

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 1492 OF 2018
IN
FIRST APPEAL (ST) NO. 10531 OF 2018

Prashant Chandrakant Shah and ... Appellants/Applicants
Ors.

V/s.

Borvali Chandra Vatika Chs. Ltd. & ... Respondents
Ors.

Mr. Mayur Khandeparker I.by Mr. Sanket Mungale, for the appellants.

Mr. Sharan Jagtiani, Senior Counsel with Mr. Vishal Narichania, Mr. Shakab Shaikh and Ms. Hima Khaman I.by Makaran Raut, for the Respondent no. 1.

CORAM : KISHORE C. SANT, J.

RESERVED ON : 16TH JANUARY 2024.

PRONOUNCED ON : 10TH MAY 2024.

PC:

1. This Interim Application is filed by the Appellants / original defendant Nos.1, 1(A) and 1(B) against respondents i.e. original defendant nos. 2 and 3. The applicants have challenged the judgment and decree, whereby the original defendant nos. 1 to 3 are directed to execute a conveyance deed of suit property admeasuring 4677.12 sq. mtrs out of survey no. 226, Hissa No. 2 and Survey Nos. 269 and 445,

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446 and 447 now converted into 1429-A and 1429-B or 1429-A1 situated at junction of S.V.P. Road and Davidas Road, Village Eksar Borivali (West) in favour of the plaintiff within two months in case of failure the plaintiff to get conveyance deed executed through Court Commissioner for the purpose of convenience, parties are referred to as per their status before the trial Court.

2. The facts in short are that:

a) The plaintiff is a Co-operative Housing Society registered under Maharashtra Co-operative Societies Act, 1960 consisting of flat purchasers in two buildings. Defendant is a legal representative of the original owner. Defendant owned land admeasuring 4677.12 sq. mtrs as described in the above paragraph which is the subject matter of the suit. Defendant No. 2, happens to be a partnership firm engaged in the business of construction and development of the immovable property. Defendant No. 3 is also a partnership firm. Defendant No. 3 entered into the agreement with the original owner and obtained development rights in the suit property 1429/B admeasuring 544 sq. mtrs. The property admeasuring 1910

sq. feet was retained by the owners out of the entire property. The agreement dated 15.09.1978 came to be executed between original owner and the partners of the plaintiff – 2 firms.

3. It is the case of the plaintiff that as per the terms and conditions of the said development agreement (hereinafter referred to 'the said act). In view of the condition clause 13(a), the defendant no. 2 was to construct and deliver the Bungalow of not less than 1910.sq. ft. built up area with one garage for the original owners as per the Clause 13 (c) of the said agreement. Defendant No.2 was to execute the lease of the said portion of land of the said Bungalow constructed as sub division of the plot was not possible as per the rules and regulations of the Mumbai Municipal Corporation Act. (hereinafter referred to as "Corporation"). The defendant no. 2 was to develop the other area of property and to sale the flats, units, garages and shops to the prospective purchasers by constructing buildings to be named as Chandra Vatika Co-operative Housing Society Ltd. Pursuant to the agreement, the Defendant No. 2 has constructed two buildings namely 'A' Wing consisting of ground + 6 floors and B-Wing consisting of ground + 4 floors and one independent bungalow of 1910 sq.ft. built

up area. The defendant no. 2 thereafter sold the constructed flats/units and garages to the respective purchasers and the said purchasers formed a registered Co-operative society. The construction is now complete. The Bungalow was also constructed. After completion of the work the plaintiff sought execution of conveyance deed of the suit property in favour of plaintiff society.

4. It is the case of the plaintiff that entire land is required to be conveyed in the name of the society. The defendant no. 2 also collected amount of Rs. 1,75,000/- from plaintiff society for execution of conveyance and stamp duty for the same purpose. However, the defendant no. 2 avoided to execute the conveyance deed. A suit therefore, came to be filed for execution of conveyance deed of the total land admeasuring 4677.12 sq. mtrs.

