

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
INTERIM APPLICATION (L) NO. 6682 of 2024  
IN  
SUIT (L) NO. 5236 of 2024

Shri Diamond Center Premises Co-op Society Ltd. ...Applicant

**In the matter between**

Shri Diamond Center Premises Co-op Society Ltd. ...Plaintiff

**Vs.**

D. K. Builders and Associates & Ors. ...Defendants

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Dr. Abhinav Chandrachud a/w Saurabh Utangale and Vedant Joshi i/by M/s.  
Utangale & Co. for the Applicant.

Mr. Gaurav Joshi, Senior Advocate a/w Piyush Raheja, Dimple Vora, Sharad  
Bansal and Sahil Gandhi i/by Markand Gandhi & Co. for Defendant No.14.  
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CORAM : ARIF S. DOCTOR, J.

DATE : 15<sup>th</sup> OCTOBER, 2024

**P.C.:-**

1. This is an application for ad interim relief which was heard at some length.
2. Dr. Chandrachud, Learned Counsel appearing on behalf of the Plaintiff Society has pressed for ad interim relief in terms of prayer clause (a) of the Interim Application, which reads thus:

*“a. pending the hearing and final disposal of the Suit, the Defendants, their agents, servants or any other person claiming through or under them be restrained by a temporary order of Injunction from recovering possession and/or evicting the Applicant and its members from their respective units situated in the building known as Shree Diamon Centre, LBS Marg, Vikroli West, Mumbai 400 083, with or without due process of law;”*

3. Mr. Joshi, Learned Senior Counsel appearing on behalf of Defendant No.14 at the outset raised a preliminary objection and submitted that the present Suit was nothing but an attempt by the Plaintiff Society to defeat the orders passed by a Coordinate Bench of this Court. In support of his contention, he adverted to the following, viz.

- i. That Defendant No. 14 was the owner of the land (“the said land”) more particularly described in prayer clause (a) above in respect of which Defendant No. 14 had granted a lease in favour of Defendant Nos. 1 and 13 (“Developer”) under a Consent Decree dated 16<sup>th</sup> April inter alia by which the Developer was permitted to construct upon the said land. The Developer had thereafter constructed a commercial building upon the said land known as Shree Diamond Centre (“the said building”) and sold various commercial units therein to the members of the Plaintiff Society.
- ii. That Defendant No. 14 had in the year 2003 terminated the said lease

and filed a Suit in the Small Causes Court, Bombay (Eviction Suit) against the Developer as also the Plaintiff Society *inter alia* seeking eviction of the Plaintiff Society and the Developer from the said land and also for mesne profits.

- iii. On 29<sup>th</sup> January 2014 (Order of Eviction) the Eviction Suit was decreed in favour of Defendant No.14 in which the Small Causes Court *inter alia* held that (i) the Developer had not assigned any rights and interest in the said land to the Plaintiff Society or its members (ii) the agreement between the Plaintiff Society and the Developer was only in respect of the said building (ii) that on termination of the lease by Defendant No.14, the Developer was tenant on monthly basis and (iii) The Plaintiff Society could not claim any larger right/interest in said land than the Developer.
- iv. The Plaintiff Society filed an Appeal before the Appellate Bench of the Small Causes Court, and by an Order dated 3<sup>rd</sup> February 2015 obtained a conditional stay of the eviction decree subject to the Plaintiff Society paying compensation of Rs. 7,05,637/- per month in addition to monthly rent of Rs. 900/-. The Plaintiff Society however failed to pay the same.
- v. Thereafter the Plaintiff Society filed Writ Petition No.12154 of 2016 in which the Plaintiff Society took out a Civil Application seeking an

extension of time for complying with the Order of the Appellate Bench for payment of interim compensation. However, the said Civil Application was dismissed for default.

