

CASE NO.:
Appeal (civil) 3596 of 2006

PETITIONER:
Rangnath Haridas

RESPONDENT:
Dr. Shrikant B. Hegde

DATE OF JUDGMENT: 22/08/2006

BENCH:
S. B. SINHA & DALVEER BHANDARI

JUDGMENT:
J U D G M E N T
[Arising out of SLP(C) Nos.24511-24512/2004]

DALVEER BHANDARI, J.

Leave granted.

By the order dated 17.08.2004, Chamber Summons No. 1460 of 2003 in Execution Application No. 388 of 2003 in Suit No. 3550 of 1990 was made absolute by the Single Judge of the High Court of Bombay.

Aggrieved by the said order of the Single Judge, the appellant-defendant filed an appeal before the Division Bench. The Division Bench of the Bombay High Court dismissed the said appeal (Appeal No. 672 of 2004) by an order dated 21.10.2004.

The appellant aggrieved by the aforesaid orders of the learned Single Judge and the Division Bench has preferred this civil appeal before this Court.

The brief facts which are necessary to dispose of this appeal is recapitulated as under:

The respondent-plaintiff entered into an agreement with the appellant for the purchase of a flat on 16.9.1985. Despite making part payment, when the appellant did not perform his part of the agreement, the respondent filed a Suit No. 3550 of 1990 in the High Court of Bombay for seeking specific performance of the agreement dated 16.9.1985.

During the pendency of the suit, the parties have amicably settled the dispute involved in the suit and filed the consent terms on 1.11.1991. The details of the Chamber Summons and the consent terms incorporated in the order of the learned Single Judge are reproduced hereinafter for proper appreciation of the facts of this case.

"that pending the above Execution Application, this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay with all powers under Rule XL rule 1 of C.P.C. 1908 with further directions to the Court Receiver, High Court, Bombay, to take possession of Flat

No.B-4, 2nd Floor, Golden Height, situated at Anant Patil Marg, Dadar Mumbai 400 028 with further directions to the Court Receiver to appoint Architect and Contractor from panel of this Hon'ble Court to get the said incomplete work completed as mentioned in the report dated 29th November, 1999 filed by M/s Nandkarni & Co. in Notice of Motion no.2660 of 1999 and to obtain part Occupation Certificate from the Municipal Corporation of Greater Mumbai, in respect of the said flat with further directions to hand over quiet, vacant and peaceful possession of the said flat to the plaintiff as per consent decree dated 1st November, 1991."

The consent terms contained the following clauses:

"2. The parties confirm that the agreement dated 16.9.1985 between them is valid and subsisting and the same is binding on the parties.

3. The Defendant hereby confirm having received Rs.2,35,000/- from the plaintiff as per the agreement dated 16.9.1985.

5. The Defendant states that as per the said proposed plan there are no flats admeasuring about 750 sq.ft. in both the Wings of the proposed buildings. But there are flats admeasuring about 935 sq. ft. (super built up area) in the said building and the plaintiff has agreed to purchase a flat admeasuring 935 sq. ft. on further payment of Rs.6,00,000/- which the plaintiff has agreed to purchase the flat on 2nd floor in Wing 'B' Western Side on the following terms.

6. The Defendant to sell and to entrust to the plaintiff flat No.B-4 on the 2nd Floor of B-Wing (super built up area) of the building on plaintiff's paying the sum of Rs.6,00,000/- in addition to Rs.2,35,000/- already paid by him to the plaintiff in the following manner:

Rs.3,00,000/- prior to the execution of these terms by pay order No. 466770 dated 31.10.1991 at the time of Defendant handing over quiet, vacant and peaceful possession of Flat No.B-4, 2nd Floor, B- Wing at Anant Patil Marg, Shivaji Park, Dadar (West) Bombay \026 400028.

7. The Defendant agrees and undertakes to provide the aforementioned flat with all modern facilities to the plaintiff, after the said building is ready for occupation. The Defendant agrees and undertakes to

execute separate agreement to sell in respect of the aforementioned flat admeasuring 925 sq. ft. (super built up area) in favour of the plaintiff as required by the Maharashtra Ownership Flat Act, 1964 within eight weeks from the execution of these terms and the plaintiff agrees and undertakes to pay stamp duty and registration charges as applicable on the agreement registered before the Sub-Registrar of Assurances at the earliest as required by the said Act.

11. The Defendant hereby agrees and undertakes to hand over quiet, vacant and peaceful possession of Flat No.B-4, 2nd Floor, B-Wing at Anant Patil Marg to the Plaintiff on his paying the entire consideration mentioned hereinabove and after completing the construction of the entire building wherein the said flat is situated and the said flat is ready for occupation.

