M.P. Housing Board vs Anil Kumar Khiwani on 14 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1863, 2005 (10) SCC 796, 2005 AIR SCW 1468, (2005) 2 CLR 32 (SC), (2005) 2 CTC 601 (SC), 2005 (1) UJ (SC) 579, (2005) 28 ALLINDCAS 36 (SC), 2005 (28) ALLINDCAS 36, (2005) 2 JAB LJ 168, 2005 (4) SRJ 318, 2005 UJ(SC) 1 579, 2005 (3) SLT 287, 2005 (2) CLR 32, 2005 (2) CTC 601, 2005 (3) SCALE 167, (2005) 3 JT 225 (SC), 2005 (3) JT 225, (2005) 2 MAD LJ 175, (2006) 1 MAD LW 182, (2005) 4 SCJ 717, (2005) 4 SUPREME 380, (2005) 3 SCALE 167, (2005) 3 MPHT 308, (2005) 59 ALL LR 306, (2005) 2 CIVILCOURTC 775, (2005) 1 WLC(SC)CVL 487, (2005) 2 ALL WC 1059, (2005) 2 CURCC 270

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  1731 of 2005

PETITIONER:
M.P. Housing Board

RESPONDENT:
Anil Kumar Khiwani

DATE OF JUDGMENT: 14/03/2005

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
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J U D G M E N T [Arising out of SLP (Civil) No.22560 of 2004] WITH CIVIL APPEAL No.1732 OF 2005 [Arising out of SLP (Civil) No.22616 of 2004] M.P. Housing Board Appellant Versus Kishan Lal Mulani Respondent KAPADIA, J.

Leave granted.

These civil appeals by grant of special leave are directed against a common Order dated 2.7.2004 passed by the High Court of Madhya Pradesh at Jabalpur in M.A. No.1611 of 2003 and M.A. No.1628 of 2003.

Since the impugned order is common in both the appeals, the same are jointly disposed of by this judgment.

For the sake of convenience, we may mention briefly the facts of Civil Appeal No. 1731 of 2005

[arising out of SLP (C) No.22560 of 2003].

On 18th January, 2000, M.P. Housing Board, appellant herein, issued an advertisement in local newspaper "Dainik Bhaskar" inviting offers to subscribe to two schemes floated by the Board, namely, Katara Hills Residential Scheme and Centre Point Commercial Scheme. In these appeals, we are concerned with the booking of a showroom in the commercial complex. According to the said advertisement, the estimated cost of a showroom and departmental store in the commercial complex (Centre Point), having built up area of 3550 sq. ft. on the upper ground level, was Rs.39 lacs. The registration amount was Rs.3.90 lacs i.e. 10% of the estimated cost of Rs.39 lacs. What was proposed to be constructed was a seven storeyed commercial complex of showrooms, shops, halls etc. near New Market Stadium, Bhopal. To give publicity to the said schemes, brochures were also distributed.

On the basis of the above advertisement, Anil Kumar Khiwani, the respondent herein, submitted an application in the prescribed form enclosing his cheque for Rs.3.90 lacs, being 10% of the estimated cost of the showroom. On 25.9.2000, a temporary registration was made in favour of the said respondent. On the same date, he was informed in writing that temporary registration stood granted to him and further particulars would be conveyed to him on a later date regarding the total consideration. Thereafter, the appellant herein took steps to prepare a detailed Project Report, which was approved by the Town Planning Authority, the Municipal Corporation and a Committee known as Building High-rise Committee. The appellant also called upon the State government to forward the actual land cost and the lease rent, which the State proposed to charge. The appellant also called upon the electricity board to forward to them the estimated strengthening charges. After getting all these informations and approvals, tenders were invited and after receiving the tenders, the actual cost was worked out which came to Rs.2000/- per sq. ft.

Accordingly, by letter dated 27.9.2001, the respondent herein was called upon to give his consent within one month. By the said letter, each of the contributors including the respondent was given an option to withdraw from the scheme if he did not agree to the proposed actual cost of Rs.2000/- per sq. ft. The contributors were told to collect the registration amount with interest @ 8% per annum from the board if they opted for withdrawal from the commercial scheme, provided they opted for refund by 10.10.2001.

By letter dated 16.10.2001, the respondent wrote to the board stating that he was not willing to accept the price nor was he willing to withdraw the registration amount.