- vi. On 29<sup>th</sup> November 2023, the Appellate Bench of the Small Cause Court dismissed the Appeal filed by the Plaintiff Society against the Order of Eviction. The Plaintiff Society impugned the Order of the Appellate Bench of the Small Causes Court by filing a Civil Revision Application before this Court, being Civil Revision Application No. 35 of 2024 (CRA) on 15<sup>th</sup> January 2024.
- vii. On 16<sup>th</sup> January 2024, despite the fact that a caveat had been filed by Defendant No. 14, this Court without notice to Defendant No.14 passed an *ex-parte* Order staying the Order of Eviction.
- viii. Thereafter on 6<sup>th</sup> August 2024, this Court in the CRA directed the Plaintiff Society to make payment of the interim compensation fixed by the Appellate Bench of the Small Cause Court before 10<sup>th</sup> September 2024 failing which the interim protection granted by this Court would stand vacated.
- ix. That the Plaintiff Society failed to deposit the interim compensation and hence the interim protection stood vacated.

It was basis the above he submitted that the present application for interim relief was only an attempt to defeat and/or overreach the orders of the coordinate bench of this Court. It was thus, as a matter of judicial propriety, he submitted that this Court ought not to grant interim reliefs in the facts of the present case as the same would set a bad judicial precedent. He submitted that the Plaintiff Society's above conduct made it clear that the Plaintiff Society was only engaging in forum shopping having failed to obtain interim relief in the CRA.

4. Mr. Joshi then even on merits pointed out that Defendant No. 14 was the owner of the said land and had merely granted a lease of the said land in favour of the Developer which lease *inter alia* merely permitted that Developer to build and/or construct upon the said land. He submitted that Defendant No. 14 had neither caused the construction to be carried out, nor was in any manner concerned with the same. He thus submitted that the Plaintiff Society's case that Defendant No. 14 would be liable for the obligations of a Promoter under Maharashtra Ownership Flat (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA) was therefore *ex facie* misplaced and legally untenable. He thus submitted that Defendant No. 14 was not a Promoter as defined under MOFA nor could Defendant No. 14 be saddled with the obligations and liabilities of a Promoter under MOFA. He then to illustrate his point submitted that if the Plaintiff Society's case was to be accepted, it would mean that in every case of a lease of land given by the Collector and/or the Government, where the Lessee had built and sold flats/units under the provisions

of MOFA, the Collector and/or the Government would become a Promoter. He submitted that such an interpretation would result in a complete absurdity. In support of his contention that a Lessee who carries on construction independent of a Lessor cannot be considered as Promoter under MOFA he placed reliance upon the judgment of this Court in the case of *AH Wadia Trust & Ors. Vs. State of Maharashtra & Ors.*<sup>1</sup>.

5. Mr. Joshi then took me through the Complaint and *first* pointed out that the Complaint infact proceeded entirely on the basis that it was the Developer who was the Promoter under MOFA and not Defendant No.14. He *secondly* pointed out that the Plaintiff Society had not even sought any final relief against Defendant No. 14 and that the only final relief in the Complaint was against the Developer. It was thus he submitted that even if the Suit were to be decreed, such decree would not bind and/or be enforceable against Defendant No.14. He then submitted that it was only too well settled that interim relief could only be granted in aid of final relief and since no final relief was sought qua Defendant No. 14 the question of granting any interim relief against Defendant No. 14 did not arise.

6. Mr. Joshi then took me through the Order of Eviction as also the Order of the Appellate Bench of the Small Causes Court and pointed out that both were detailed orders in which the Small Cause Court had arrived at a various findings including that the Developer had not assigned, any interest in the said

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1 (2023) SCC Online Bom 1441

land in favour of the Plaintiff Society. He then pointed out that the very same issues which had arisen for determination in the CRA would also arise in the present Suit and it was thus not open to the Plaintiff Society to once again reargue what had already been conclusively determined in the Eviction Suit. He then in any view of the matter pointed out that the lease had been terminated by Defendant No.14 and that the Developer had accepted termination. He thus submitted that the Plaintiff Society could not therefore claim any higher right than that claimed by the Developer which was merely as a lessee of the said land and nothing more. It was thus that he submitted that the present Suit was therefore also barred by res judicata and issue estoppel. In support of his contention, he placed reliance upon the judgments of the Hon'ble Supreme Court in the case of *Barkat Ali vs. Badrinarain*<sup>2</sup> and *Jamia Masjid vs. K. V. Rudrappa*.<sup>3</sup>

