



Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION (I) NO. 5060 OF 2023
IN
COMMERCIAL SUIT NO. 4 OF 2021

M/s SR Enterprises	Applicant
<i>In The Matter Between</i>	
M/s SR Enterprises	...Plaintiff
<i>Versus</i>	
Gurbachan Kaur Jattinder Singh Chadha & Anr	...Defendants
<i>And</i>	
Amardeep Kaur Chadha	Respondent
	Prop. Defendant
	No. 3

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Mr Shoaib Ibrahim Memon, *for the Applicants/Plaintiffs.*
Mr Sutapa Saha, *for Defendant No. 1.*
Mr Robin Jaisinghani *with Ranjit Dharmadhikari & Kartik Tiwari, i/b*
Lakshyavedhi Legal, for Defendant No. 2.

CORAM. ARIF S. DOCTOR, J
DATED: 27th September 2024

ORDER.

1. The Applicant is the Plaintiff in the captioned Suit and has filed the present Interim Application (“IA”) seeking amendments to the Plaint

as have been more particularly set out in the schedule appended to the IA. For the ease and continuity of reference, the parties shall be referred to as they appear in the Plaint.

2. Mr Memon then for context submitted that Defendant No. 1 and the Plaintiff had entered into a Development Agreement (DA) and subsequently a Supplementary Agreement (SA) for the redevelopment of a building known as 'Guru Niwas' ("the said building") which stood on a plot of land ("the said Plot") owned by Defendant No. 1. He submitted that it was not in dispute that the said building was occupied by tenants/occupants who were to be provided permanent alternate accommodation of same area as occupied by them in the said building. It was thus he submitted that the area occupied by the tenants/occupants was of vital importance and was a crucial factor.

3. Mr Memon then submitted that it was only after the DA was entered into, that the Plaintiff become aware that Defendant No. 1 had misrepresented to the Plaintiff, the area which was in the occupation of each tenant. He pointed out that for the reasons more particularly set out in the Plaint, Defendant No. 1 terminated the DA and SA and had entered into a Deed of Conveyance with Defendant No. 2 which is why the Plaintiff was constrained to file the present Suit.

4. Mr Memon submitted that it was only after the present Suit was filed that the Plaintiff obtained a complete copy of the entire Deed of Conveyance entered into between Defendant No.1 and Defendant No.2. He submitted that from a perusal of the complete Deed of Conveyance, the Plaintiff *inter alia* became aware that the same stated the areas in the occupation of the tenants were in excess of what had been disclosed to the Plaintiff by Defendant No. 1, when the DA was executed. He thus submitted that this corroborated the Plaintiff's case that Defendant No. 1 had misrepresented the areas which were in the occupation of the tenants to the Plaintiff when the DA was executed.

5. Mr Memon then additionally submitted that the Plaintiff also became aware of the fact that Defendant No.1 had fraudulently created certain tenancies in favour of his daughter in-law i.e. proposed Defendant No. 3, in the said building. He submitted that this was also done to defeat the rights of the Plaintiff under the DA. Mr Memon then additionally submitted that despite the fact that the Deed of Conveyance had been entered into between Defendant No. 1 and Defendant No. 2 on 20th November 2020, Defendant No. 1 continued to act and represent himself as the owner of the said land and building. It was thus he submitted that the Deed of Conveyance was a collusive, bogus and a sham document.

6. It was basis the above fact all of which have come to the Plaintiff's knowledge only after the Suit was filed, that the Plaintiff has filed the IA essentially seeking to (i) bring on record the additional facts (ii) implead proposed Defendant No. 3 as a party Defendant to the Suit and (iii) seek certain consequential reliefs. Mr Memon submitted that if the amendments were not allowed the Plaintiff would be precluded from relying upon the Deed of Conveyance in evidence which would gravely prejudice the Plaintiff's case both for wrongful termination as also the Plaintiff's claim for damages. He therefore submitted that the present IA ought to be allowed in the interest of justice.

