profit of the developer and Mr. Samdani fairly submitted that the appellant was not pursuing the scheme of redevelopment as a gesture of charity or goodwill for the slum occupiers but for profit which the appellant would earn by sale of flats in the free sale component. Keeping in mind that the principal object of the slum rehabilitation scheme is rehabilitation of the slum dwellers as also the inevitable consequence, any injunction granted viz. delay in the redevelopment of the slum rehabilitation scheme, we decline to grant any injunction. Nearly 500 eligible slum dwellers who have been waiting since August 2003 when the appellant entered into the contract would not get accommodation by way of rehabilitation for quite a few years. The very persons for whom the slum rehabilitation scheme is intended would be deprived of the benefits for a number of years. In this connection, we may quote the observations of the Supreme Court in *Shiv Kumar Chadha v. Municipal Corporation of Delhi*, (1993) 3 SCC 161 (para 31).

“31. Under the changed circumstance with so many cases pending in Courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extent its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to

protect or to perpetuate a wrong committed by a person who approaches the Court.”

(underlining supplied)

These observations aptly apply to the facts of the present case. In our view, protecting the interest of 500 slum dwellers in getting accommodation in the slum rehabilitation scheme within a reasonable time far outweighs the loss, if any, which the appellant would suffer by refusal of an injunction. In any event, the appellant is not interested in retaining the property for himself but he is only a professional developer in making quick money. His interests are purely monetary. He would have adequate remedy in damages if at all he succeeds in the suit. His monetary interest can be protected by the order that we propose to pass hereafter.

9] On our query, Mr. Samdani, learned counsel for the appellant stated that the developer would be required to construct 500 tenements having an area of 269 sq. ft. each and the said tenements would be required to be given to the eligible slum dwellers free of cost as per the scheme. The total area to be given to the slum dwellers free of cost thus comes to 1,34,500 sq. ft. Mr. Samdani further submitted that in lieu of constructing and providing this 1,34,500 sq. ft. area consisting of 500 tenements of 269 sq. ft. each, the developer would be allowed to construct and sell about 1,00,000 sq. ft. of area as free sale component. Assuming that the developer's profit which traditionally is computed at 15% (both the counsel were unable to give amount of profit which a developer would make in a slum rehabilitation scheme and we also do not venture to estimate his profit), we would adopt the traditional mode of 15% of the area of the free sale component, i.e. about 15,000 sq. ft. as the profit of the developer. In our view, therefore, the interest of the appellant would be adequately protected by restraining the respondent no.23 from selling, transferring, alienating or otherwise creating any third party interest in respect of 15% (15,000 sq. ft.) out of the free sale area available to him for redevelopment.

10. It would be contextually relevant to note that a challenge to

the aforesaid order at the instance of the applicant did not yield any success before the Supreme Court and SLP Nos. 15090 of 2011, 15091 of 2011 and 15935 of 2011 came to be dismissed by an order dated 20th May, 2011.

11. Noting the aforesaid orders, the learned single judge by an order dated 10th August, 2015 was persuaded to dispose of the Notice of Motion No. 1516 of 2011 by passing the following order.

5] Learned counsel for defendant no.26 submits that in view of the pendency of the appeal, her right to agitate the findings as far as preliminary issue is concerned, may be kept open as an appeal is pending before the Division Bench. That is a reasonable suggestion. The plaintiff is not seeking any other relief since its rights are protected by the order of the Division Bench reported in 2011(4) Bom. C. R. 583. In the circumstances, I pass the following order:-

(i) Notice of Motion No.1516/2011 in Suit No.1108/2011 and Notice of Motion No.1551/2011 in Suit No.1163/2011 are disposed of in terms of the order of the Division Bench dated 7th May, 2011 in Appeal(L)Nos.235 & 234/2011 and reported in 2011(4) Bom. C.R. 583.

(ii) This order issues without prejudice to the defendants rights to pursue the challenge to the order dated 30th October, 2014 deciding the preliminary issue.

(iii) There will be no orders as to costs.

12. In face of the aforesaid orders, at this stage, a prayer for further interim relief ordinarily does not deserve to be entertained as the aspect of the interim relief stands concluded by the order of the appeal Bench and confirmed by the Supreme Court.

13. The learned counsel for the applicant endeavored to persuade the Court to consider the prayers in the instant application on the premise that, in the intervening period, the defendant No. 26 has created third party interest in the subject matter of the suit in breach of the order passed by the Appeal Bench. Attention of the Court was invited to averments in paragraphs 7 and 9 of the application. The learned counsel would further urge that the order of the Division Bench is required to be construed in its true spirit and 15% of the entire free sale component is required to be carved out if the order of the Division Bench is to be given meaning and content.

14. In opposition to this Mr. Tamboly, learned counsel for defendant No. 26, would urge that the correspondence, to which a reference is made in paragraphs 7 and 9 of the application, was very much before the Court when the Notice of Motion came to be disposed of by the learned single Judge by an order dated 10th August, 2015. Attention of the Court was invited to the letter dated 4th February, 2015 (Exhibit J) addressed by the plaintiff to defendant wherein the allegations of the defendant No. 26 having created third party interest in the suit premises in favour of M/s. Parinee Realty Private Limited were made. In this view of the

matter, after disposal of the Notice of Motion in terms of the order of the Appeal Bench, the plaintiff can not be permitted to re-agitate the very same issue. Mr. Tamboly further urged that by seeking demarcation of the 15% of the free sale component, the plaintiff is expanding the scope of the order passed by the Appeal Bench.

15. I am persuaded to agree with the submissions of Mr. Tamboly. First and foremost, the order passed by the Division Bench clarifies in clear and explicit terms what 15% of the free sale component was to mean i.e. 15,000 sq. ft in the free sale area. It is not open for the plaintiff to agitate before this Court that the said clarification does not cap 15% of the free sale area and the said order operates upon entire 15% of the free sale area, notwithstanding the said clarification. Secondly, by the instant application, the plaintiff is, in a sense, seeking carving out of 15% of the free sale area as if its entitlement thereto has been adjudicated. The Appeal Bench has protected the interest of the plaintiff by simply restraining the defendant No. 26 from selling, transferring, alienating, encumbering or otherwise creating any third party interest in respect of 15% of free sale component i.e. 15,000 sq.ft. out of free sale area available for defendant No. 26 for redevelopment. The scope of the said order cannot be expanded by seeking demarcation

of the area even before the project is fully developed.

16. To sum up, since the appeal Bench has already restrained defendant No. 26 from alienating or otherwise creating third party interest in 15% of the free sale area, in my view, the plaintiff would not be justified in seeking further interim relief, as sought. Undoubtedly, the plaintiff will have a cause to agitate if the defendant No. 26 creates third party rights in respect of the said 15% area. In that event, the action would take the shape of an action for contempt.

17. The application stands rejected.

(N. J. JAMADAR, J.)