7. Basis the above, he submitted that both in fact and law, no case for the grant of any ad interim relief had been made out qua Defendant No. 14. He reiterated that the balance of convenience was entirely in favour of Defendant No. 14 and thus, no ad interim relief ought to be granted in favour of the Plaintiff Society against Defendant No. 14.

8. Dr. Chandrachud, Learned Counsel appearing on behalf of the Plaintiff Society at the outset submitted that the preliminary objections raised by Mr. Joshi were entirely misconceived. Placing strong reliance upon the judgment

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2 (2008) 4 SCC 615

3 (2022) 9 SCC 225

of the Hon'ble Supreme Court in the case of *Gangabai W/o Rambilas Gilda Vs. Chhabubai W/o Pukhrajji Gandhi*,<sup>4</sup> he submitted that the present Suit was maintainable, since what the Plaintiff Society was asserting was title to the said land under the provisions of MOFA, He submitted that the Small Causes Court did not have jurisdiction to grant such the relief which the Plaintiff Society had now prayed for in the present Suit. He then submitted that the mere fact that the Small Causes Court had passed a decree in favour of Defendant No. 14 would also not make any difference. He also placed reliance upon the judgment of this Court in the case of *Cooperage Warehousing Co-Op. Housing Society Ltd. Vs. Ms. Bhansali & Kanungo Builders & Developers*<sup>5</sup> to submit that this Court had in the said judgment held that the obligations of a Promoter under MOFA were continuing obligations to which the provisions of the Limitation Act, 1963 would not apply. It was thus he submitted that the issue of delay or limitation would not therefore preclude the grant of ad interim relief in the present case.

9. He then from the judgment of the Hon'ble Supreme Court in the case of *Gangabai* (supra) pointed out that any determination arrived at by the Small Causes Court on the issue of title were only incidental findings and nothing more, since the same were rendered on issues which the Small Causes Court did not have jurisdiction to decide. He then placed reliance upon a judgment of the Hon'ble Supreme Court in the case of *Municipal Corporation of Greater Mumbai Vs. Pankaj Arora (Secretary) and others*<sup>6</sup> to submit that the principle of *res*

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4 (1982) 1 SCC 4

5 Order of this Court dated 30<sup>th</sup> August 2018 in Suit No. 4672 of 2000

6 (2018) 3 SCC 699

*judicata* would not apply when a Court incidentally decides a matter on an issue over which the Court does not have jurisdiction.

10. Dr. Chandrachud then reiterated that the interim orders passed in the CRA filed by the Plaintiff Society were in the context of an entirely separate and distinct cause of action from the one in the present Suit. He reiterated that the Plaintiff Society's title to the said land was not the subject matter of the proceedings in the CRA. He placed reliance upon Section 41 of the Presidency Small Cause Courts Act, 1982 (PSCC Act) and pointed out that the same merely conferred jurisdiction upon the Small Causes Court to decide Suits between landlord and tenant and for recovery of possession. He also placed reliance upon Section 19 of the PSCC Act and pointed out that the Small Causes Court also did not have jurisdiction to decide questions of title and/or grant a mandatory injunction and/or for determining the Plaintiff Society's statutory entitlement to a conveyance under Section 11 of MOFA. He submitted that the term 'title' does not only merely mean ownership of property but includes right to possession of property. In support of his contention, he placed reliance upon a judgment of the Gauhati High Court in the case of *Nagen Hazarika Vs. Manorama Sharma*<sup>7</sup> and also the dictionary meaning of the term 'title' as defined in P. Ramanatha Aiyar's Advanced Law Lexicon.