7. Without prejudice to the aforesaid, Mr Memon also submitted that since the Plaintiff had paid Defendant No. 1 a sum of Rs.51,00,000/- towards the grant of development rights the Plaintiff had a charge on the said property. In support of his contention, he invited my attention to Section 55(6) of the Transfer of Property Act, 1882 and also placed reliance upon the judgement of the Hon'ble Supreme Court in the case of *Usha Sinha vs. Dina Ram & Ors.*¹ to submit that the doctrine of *lis pendens* prohibits a party from dealing with the property which was the subject matter of Suit in respect of which *lis*

¹ AIR 2008 SC 1997

pendens notice had been given. He submitted that the Plaintiff was thus on this ground also, entitled to the amendment sought for.

8. Mr Memon then submitted that the Suit was at the pre-trial stage and the law with regard to grant of pre-trial amendments was well settled, i.e., that the same were to be liberally allowed. In support of his contention, Mr Memon placed reliance upon the following judgements of the Hon'ble Supreme Court in the cases of *Sampath Kumar vs. Ayyakannu & Anr.*², *Rajesh Kumar Aggarwal & Ors. vs. K. K. Modi & Ors.*³, *Life Insurance Corporation of India vs. Sanjeev Builders Private Limited & Anr.*⁴ and *Ganesh Prasad vs. Rajeshwar Prasad & Ors.*⁵

9. The Application was opposed by Mr Jaisinghani, Learned Counsel appearing on behalf of Defendant No. 2. Mr Jaisinghani submitted that the primary duty of a Court before deciding and/or allowing any application for amendment was to first determine as to whether such amendment was necessary for determining the real dispute between the Parties. He submitted that while the Hon'ble Supreme Court had reiterated this in several judgements, the same was

2 AIR 2002 SC 3369

3 AIR 2006 SC 1647

4 AIR 2022 SC 4256

5 2023 SCC OnLine SC 256

in fact very succinctly summed up in the judgement of the Hon'ble Supreme Court in the case of **Rajesh Kumar Aggarwal** (supra) cited by Mr Memon in which the Hon'ble Supreme Court had noted as follows, viz.

"19. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court."

10. Mr Jaisinghani then placed reliance upon the judgments of the Hon'ble Supreme Court in the case of **State of Kerala vs. The Cochin Chemical Refineries Ltd.**⁶ and **Jawahar Lal Wadhwa & Anr. vs. Haripada Chakroberty**,⁷ to submit that breach of contract by one party would not automatically terminate the obligations under the contract. He

⁶ AIR 1968 SC 1361

⁷ AIR 1989 SC 606

submitted that the party aggrieved by the breach had two options, either to treat the contract as still in existence or then to regard the contract as discharged. He submitted that if a party accepts the discharge of a contract by the other party, the contract is at an end and may sue for damages. If a party does not accept the discharge, then such party may insist on performance.

11. Mr Jaisinghani then took pains to point out that in the facts of the present case, the Plaintiff had not sought specific performance of the DA and/or the SA but had relegated its claim to damages, the Plaintiff had accepted that the contract between the parties had come to an end. It was thus he submitted that the amendments now sought for were wholly immaterial to decide the real issue between the parties, which was as to whether the termination was valid or not. He submitted that in the event the Plaintiff succeeded proving the termination was wrongful, the Plaintiff would be entitled to damages assuming the Plaintiff was able to prove the same. He however submitted that in either case, there was no question of the Plaintiff impugning the Deed of Transfer entered into between Defendant No. 1 and Defendant No. 2 or for that matter any transfer of the said property.

12. Mr Jaishingani then in dealing with the Plaintiff's contention that the Plaintiff would have a charge on the said plot submitted that the such a contention was entirely misconceived and legally untenable since the charge under Section 55(6) of the Transfer of Property Act would apply to a buyer/purchaser of immovable property and not to the Plaintiff who admittedly was a Developer. He then without prejudice to this submitted that even assuming the Plaintiff did have a charge on the property, the same would continue to subsist against Defendant No.1 and all persons who were claiming through and/or under Defendant No.1. In support of his contention, he placed reliance upon the judgement of the Hon'ble Supreme Court in the case of the ***Delhi Development Authority vs Skipper Construction Co (P) Ltd & Ors***⁸ from which he pointed out that the Hon'ble Supreme Court had held as follows, viz.