5. It is the case of the defendant no. 1 that the plaintiff have used the FSI more than that was given to defendant no. 2. A suit suffers from non-joinder of the parties as defendant nos. 1(A) and 1(B) were not added as a defendants though they have a shares in property. Though basic consideration was to be payable in the agreement was on the basis of FSI admeasuring 33,500 sq. ft. only that was to be consumed by defendant no. 2 and the said fact is mentioned in the

agreement. In the agreement it is mentioned that if the additional if FSI is used, the same would be negotiable with the defendant no. 2 at an additional rise of such increased FSI. It is contended that the plaintiff and defendant no. 2 have committed breach of this condition of the said agreement. In short, it is the case of defendant no.1 that the plaintiffs are entitled only to get conveyance of land admeasuring 33,500 sq.ft. only in view of the clause 13(c).

6. Defendant no. 2 has to execute nominal lease deed for the said plot in the name of defendant no. 1. It is further case that land was divided into two parts i.e. 1429/A and 1429/B. The defendant no. 2 and plaintiff have used more FSI than permissible on the land given to them and have committed breach of condition. The defendant no. 1 is ready to execute Conveyance Deed in favour of plaintiff for the area sanctioned to them. There is no cause of action. It is ultimately prayed to dismiss the suit.

7. Defendant no. 2 by filing a written statement contended that the suit is not maintainable against the defendant no. 2 as property is not fully developed by defendant no. 2 and therefore, plaintiffs are not entitled to get the deed of conveyance. The plaintiff and defendant no. 1 have exchanged the correspondence by keeping

defendant no. 2 in dark and there is no question of defendant No. 2 to execute any conveyance deed.

8. The case of defendant no. 3 is that the CTS No. 1429/B admeasuirng 544 sq. mtrs. is developed by defendant no. 3 as per the agreement dated 04.10.2006 by demolishing the Bungalow and therefore the plaintiff is not entitled to get conveyance deed executed as sought and prayed for dismissal of suit.

9. Learned trial Court on evidence and after trial held that the plaintiffs are entitled to the conveyance of the suit property i.e. land admeasuring 4677.12 sq. mtrs. The defendants have no right to sale the suit property to any 3rd person and to do any further construction upon the suit property or to utilise the FSI or TDR and decreed the suit. Defendant no. 1(A) and 1(B) are thus now before this Court.

10. It is the case of the defendant Nos 1(A) and 1(B) that they are owners of 544 sq. mtrs. of plot on which a bungalow of 1910 sq. ft. is constructed. It is thus these defendants who are entitled to get FSI and TDR etc. available on the plot of 544 sq. mtrs. Though the bungalow was constructed of 1910 sq. ft, the right of the defendant however was not restricted only to that much FSI in case in future further TDR is made available. They have a full right to utilise the said

FSI under the said agreement. The developers were given rights only to sale the flats in the perspective building to the extend of 33,500 sq. ft. along with increased FSI and TDR etc., in any case the agreement had given the Defendant no. 2 a right to get FSI in future only for land 1429/B.

11. It is the case of the plaintiffs that when the agreement specifically stated that the original owner was to be given 544 sq. mtrs of land with construction of 1910 sq. ft. bungalow, the original owner was entitled to that much FSI only. Any benefit in future if allowed on the said land that was to be utilised by defendant no. 2. Thus he justifies the decree.

12. Controversy appears to be about clauses 13(b) of the said agreement as it is the case that the amount of consideration was adjusted and thus the consideration was paid to the owner and even the construction of the bungalow was a part of consideration towards the land. The owner was paid consideration of Rs. 1,72,500/- purchase price of bungalow Rs. 5,52,600+Rs.30,000/-. The bungalow was infact purchased by the original owner and thus the owner could get only bungalow purchased by him. The the agreement Clause 13 (c) reads as follows:

“13(c). THE PURCHASERS or their nominee or nominees or assign shall give a Lease in perpetuity of the said bungalow with land appurtenant thereto (the land appurtenant shall mean the area to be compulsorily kept open around the said bungalow as per the building Rules of the Bombay Municipal Corporation) with a free and full right of access and agrees thereto at all times of the day and night from Sardar Vallabhbhai Patel Road and also from Devidas Road at a yearly rent of Rupee one and without any deposit or any restrictive covenant and with a right to use the said Bungalow for any lawful purpose develop it as permitted by law and sell assign or transfer or sub-lease the same without any sanction or permission being required to be obtained for the same from the Purchasers or their successors-in-title. The said Lease will also include in it besides the said bungalow garage and land, appurtenant as aforesaid, but subject to the reservation attached thereto to the intent that the Vendors will have full use and enjoyment thereof along with others having a like right SUBJECT HOWEVE to Municipal restrictions if any. As and when any sub-division is permitted, the Purchases shall sell convey and assign their reversionary rights in the said bungalow garage and land appurtenant thereto as aforesaid to bungalow garage and land appurtenant thereto as aforesaid to the Vendors at or for the price of Rs. 101/- without my objection or hindrance. This covenant to sell will be binding upon the assignees and Successor-in-title of the Purchasers”.