11. Dr. Chandrachud then placed reliance upon the Consent Decree entered into between the Developer and Defendant No. 14 and pointed out that

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<sup>7</sup> AIR 2007 Gau 62

the same specifically permitted the Developer to install, erect, construct and maintain upon the said land a suitable structure or building of any nature. It was thus that he submitted that Defendant No.14 had caused the construction by the Developer upon the said land and therefore Defendant No. 14 would also be covered under the definition of a Promoter under the provisions of MOFA. He submitted that the Consent Decree was not required to be registered, since no new right was created under the said Consent Decree but the same only recognized pre-existing rights between the Parties thereto. In support of his contention that Consent Terms which did not create any new rights in the Parties did not need registration he placed reliance upon the judgments of the Hon'ble Supreme Court in the case of *Bhoop Singh Vs. Ram Singh*<sup>8</sup>, *K. Raghunandan Vs. Ali Hussain*<sup>9</sup> and *Phool Patti Vs. Ram Singh*<sup>10</sup>. It was thus he submitted that the termination of the lease by Defendant No. 14 on the ground on non-registration was patently bad in law.

12. He then without prejudice to the above submitted that even assuming that the Consent Decree was required to be registered and was not, the same would make no difference in the facts of the present case in view of the provisions of Section 53A of the Transfer of Property Act, 1882 (ToPA) as it stood prior to amendment. He pointed out from Section 53A of the ToPA pointed out that prior to amendment of 2001, even if the contract concerning the immovable property was not registered, if the transferee in part performance has taken the

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8 (1995) 5 SCC 709

9 (2008) 13 SCC 102

10 (2015) 3 SCC 465

possession or transferee already in possession continues to be in possession of the property in part performance of the contract and has acted in furtherance of the contract, the transferor then would be debarred from claiming any rights against the transferee and person claiming under him, in respect of the property of which the transferee has taken possession or continued in possession, other than a right expressly provided by the terms of the contract. He submitted that in the present case, it was beyond any doubt that the Developer had been handed over possession of said land under the Consent Decree, since the same expressly recognized that the developer was put in possession of the said land and was permitted to construct there on. He further pointed out that part performance of the contract was evidenced by the fact that (i) the developer had obtained an occupation certificate on 27<sup>th</sup> April, 1983 (ii) entered into agreements for sale with the members of the Plaintiff Society in the year 1986 and (iii) the Plaintiff Society was registered in the year 1988. He then also placed reliance upon the judgment of this Court in the case of *Shri Vishnu Krishna Dhadphale vs. Competent Authority*<sup>11</sup> as also the judgment of this Court in the case of *AH Wadia Trust & Ors.* (supra) upon which reliance was also placed by Defendant No. 14 to point out that the owner of property who causes construction would be covered under the definition of a Promoter under Section 11 of MOFA. He also placed reliance upon the judgment of this Court in the case of *Harshal Developers Pvt. Ltd. vs. Manohar Gopal Bavdekar*<sup>12</sup> to submit that the rights under MOFA could be established even if the contract was not registered.

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11 (2017) SCC OnLine Bom 4834

12 (2013) 1 MhLJ 855

13. Dr. Chandrachud then in dealing with the contention that the Plaintiff proceeded on the basis that the Developer was the Promoter under MOFA and not Defendant No.14 submitted that it was well settled that pleadings had to be liberally construed and not read like statutes. In support of his contention, he placed reliance upon the judgment of the Hon'ble Supreme Court in the case of *Ram Sarup Gupta Vs. Bishun Narain*<sup>13</sup> as also the judgment of *SB Noronah Vs. Prem Kumari Khanna*<sup>14</sup>. He pointed out that though the Plaintiff referred to the Developer as the Promoter, a reading of the Plaintiff as a whole made it clear that since Defendant No.14 had caused the said building to be constructed Defendant No. 14 was also a Promoter under MOFA. He submitted that this was a legal submission and thus did not have to be pleaded. He then submitted that prayer clause (a) would suffice to grant the Plaintiff Society relief against Defendant No.14.

