

SUPREME COURT OF INDIA

Madhav Prasad Aggarwal

Vs.

Axis Bank Ltd.

C.A.No. of 2019

(A.M.Khanwilkar and Ajay Rastogi,JJ.,)

01.07.2019

JUDGMENT

A.M. Khanwilkar,J.,

SLP(C)No.31579 of 2018

1. Leave granted.

2. These appeals take exception to the common judgment and order passed by the High Court of Judicature at Bombay and Commercial Civil Jurisdiction) in Appeal Nos.360, 361, 362 Appeal No.172 of 2017 dated 26th October, 2018, whereby the notice of motion(s) filed by respondent No.1- Axis Bank Ltd. (one of the defendant in the suits filed by the respective appellant(s)) came to be allowed and as a result of which, the suit filed by the concerned appellant(s) had been dismissed as against respondent No.1-Axis Bank Ltd., by invoking the provisions of Order 7 Rule 11(d) of the Civil Procedure Code (for short “CPC”).

3. The appellant(s) being the original plaintiff(s) in the respective suit(s) wanted to purchase flats in a project known as ‘Orbit Heaven’ (for short “the project”) being developed by Orbit Corporation Ltd. (In Liq.) (for short “The builder”), at Nepean Sea Road in Mumbai and in furtherance thereof parted with huge amounts of money to the builder ranging in several crores although the construction of the project was under way. The appellant(s) had started paying installments towards the consideration of the concerned flats from 2009. Admittedly, no registered agreement/document for purchase of concerned flats has been executed in favour of respective appellant(s). The appellant(s), however, would rely on the correspondence and including the letter of allotment issued by the builder in respect of concerned flats - to assert that there was an agreement between them and the builder in respect of the earmarked flat(s) mentioned therein and which had statutory protection.

4. The respondent No.1-bank gave loan facility to builder against the project only around year 2013, aggregating to principal sum of Rupees 150 Crores in respect of which a

mortgage deed is said to have been executed between the builder and the bank. That transaction came to the notice of the concerned plaintiff(s) only after publication of a public notice on 13th September, 2016 in Economic Times, informing the general public that the said project (Orbit Heaven) has been mortgaged. The sum and substance of the assertion made by the appellant(s) is that the appellant(s) were kept in the dark whilst the mortgage transaction was executed between the builder and the bank whereunder their rights have been unilaterally jeopardised, to receive possession of the concerned flats earmarked in the allotment letter(s) and in respect of which the concerned appellant(s) have paid substantial contribution and the aggregate contribution of all the plaintiff(s) would be much more than the loan amount given by the bank to the builder in terms of the mortgage deed for the entire project. In this backdrop, the concerned appellant(s) had asked for reliefs not only against the builder but also concerned parties joined as defendant(s) in the suit(s) filed by them and including respondent No.1-bank.

5. The reliefs claimed by the concerned appellant(s) in separate suit(s) filed by them are more or less similar. We may presently refer to the reliefs claimed in suit No.8 of 2017 filed by Padma Ashok Bhatt (appellant in civil appeal arising from SLP (C) No.30900 of 2018), the same read thus:

“The Plaintiff therefore prays:

(a) That the Defendant No.1 be ordered and decreed to complete the Flat Nos.2302 and 2402 in the Project “Orbit Haven” situate at Darabshaw Lane, Nepean Sea Road, Mumbai-400036 as per the agreement being letter of confirmation dated 16th April 2009 and receipts executed by Defendant No.1 in favour of the Plaintiff and hand over the possession of Flat Nos.2302 and 2402 to the Plaintiff and that the Defendant No.1 and Defendant No.15 be jointly and/or severally be ordered and directed to comply with all the obligations under Maharashtra Ownership Flats Act including, but not limited to, (i) the execution of the Agreement in terms of Section 4 of Maharashtra Ownership Flats Act, (ii) completing the building as per the sanction plan as sanctioned by Municipal Corporation of Greater Mumbai, (iii) to delivery vacant and peaceful possession of the respective flats, (iv) to form the Society or body of the Corporation as provided under Maharashtra Ownership Flats Act and to convey the land along with the building in favour of the Society or body of Corporation as per Maharashtra Ownership Flats Act.