"29. These points depend upon the effect of the provisions in Sub-clause (6) of Section 55 of the Transfer of Property Act. That Section starts with the words "In the absence of a contract to the contrary", and reads thus (insofar as it is material for our purpose):

"Section 55 (6)(b). The buyer is entitled-

(a)

⁸ (2000) 10 SCC 130.

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money property paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission".

(emphasis supplied)

It is plain from the above provision that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. This charge in favour of the buyer is the converse of the seller's charge under Section 55(4)(b). The buyer's charge under this Section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract (Chettiar Firm Vs. Chettiar) (AIR 1941 P.C. 47). No charge is available unless the agreement is genuine. (T.N. Hardas Vs. Babulal) (AIR 1973 SC 1363) As pointed out in Mulla's Commentary on Transfer of Property Act, 8th Ed. (P.411), the charge on the property under Section 55(6)(b) is enforceable not only against the seller but against all persons claiming under him. Before the amending Act of 1929, the words 'with notice of payment' occurred after the words "all the persons claiming under him". These words were omitted as they allowed a transferee without notice to escape. After the Amendment of 1929, notice to the purchaser has now become irrelevant.

30. When the property upon which the charge is created gets

converted into another form, the buyer will be entitled to proceed against the substituted security. This is a general principle of law and Section 73 of the Transfer of Property Act is only an example of the said principle. The above principle has been applied to enforce mortgage on substituted securities (see Barham Deo Prasad Vs. Tara Chand (1913) 41 I.A. 45 (PC) and Muniappa Vs. Subbaiah (AIR 1917 Mad.880)). The same principle which is applicable to mortgages applies to cases of statutory charge under Section 55(6)(b). If immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject matter of the agreement is converted."

13. Basis the above, Mr Jaisinghani submitted that the amendments sought for were not only not necessary to determine the real dispute between the parties but were also sought for on a legally misconceived basis. It was thus that he pressed for the dismissal of the Interim Application.

14. After having heard Learned Counsel for the parties and considering the submissions made as also the case laws cited and going through the Schedule of amendments, I find that the present Interim Application deserves to be dismissed for the following reasons:-

A. The Plaintiff has admittedly neither in the Plaint as filed nor in the amendment that is now sought for, sought specific performance of the DA and/or SA. The Plaintiff has in fact

sought damages as also for a refund of amounts paid under DA, stamp duty and brokerage stated to have been paid and/or expended by the Plaintiff. Mr Jaisinghani is therefore absolutely right in his contention that the Plaintiff has treated the DA as having come to an end. Thus, in my view the judgements of the Hon'ble Supreme Court in the case of *State of Kerala vs. The Cochin Chemical Refineries Ltd.* (supra) and *Jawahar Lal Wadhwa & Anr.* (supra) would squarely apply.

- B. Hence, the amendments now sought for insofar they seek to challenge the Deed of Conveyance and the Agreements entered into between Defendant. No. 1 and proposed Defendant No. 3 are to my mind entirely unnecessary to determine the real dispute between the Parties i.e. the validity of the termination of the DA and SA. To allow the amendment to the extent that the same now seeks to challenge a Deed of Conveyance after the termination of the DA has been accepted by the Plaintiff would in my view be introducing a new case and one which is beyond what has been pleaded and prayed for in the Plaint.