13. The Minutes of the order dated 16th day of September, 1991 passed by their Lordships Chief Justice P.D. Desai and Mr. Justice Tipnis in Appeal No.622 of 1991 shall remain in force until the Defendant hands over possession of the said flat to the plaintiff on plaintiff's paying the entire consideration mentioned hereinabove."

The learned Single Judge further examined the matter and observed as under:

"Clause 2 of the Minutes of the order dated 16th September, 1991 referred to in Clause 13 above read as under:-

"The Respondent/Defendant states that there is no flat admeasuring 750 sq. ft. in the proposed building. However, there is a flat of 935 sq. ft. on second floor (Right Side) which at present is not agreed to be sold to anyone. The Respondent states that without prejudice to his rights and contentions the Respondent shall not enter into any agreement for sale in respect of said flat unless he has given seven days clear notice to the Appellant's Advocate, during which period the Appellant shall be at liberty to adopt appropriate proceedings before trial court for appropriate reliefs. The Respondent shall also be at liberty to urge all contentions as are permissible to him in law."

By an order dated 10th August, 1999, S.S. Nijjar, J. held that the Defendants had failed

and neglected to comply with the above order. His Lordship observed that the Defendants had committed contempt of court. In the circumstances, the learned Judge in order to protect the interest of the Plaintiff granted ad-interim relief in terms of prayer (a) of the Notice of Motion No.2660 of 1999. However, that Notice of Motion was withdrawn with liberty to adopt appropriate proceedings. A further Notice of Motion No.1701 of 2002 for similar reliefs was also withdrawn, as reflected from the order dated 30th July, 2001. The explanation that the aforesaid Notices of Motion were withdrawn for the purpose of adopting appropriate proceedings, is accepted.

The present Chamber Summons is taken out in execution proceedings, which is the proper remedy.

There is no answer on the merits of the case whatsoever. The only answer sought to be given is that there was an alleged oral understanding prior to the execution of the consent terms dated 1st November, 1991. The same is unsustainable, in view of the fact that the consent terms are still valid and binding.

The defendant has not complied with any of his obligations including the obligation under clause 7 of the consent terms. There is an open defiance of the order.

The learned counsel appearing on behalf of the Defendant further stated that there is an order of attachment in respect of Flat No.B-3 passed by the Debt Recovery Tribunal in respect of the dues of SICOM. Admittedly an M.O.U. dated 9th July, 1996 was entered into between the Defendant and Dinesh Anant Rane for Flat No.B-3. That flat however, is not the subject matter of this suit. The learned counsel for the Defendant further stated that there is no wall between flat No.B-4 i.e. the suit flat and flat No.B-3. He further states that the possession of flat No.B-4 was never handed over to the said Rane and that Rane does not have any right in respect thereof. The warrant of attachment therefore, on its own showing does not apply to the suit flat. In fact had the Defendant sought to create any right in respect of flat No.B-4 i.e. the suit flat in favour of Rane or anyone else, it would have been contempt of the aforesaid orders of this Court. In the circumstances, there can be no objection to the grant of reliefs in the present Chamber Summons.

The Chamber Summons is made absolute in terms of Prayer (a). The Court Receiver shall erect a wall at the appropriate place between flat Nos.B-3 and B-4. The defendant shall pay the costs of this Chamber Summons fixed at Rs.5000/- within two weeks from today. The Defendant shall also pay the cost

of construction of the wall to the Court Receiver within four weeks of a demand for the same by the Court Receiver.

The operation of this order is stayed for a period of four weeks from today to enable the Defendant to carry the matter higher.

The Chamber Summons is accordingly disposed of."

The appellant aggrieved by the said order preferred Appeal No.672 of 2004 before the Division Bench of the Bombay High Court. The submission before the Division Bench was that the impugned leave under Order 21 Rule 22 CPC having not been sought by the respondent, the impugned order is illegal. The Division Bench rejected the objection on the ground that this plea was not raised before the learned Chamber Judge.

The learned Chamber Judge held that the consent terms were valid and subsisting and accordingly passed the impugned order. The Division Bench did not find any infirmity in the order passed by the learned Chamber Judge and consequently the appeal filed by the appellant was dismissed.

The appellant aggrieved by the aforesaid orders dated 17th August, 2004 and 21st October, 2004 passed by the learned Single Judge and the Division Bench respectively has preferred this civil appeal before this Court.

We have heard the learned counsel for the parties and perused the order of the Division Bench and the order of the learned Chamber Judge. The consent terms submitted between the parties are as under:

"1. The defendant abovenamed waives the service of Writ of Summons in the above matter.