(b) That the Plaintiff is also entitled for a declaration that there is no legal, valid enforceable lien, charge or mortgage in favour of Defendant No.15 in respect of the building or any part thereof known as Orbit Haven, situated at Darabshaw Lane, Napeansea Road, Mumbai-400036;

(c) The Defendant No.1 be also ordered and directed to disclose all their assets, properties including the personal properties of the Directors and its sister concern particularly M/s Apex Hotel Enterprise Pvt. Ltd. on Affidavit before this Hon'ble Court, within the period of two weeks or such other time as this Hon'ble Court may deem fit and proper;

(d) This Hon'ble Court be pleased to pass an order of injunction restraining the Defendant No.1 from in any manner creating any third party rights in respect of all the properties that may be disclosed by the Defendant No.1, pursuant to the orders of this Hon'ble Court on Affidavit;

(e) The Plaintiff is also entitled for an order and direction that the Defendant No.1 be ordered and directed to give clear and marketable title in respect of flat being Flat Nos.2302 and 2402 and the building Orbit Haven, situated at Darabshaw Lane, Napeansea Road, Mumbai-400036 and to enter into and register the Agreement as provided under the provisions of Maharashtra Ownership Flats Act;

(f) The Defendant No.1 be also ordered and directed to indemnify the Plaintiff in respect of all claims, charges that may be made by anybody in respect of Flat Nos.2302 and 2402 at Orbit Haven, situated at Darabshaw Lane, Napeansea Road, Mumbai-400036 and keep the same indemnified till the registration of the Agreement and Conveyance of the land in favour of the Society that may be formed;

(f1) Without prejudice to the reliefs as claimed hereinabove and in the alternative and in the event this Hon'ble Court comes to the conclusion that the specific performance of the suit flat cannot or ought not to be granted, in such an event, the Plaintiff is entitled for refund of the amount of Rs.9,23,50,000/- (Rupees Nine Crores Twenty Three Lakhs Fifty Thousand Only) paid by the Plaintiff to Defendant No.1 along with interest thereon @12% from the date of payment till repayment and cost.

(f2) It be declared that the payment of the amount as stated in prayer (f1) stands validly charged on the land and in the flat Nos.2302 and 2402.

(f3) In the event of failure to pay the amount as stated in prayer (f1), directions be issued for enforcement of the Plaintiff's charge upon the suit plot of land and Flat Nos.2302 and 2402.

(f4) In addition to the amount as prayed in prayer (f1) the Defendant be also ordered and decreed to pay damages of Rs.15,00,00,000/- (Rupees Fifteen Crores Only) to the Plaintiff.

(g) This Hon'ble Court be pleased to appoint Court Receiver, High Court, Bombay, as Receiver under all powers under Order XL Rule 1 of Code of Civil Procedure, in respect of suit building Orbit Haven and the Plot of Land being Plot No.12, 8, Darabshaw Road, Off Nepean Sea Road, admeasuring 1105.00 square yards i.e. 923.92 sq. mtrs. Or thereabouts and registered with Collector of Land Revenue under Collector's Old Nos.573 and 104A and Collector's New Nos.2736 and 11317 old Survey No.48 and New Survey Nos.3 and 4/7139 and Cadastral Survey Nos.8/593 of Malabar Hill and Cumballa Hill Division bearing Municipal Ward

No.D-3326 (4) and Street No.76(a), to do following things and/or such other things as this Hon'ble Court may deem fit and proper:-

- i. To take complete charge of the said building;
 - ii. To call for the balance money from the Flat Purchasers as mentioned in Exhibit 'E', being Plaintiff and Defendant Nos.2 to 14;
 - iii. To execute the Agreement for and on behalf of Defendant No.1 with the Plaintiff as provided under the provisions of MOFA on payment of stamp duty, registration charges and all other incidental charges to be paid by the Plaintiff;
 - iv. To pay all requisite fees to Municipal Corporation of Greater Mumbai as may be required for further progress of the work;
 - v. To appoint the existing Architect, who are the Architect to complete the said Project;
 - vi. To appoint the existing Contractor of the said building, to complete the work;
 - vii. To appoint the existing Structural Engineer who have already been the Structural Engineer of the said Project;
 - viii. To pay all fees/charges in respect of the aforesaid persons;
 - ix. To regularly submit report to this Hon'ble Court with regard to the progress and any other measures that may be required for completion of the Project;
 - x. To make all application to Corporation and all other Semi-Government Authorities as may be required for completing the said building Orbit Haven.
 - xi. After completion of the Project, to apply for Occupancy Certificate and Completion Certificate.
 - xii. To hand over the flats after completion to the Plaintiff.
- (h) Interim and ad-interim in terms of prayers (c) to (g) be granted;
- (i) Cost of the suit be provided;
- (j) Such further and other reliefs as the nature and circumstances of the case may require be granted.”