14. Basis the above, Dr. Chandrachud submitted that the balance of convenience was entirely in favour of the Plaintiff Society, since the Plaintiff Society would suffer irreparable harm if ad interim relief was not granted to the Plaintiff Society. He submitted that this was so, since the Plaintiff Society had been in possession of the said land and building since at least 1988. He submitted that Defendant No.14 admittedly did not have possession of the said property since then i.e. for nearly 40 years. It was thus to protect this possession until the

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13 (1987) 2 SCC 555

14 (1980) 1 SCC 52

hearing of the Interim Application that he submitted ad interim reliefs ought to be granted in favour of the Plaintiff Society.

15. After having heard Learned Counsel at length and considering the case law upon which reliance has been placed, I find that the Plaintiff Society has not made out a case for the grant of ad interim reliefs, essentially for the following reasons, viz.

- i. A plain reading of the Plaint makes clear that the Plaintiff Society has specifically pleaded that it is the Developer who is the Promoter under MOFA and not Defendant No.14. *Additionally*, the Plaint also does not contain a single prayer against Defendant No.14. Thus, even though pleadings do not have to be read as statues, the same cannot be left completely ambivalent, vague and open ended. A party seeking to assert a specific case, must with some clarity plead that case and the relief that is sought for basis the case so pleaded. In the present case, at this *prima facie* stage, I find the Plaintiff Society's case qua Defendant No.14 being a Promoter under MOFA to be entirely lacking in the Plaint. Thus, in my view at this *prima facie* stage, I find no case made out to support the ad interim relief that has been sought for by the Plaintiff Society against Defendant No.14.
- ii. *Also*, in the facts of this case, I find that the Plaintiff Society conduct alone has disentitled the Plaintiff Society to any ad interim relief.

*Firstly*, the Plaintiff Society has despite multiple opportunities given to deposit the rent has failed, and neglected to do so and *secondly*, the Plaintiff Society has in the CRA filed an Affidavit stating that Defendant No. 14 is not the owner of the said land. Though the Plaintiff Society has placed heavy reliance on the judgment of the Hon'ble Supreme Court in the case of *Gangabai* (supra) as also the judgment of this Court in the case of *Coorage Hosuing* (supra), I find that neither of the said judgments would support the Plaintiff Society's case for the grant of ad interim relief because said judgments are on the issue of the maintainability of the present Suit and limitation.

- iii. Additionally, I find that the Plaintiff Society is also disentitled to any *ad interim* relief on the ground of delay. Even if I were to at this *ad interim* stage accept that the obligations of a Promoter under MOFA are continuing to which the provisions of the Limitation Act, 1963 do not apply, the same would not absolve the Plaintiff Society from acting with due dispatch to assert the Plaintiff Society's rights (if any) under MOFA. In the present case, the Plaintiff Society despite asserting title under MOFA in the written statement filed in the year 2004, has done absolutely nothing to assert their rights until after the filing of the CRA. Thus, in my view, having regard to the Plaintiff Society's delay in filing the present Suit and the events which have transpired in the interregnum, delay is clearly a factor which in my view would

disentitle the Plaintiff Society to *ad interim* relief especially when Defendant No. 14 is today armed with a Decree of Eviction.

16. Hence in view of the aforesaid findings, I find that the balance of convenience at this stage is entirely in favour of Defendant No.14 and not the Plaintiff Society. Hence, I am unable to grant ad interim relief.

17. List the Interim Application for hearing on 19<sup>th</sup> November 2024.

18. At this stage, Dr. Chandrachud sought a stay of the operation of the order.

19. Learned Counsel for Defendant No.14 however submitted that the matter is now placed before the Executing Court on 12<sup>th</sup> November, 2024 and that Defendant No.14 shall not before that date and without orders of the Executing Court take further steps.

20. Dr. Chandrachud accepting this submitted that the same would afford the Plaintiff adequate protection.

**(ARIF S. DOCTOR, J.)**