2. The parties confirm that the agreement dated 16.9.1985 between them is valid and subsisting and the same is binding on the parties.

3. The defendant hereby confirms having received Rs.2,35,000/- from the Plaintiff as per the agreement dated 16.9.1985.

4. The defendant states that he has submitted the plan in respect of Plot No.707 T.P.S. No.IV for development of the said property to the Municipal Corporation of Greater Bombay and the same is to be sanctioned by the Municipal Corporation of Greater Bombay.

5. The defendant states that as per the said proposed plan there are no flats admeasuring about 750 sq. ft. in both the wings of the proposed buildings. But there are flats admeasuring about 925 sq. ft. (super built up area) in the said

building and the Plaintiff has agreed to purchase a flat admeasuring 925 sq. ft. on further payment of Rs.6,00,000/- which the plaintiff has agreed to purchase the flat on 2nd floor in Wing B Western Side on the following terms :

6. The defendant to sell and to entrust to the plaintiff flat No.B-4 on the 2nd floor of B-Wing (super built area) of the building on plaintiff's paying the sum of Rs.6,00,000/- in addition to Rs.2,35,000/- already paid by him to the plaintiff in the following manner :

Rs.3,00,000/- prior to the execution of these terms by Pay Order No.466770 dated 31.10.1991 drawn on Canara Bank, Dadar (West) Branch; Rs.3,00,000/- at the time of the defendant handing over quiet, vacant and peaceful possession of Flat No.B-4, 2nd floor, B-Wing at Anant Patil Marg, Shivaji Park, Dadar (West), Bombay-400028

7. The defendant agrees and undertakes to provide the aforementioned flat with all modern facilities to the plaintiff, after the said building is ready for occupation. The defendant agrees and undertakes to execute separate agreement to sell in respect of the aforementioned flat admeasuring 925 sq. ft. (super built up area) in favour of the Plaintiff as required by Maharashtra Ownership Flat Act, 1964 within eight weeks from the execution of these terms and the plaintiff agrees and undertakes to pay stamp duty and registration charges as applicable on the agreement registered before the Sub-Registrar of Assurances at the earliest as required by the said Act.

8. The plaintiff agrees and undertakes to pay the additional sum of Rs.6,00,000/- (in addition to Rs.2,35,000/- paid by him as per the agreement dated 16th September 1985 Ex.A to the plaint, in the manner stated hereinabove.

9. The plaintiff agrees and undertakes to reconvey to the Defendant that the land bearing S. No. 25 (Gate No.255) 2 of Village Loni Kalbhor, Taluka Haveli, District Pune, admeasuring about 324 sq. metres within four weeks from the date of the execution of these terms. It is expressly agreed by and between the parties hereto that all the expenses towards the stamp duty, registration etc. in respect of such reconveyance shall be borne by the defendant.

10. The plaintiff has been advised that it is not required to obtain necessary

certificate under Section 37(1) of the Income Tax Act since the consideration of the suit flat is less than Rs.10,00,000/-. However, the plaintiff agrees and undertakes to obtain necessary certificate under Section 37(1) of the Income Tax if and when required. It is expressly agreed by and between the parties and payment of registration charges if any and the plaintiff agree and undertakes to bear the aforementioned expenses towards obtaining 37(1) if required and getting the said agreement registered.

11. The defendant hereby agrees and undertakes to hand over quiet, vacant and peaceful possession of Flat No.B-4, 2nd floor B-Wing at Anant Patil Marg to the plaintiff on his paying the entire consideration mentioned hereinabove and after completing the construction of the entire building wherein the said flat is situated and the said flat is ready for occupation.

12. The plaintiff agrees and undertakes to abide by the terms and conditions that may be mentioned in the proposed agreement that may be executed in his favour by the defendant and join the co-operative body of the flat purchasers in the suit building in whose favour the defendant will execute the conveyance to be executed in respect of the said land in the said proposed building.

13. The Minutes of Order dated 16th of September 1991 passed by their Lordship Chief Justice P.D. Desai and Mr. Justice Tipnis in Appeal No.622 of 1991 shall remain in force until the Defendant hands over possession of the said flat to the plaintiff on plaintiff's paying the entire consideration mentioned hereinabove."

Clauses 9, 10 and 12 of the said Consent Terms categorically state that there had been some mutual obligations on the part of both the parties.

The appellant herein contends that despite such reciprocal obligations on the part of the parties, the plaintiff-respondent did not fulfill his obligation in terms thereof. It was in the aforementioned context, another arrangement was said to have been arrived at on 27.07.1995, pursuant where to and in furtherance whereof, the respondent herein offered to take an amount of Rs.32 lakhs enabling him to purchase the flat of his choice in the vicinity instead of the concerned flat for which the appellant herein agreed to pay the said amount.