6. The respondent No.1-bank (defendant No.15) appeared in the concerned suit and filed a notice of motion for identical relief, as claimed in notice of motion No.1206 of 2017 in suit No.8 of 2017. The relief claimed in the subject notice of motion(s) was limited to reject the plaint qua respondent No.1 herein, in exercise of powers under Order 7 Rule 11(d) of CPC on the ground that the suit(s) against the said respondent would be barred by provisions of

Section 34 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “2002 Act”). The reliefs claimed in notice of motion No.1206 of 2017 in suit No.8 of 2017, read thus:

- “(a) That the plaint in suit no.8 of 2017 be rejected qua the applicant/defendant No. 15;
- (b) that pending the hearing and final disposal of the Notice of Motion the suit be stayed;
- (c) that pending the hearing and final disposal of the notice of motion the status-quo granted vide dated 3rd March, 2017, of this Hon’ble Court be vacated;
- (d) for ad-interim relief in terms of prayers (b) and (c)above;
- (e) for such further and other relief as the nature and circumstances of the case may require; and
- (f)costs.”

(emphasis supplied)

As aforementioned, the reliefs claimed in the plaint and the notice of motion in the respective suit(s) which are the subject matter of the present set of appeals are similar, albeit with minor variation. That, however, need not detain us from considering the common question which has arisen for our consideration in the present appeals.

7. Be that as it may, the notice of motion(s) in the concerned appeals came to be dismissed by the learned Single Judge of the High Court by a common judgment dated 26th July, 2017, on the finding that there was no bar from entertaining civil suit(s) in respect of any other matter which is outside the scope of matters required to be determined by the Debt Recovery Tribunal (for short “DRT”) constituted under 2002 Act. The learned Single Judge held that the facts of the present case clearly indicate that the cause of action and the reliefs claimed by the concerned plaintiff(s) fell within the excepted category and the bar under Section 34 read with Section 17 of 2002 Act would be no impediment in adjudicating the subject matter of the concerned suit. The learned Single Judge referred to decisions of this Court in *Mardia Chemicals Ltd. and Ors. Vs. Union of India and Ors.*, *Ja.gdish Singh Vs. Heeralal and Ors.* and of High Courts in *Sta.te Bank of India Vs. Smt. Jigishaben B. Sanghvi and Ors.* and *Arasa Kumar Vs. Nauamma.l*. However, the learned Single Judge rejected the argument/objection raised by the appellant(s) that it is impermissible to reject the plaint only against one of the defendant(s), in exercise of power under Order 7 Rule 11(d) of CPC by relying on the decision of the Division Bench of the same High Court in *M.V. “Sea Success I” Vs. Liverpool and London Steamship Protection and Indemnity Association Ltd. and Ors.* As the notice of motion moved by respondent

No.1-bank came to be dismissed, respondent No.1 carried the matter in appeal before the Division Bench by way of separate five appeals in the concerned suit. All these appeals came to be allowed by the Division Bench vide impugned judgment.

8. The impugned judgment has reversed the opinion of the learned Single Judge that bar under Section 34 will not come in the way of the appellants/plaintiffs. The Division Bench also opined that the averments in the concerned plaint do not spell out the case of fraud committed by the bank and/or the builder. As a result of which, the Court held that the suit(s) instituted by the appellant(s) did not come within the excepted category predicated in *Mardia Chemicals Ltd.* (supra) and thus the plaint against respondent No.1-bank was not maintainable, being barred by Section 34 of the 2002 Act.

9. Feeling aggrieved, out of the five plaintiff(s) only four of them have chosen to file the present appeals. They have assailed every reason assigned by the Division Bench both on facts and the law. It is urged that the plaint cannot be rejected only against one of the defendant(s) but it could be rejected as a whole. To buttress this contention reliance has been placed on *Sejal Glass Limited Vs. Navilan Merchants Private Limited*. According to the appellant(s), even otherwise the decisions considered by the High Court to hold against the appellant(s) that the suit(s) filed by them were barred by Section 34 of 2002 Act were inapplicable to the fact situation of the present case being a case of third party claiming right under an agreement which has the statutory protection under the provisions of The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short "1963 Act"). The appellant(s) would also urge that the bar under Section 34 has no bearing on the subject matter of the suit filed by the respective appellant(s) and the nature of reliefs claimed by them including against respondent No.1-bank. The presence of respondent No.1 in the said suit would be proper, even if not a necessary party. It is urged that the impugned judgment cannot be countenanced.