C. *Additionally*, I find that the Plaintiff's contention that the amendment is necessitated on account of the fact that the Plaintiff has a charge on the property, having paid an amount of Rs. ,51,00,000/- to Defendant No.1, is also equally misplaced. *Firstly*, a plain reading of Section 55(6) of the Transfer of Property Act, 1882 makes clear that such charge would apply only to a buyer. The Plaintiff is admittedly not a buyer, but is only a developer under the DA. Even accepting the Plaintiff's contention that the Plaintiff would be entitled to a charge on the property, I find that the amendment on this ground seeking to impugn subsequent agreements entered into between Defendant No. 1 is also untenable, since the charge under Section 55(6) of the Transfer of Property Act would be enforceable not only against Defendant No.1, *but against all persons claiming under* Defendant No. 1 as held by the Hon'ble Supreme Court in the case of ***Delhi Development Authority*** (supra). Hence, even on this ground assuming that the Plaintiff has charge on the property, the same would continue to subsist and that fact alone would not entitle the Plaintiff to challenge the Deed of Conveyance more so when the

Plaintiff has treated the DA as having come to an end.

- D. There can be no dispute to the well settled position in law that pretrial amendments are to be liberally allowed. Thus in my view, the Plaintiff certainly ought to be permitted to bring on record the subsequent facts which according to the Plaintiff would greatly aid the Plaintiff's case that the termination of the DA and SA were wrongful. However, while the Court no doubt has to be liberal in the grant of such amendments, this would not mean that the same should be mechanically allowed. It would certainly be open to the Court to examine the contents and form (not the merits) of the amendments that have been sought for and the manner in which they have been made. In this regard I must note that the amendments which have been sought for in the present case have been made in the most slipshod manner and with complete non application of mind. Hence, even if I were to allow the IA for the limited purpose of bringing on record the subsequent facts, the same would in fact result in the Plaint coming across as completely incongruous. Thus it would result in complete confusion instead of clarity. I say so for the following reasons, viz.

- i. Large portions of the amendment read as a response to the Written Statement and Affidavits filed by the Defendants in the Suit. I will extract one paragraph to amplify this, viz.

“31B) The Plaintiffs state that apparently the Defendant No I has filed a reply in a clandestine manner on 06/04/2021 to the Interim Application No. 306 of 2021 through their Advocate M/s. Siddique and Associates and in the said reply took up a contention that the Defendant No. I was ready and willing to return back to the Applicants/Original Plaintiffs an amount of Rs 51,00,000/- (Rupees Fifty-One Lacs Only) deposit given to the Defendant No. 1 and relied upon a Letter dated 11/12/2019. The Plaintiffs state that in the said reply the advocate for the Defendant No. I has inter alia has no answer to the averments made in the Plaint regarding the fraud committed by the Defendants regarding suppression of the tenants. The Plaintiffs further state that the Defendant No. 1 similarly through the said Advocates M/s. Siddique, and Associates have filed her Written Statement dated 08/04/2021 however kept quiet and did not serve the same. The Plaintiffs state that in the said Written Statement also while dealing with Para #15 regarding the encroachment of Swadesh Hotel, no explanation has been given. The Plaintiffs further state that no disclosure have been made in respect of the execution of the Deed of Conveyance allegedly signed in the month of 20/10/2020. The Plaintiffs states that further the said Reply and Written

Statement filed through M/s. Siddique and Associates were never served on the Advocate of the Plaintiffs neither by Hand Delivery or by any other mode and have totally suppressed the same."

- ii. The schedule of amendment runs into 47 pages while the body of the amendment mentions the Exhibit as T-1 to T-20 and V-1 to V-6. However, no such Exhibits have in fact been appended to the Schedule of Amendment. Thus, the schedule as filed is sans these Exhibits.
- iii. The Exhibits referred to in the Schedule of Amendment are in fact to be found as Exhibits appended to the Interim Application which are however numbered as Exhibit-1 to Exhibit-27 and not as they are numbered and ordered in the schedule of amendment.

It is thus that I am unable to allow the amendment even to the limited extent of bring the subsequent facts on record. However, I find that the Plaintiff must be granted an opportunity to do so, if the Plaintiff so desirous by filing a proper Interim Application for this limited purpose.

Hence, I pass the following order.

ORDER

- i. The Interim Application is dismissed.
- ii. The Plaintiff is at liberty to file a fresh Interim Application restricted to bring the subsequent facts on record, which needless to state would be considered on its own merits.
- iii. The Interim Application thus disposed of in the aforesaid terms.

(ARIF S. DOCTOR, J)