For the reasons stated hereinafter, we may not consider that part of submissions of the learned counsel for the purpose of this case.

It appears that a notice of motion was filed before the High Court by way of a Chamber summons, which was supported by an affidavit affirmed by the respondent herein. In the said affidavit, although the other clauses of the consent terms entered into by and between the parties on 01.11.1991 had been mentioned but erroneously clauses 9 and 10, which impose obligation on his part, had been omitted. We do not appreciate such deliberate omission on the part of the respondent. The said notice of motion was withdrawn on 30.07.2001. In the Counter Affidavit filed before us, the respondent, however, stated:

"I say and submit that I have always been and I am ready and willing to fulfill my obligations under the said consent terms and I have always been and I am ready and willing to pay the balance amount of Rs.3,00,000/- which is payable by me against the possession of the said flat. I say and submit that it may not be out of place to mention here that on or before execution of the said consent terms, I have paid Rs.5,35,000/- to the Petitioner abovenamed. Out of the said consideration of Rs.5,35,000/-, Rs. 2,35,000/- was paid by me way back in 1985. It may not be out of place to mention here that vide clause 9 of the said consent terms/consent decree, I had agreed and undertaken to reconvey to the Petitioner land bearing Survey No.25 (Gate No.255) of Village Loni, Kalbhor, Taluka Haveli, District Pune admeasuring about 324 sq. metres within four weeks from the date of execution of the said consent terms. However, as per the said clause, the Defendant had agreed to incur the expenses towards stamp duty, registration charges for execution of the said reconveyance of the said property in his favour. However, till the Petitioner has not taken any steps on that behalf. I am always ready and willing to reconvey the said property as and when called upon to do so."

The submission of the learned senior counsel appearing on behalf of the appellant is that the High Court committed a serious error in passing the impugned judgment, without noticing that : (i) the consent order was followed by subsequent settlement; (ii) the reciprocal obligations had not been fulfilled; and (iii) no leave had been obtained under Order 21 Rule 22 of the Code of Civil Procedure.

Mr. Arvind Sawant, the learned senior counsel appearing on behalf of the respondent, on the other hand, would draw our attention to the impugned judgment. With reference to para 9 of the consent terms, the learned counsel would submit that his client is ready and willing to comply with the said term also. Our attention in this connection has been drawn to the fact that the respondent had taken out notice under Order 21 Rule 22 of the CPC, when the appellant intended to create a third party interest.

Having heard the learned counsel for the parties,

we are of the opinion that as the High Court as also this Court are acting on the basis of the terms of the consent decree, the reciprocal obligations of the parties should be directed to be acted upon simultaneously.

We are not satisfied that the consent terms were in any manner substituted by another agreement between the parties. We, therefore, are of the opinion that the parties should be directed to give effect to the terms of the consent decree. We have noticed hereinbefore, whereas the appellant herein is to handover the flat to the respondent, the respondent was also obligated to transfer the land situated in the District of Pune. Both the parties have failed to comply with their mutual obligations.

We, therefore, direct as under:

- 1) The appellant shall handover possession of Flat No.B-4, 2nd Floor, B-Wing, Anant Patil Marg, Shivaji Park, Dadar (West), Mumbai-400 028 to the respondent herein, wherefor the requisite partition wall, if any, should be constructed. In case of any doubt or dispute as to the exact area of the flat in question, a surveyor may be appointed to demarcate the said flat and ensure construction of a wall between Flat No.B-3 and B-4. The appointment of surveyor, if any, should be undertaken within three weeks from date. The respondent shall bear the expenses therefor. The respondent shall also bear all costs for preparation of documents, stamp duties and registration costs, etc., if any, thereafter transfer of the said property.
- 2) The appellant would be entitled to withdraw the amount of Rs.3,00,000/- deposited by the respondent herein with the Court Receiver, which sum is over and above the amount of Rs.5,35,000/- paid by the respondent to the appellant. We have been assured that there is no shortfall in the entire amount of consideration.
- 3) The respondent shall execute a contract in the same format which the other allottees of the building had undertaken in regard to maintenance etc. of the said flat.
- 4) The respondent shall execute a deed of conveyance in favour of the appellant herein in respect of the land being Survey 25 (Gate No.255) situated at Village Loni Lalbhor, Taluka Haveli, District Pune, admeasuring 324 sq. metres within four weeks from date. He shall also handover vacant peaceful possession thereof within six weeks. The appellant shall pay and bear the costs for requisite stamp papers as also the registration charges.

The appeal is disposed of accordingly. In the facts and circumstances of this case, the parties are directed to bear their own costs.