10. Per contra, respondent No.1-bank would urge that the Division Bench was justified in allowing the notice of motion filed by respondent No.1-bank to reject the plaint qua the bank being barred by Section 34 of the 2002 Act. According to the said respondent, the appellant(s) are not genuine home buyers but are investors of developers i.e. *Orbit Corporation Ltd. (In Liq.)*. Due to the close acquaintance/business relationship, the concerned appellant(s) took commercial unsecured risk by purportedly investing huge amount under the guise of purchasing flats and entered into transactions which were contrary to the provisions of 1963 Act. Thus, the appellant(s) cannot claim any right merely on the basis of a self-serving allotment letter pertaining to the concerned flat, purportedly given by the builder. Noticeably, contends learned counsel for respondent No.1 that the averments in the plaint(s) regarding allegation of fraud played upon the appellant(s) are vague and general. The same are baseless and unsubstantiated. Rather, no case can be culled out from the averments in the plaint so as to hold that the suit filed by the concerned appellant(s) comes within the excepted category predicated in *Mardia Chemicals Ltd.* (supra). Respondent No.1 has supported the impugned judgment of the Division Bench and would contend that the bank is not a necessary or even a proper party to suit for specific performance of the alleged agreement and including in relation to

alternative relief of damages claimed against the developers.

11. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) of CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power Order 7 Rule 11 (d) of CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in the case of Sejal Glass Limited (supra) is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) of CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the director's defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against defendant No.1- company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) of CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) of CPC will have no application at all, and the suit as a whole must then proceed to trial.

12. In view of this settled legal position we may now turn to the nature of reliefs claimed by respondent No.1 in the notice of motion considered by the Single Judge in the first instance and then the Division Bench of the High Court of Bombay. The principal or singular substantive relief is to reject the plaint only qua the applicant/respondent No.1 herein. No more and no less.

13. Indubitably, the plaint can and must be rejected in exercise of powers under Order 7 Rule 11(d) of CPC on account of non-compliance of mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 of Order 7 of CPC. In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part. In that sense, the relief claimed by respondent No.1 in the notice of motion(s) which commended to the High Court, is clearly a jurisdictional error. The fact that one or some of the reliefs claimed against respondent No.1 in the concerned suit is barred by Section 34 of 2002 Act or otherwise, such objection can be raised by invoking other remedies including under Order 6 Rule 16 of CPC at the appropriate stage. That can be considered by the Court on its own merits and in accordance with law. Although, the High Court has examined those matters in the impugned judgment the same, in our opinion, should stand effaced and we order accordingly.

14. Resultantly, we do not wish to dilate on the argument of the appellant(s) about the inapplicability of the judgments taken into account by the Division Bench of the High

Court or for that matter the correctness of the dictum in the concerned judgment on the principle underlying the exposition in *Nahar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking Corporation* to the effect that the DRT and also the appellate authority cannot pass a decree nor it is open to it to enter upon determination in respect of matters beyond the scope of power or jurisdiction endowed in terms of Section 17 of the 2002 Act. We leave all questions open to be decided afresh on its own merits in accordance with law.

15. A fortiori, these appeals must succeed on the sole ground that the principal relief claimed in the notice of motion filed by respondent No.1 to reject the plaint only qua the said respondent and which commended to the High Court, is replete with jurisdictional error. Such a relief “cannot be entertained” in exercise of power under Order 7 Rule 11(d) of CPC. That power is limited to rejection of the plaint as a whole or not at all.

16. In view of the above, these appeals are allowed. Resultantly, the impugned judgment and order of the Division Bench of the High Court in the concerned appeals are set-aside and instead the order of the learned Single Judge dismissing the notice of motion(s) in the concerned suit(s), is restored. Thus, the notice of motion taken out by respondent No.1 in the concerned suit(s) are dismissed with liberty to respondent No.1, as aforementioned. All pending interim applications are also disposed of. No order as to costs.