13. It is the case of the defendant no. 2 that by the said agreement, defendant no. 1 vendors had sold “all and singular” and

the said land hereditaments and suit premises at the junction for a consideration of Rs. 9,51,000/- on the basis of 33,500 sq. ft FSI as was sanctioned by the Corporation. Further additional FSI over and above the FSI 33,500 sq. ft is sanctioned, the purchaser will pay additional price of said FSI. Further Clause 5 reads as under:

“5.... The vendors shall however be entitled to receive the compensation for the area in set-back and acquisition that may remain after the purchaser obtain the full benefit and advantage of the FSI in respect of the areas in set back and acquisition at the time of getting the plans for construction of the building sanctioned by the authorities....”.

Thus it is submitted that all the rights were given to the purchasers in lieu of consideration of the constructed bungalow and some amount.

14. Further there were agreements between defendant no. 2 as vendor and the purchaser of plot on 28th April 1979 and whereas by virtue of the provisions of said agreement for sale dated 15th September 1978 the vendors are placed in possession of the said lands with the authority to develop the said property to commence and carry on construction of building or buildings and to sell flats shops garages or other portions in such proposed buildings on ownership basis.

15. Clause 17 in the said agreement, provides that the defendant shall cause the owners i.e. Defendant no. 1 to execute the conveyance in respect of said piece of land in favour of the Co-operative Housing Society or association of members that may be formed by the purchasers of the premises in the said building. It is thereafter, pointed out that the word 'said land' refers to the entire land. In Clause 16, the vendor shall accept the compensation for the area of said part the original owner was not entitled to any other things.

16. The question is therefore now as to whether the right of the owner Defendant no. 1 was restricted only to bungalow consists of 1910 sq. feet is that the Defendant no. 2 cannot take benefit of ambit and deprived the purchaser of his right. It is the case that while entering into agreement and thereafter the plan was sanctioned on the basis of 33,500 sq. ft. land and the said admission is taken in the evidence. It is submitted that due purpose and meaning of the agreement and the clauses needs to be considered as that the original owner retained his right considering the area as 544 sq. meters and not merely area of bungalow. If any benefit arises in future for TDR that necessarily is to Defendant no. 1. The plaintiff cannot claim any right

on the basis of the agreement.

17. Thus after considering the submissions of the parties Court has also *Prima Facie* gone through the impugned judgment and order to see as to whether any error in the judgment appears. Considering the submissions and the documents, it is clear that by conveyance deed, the Defendant no. 1 had clearly agreed to execute conveyance of the entire land in favour Defendant no. 1 was to retain or was to get back only the area of bungalow of 1910 sq. ft. It has also come on record that now there are three separate parts of the land i.e. 1429/A, 1429/B, and 1429/A1 which are sub-division long back. However, merely because of that sub-divided, it is not seen from the any of the document after sub-division. The Defendant no. 1 was to get back title over the land to that extent. From the document it is further clear that now it is plaintiff who is entitled to get the conveyance in respect of the entire land. In any case, the Defendant no. 1 has no right to develop any part of the property without consent of the plaintiff. The plaintiffs were entitled the entire plot of land. At this stage, though it is sought to be contend that Learned Judge has not considered the document and failed to consider that Defendant no. 1 is entitled to receive land of 544 sq. mtrs. it can be decided at the stage of final

disposal of the appeal. The appeal is already admitted by separate order.

18. This Court is not convinced by the argument of the plaintiffs. This Court does not find any reason to stay the effect, execution and operation of the impugned judgment and order. Suffice it to say that everything done in between pending the appeal, shall be subject to outcome of the First Appeal.

(KISHORE C. SANT, J)