By letter dated 27.11.2001, the board called upon the respondent to pay an amount of Rs.71 lacs for the showroom on the upper ground floor admeasuring 3550 sq. ft. This was objected to by the respondent vide notice given to the board. Ultimately, on 29.6.2002, the appellant cancelled the registration and called upon the respondent to collect the registration amount of Rs.3.90 lacs with interest @ 8% calculated up to June 30, 2002.

On 15.7.2002, the present suit was filed for declaration and injunction in the Court of Additional District Judge, Bhopal (hereinafter referred to as "the trial Court"), being Civil Suit No.39-A of

2002. In the said suit, an application was moved under order 39 rules 1 & 2 CPC.

By impugned order dated 22.4.2003, the trial Court prima facie came to the conclusion that the board was guilty of inordinate delay in the implementation of the scheme; that the board had demanded almost twice the amount indicated in the advertisement after accepting the advance and consequently, the board was restrained from allotting the showroom in question to any other person, till the final hearing and disposal of the suit. By the impugned order, the trial Court permitted the board to call upon the contributor to deposit Rs.39 lacs in four instalments in terms of the schedule indicated in the above advertisement.

Aggrieved by the said decision, the matter was carried in appeal. By the impugned decision dated 2.7.2004, the High Court dismissed the Miscellaneous Appeal No.1611 of 2003 as well as Miscellaneous Appeal No.1628 of 2003. Hence, these appeals.

Normally, this Court is reluctant to interfere with the interim orders passed under order 39 rules 1 & 2 CPC. However, in the present case, we are concerned with construction of a seven storeyed commercial premises under a self-financing scheme floated by the appellant. In the said complex, there are showrooms, departmental stores and halls for commercial uses.

The question involved in this case is whether the offer contained in the above advertisement was for a fixed amount of Rs.39 lacs?

In the present case, the advertisement inserted by the appellant in "Times of India" indicated Rs.39 lacs as cost of the built-up area admeasuring 3550 sq. ft., whereas the advertisement inserted in the local newspaper "Dainik Bhaskar"

> indicated Rs.39 lacs as estimated cost for the aforestated built- up area.
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> According to the respondent herein, investment was made by him on the basis of the advertisement in "Times of India". According to the respondent, Rs.39 lacs was a fixed cost and, therefore, the board was not entitled to raise the price to Rs.71 lacs, particularly when it was guilty of delay in completing the project. It was submitted that the board was not entitled to approbate and reprobate and that it was bound by its offer of Rs.39 lacs as contained in advertisement in "Times of India".

In this case, we are concerned with a self-financing scheme under which a commercial complex is constructed. In a self-financing scheme, costing plays an important role. The building in question comprises of various units. These units are self-financed. A buyer of the unit has to fund the cost of construction. A buyer under such a scheme cannot be permitted to buy a unit at a price which is less than the cost of construction. In a self-financing scheme, pricing is generally based on cost of construction unlike sale of houses after they are completed, in which cases pricing is generally market related. In the case of a self-financing scheme, no buyer can claim a right to purchase any unit at a price lower than the actual construction cost, as the board raises its funds in turn from the banks and other financial institutions to whom the board is required to pay interest periodically. In

the case of a self-financing scheme, even if there is failure on the part of one contributor to pay the costs, the entire scheme falls in jeopardy and, therefore, there is no merit in the contention advanced on behalf of the respondent that the impugned orders should not be interfered with as they are confined only to a particular unit purchased by the respondent.

It was urged on behalf of the appellant that there was a mistake in the advertisement inserted in "Times of India", inasmuch as the word "estimated" stood omitted inadvertently from the fourth column dealing with cost, though it has been so mentioned in the advertisement in the local newspaper "Dainik Bhaskar". It was further contended on behalf of the appellant that the respondent had filled-in an application form to which the terms and conditions of allotment were attached. Clause 10 of the conditions read as follows:

> "The cost of plot/house/flat which is mentioned in the table, is estimated. If there is any increase then the same will be informed to the allottee."

It was, therefore, submitted that the respondent was fully aware that the amount of Rs.39 lacs mentioned in the advertisement was an estimated cost and not a fixed cost.

On the other hand, it was urged on behalf of the respondent that the document on which reliance is placed by the board was not placed before the trial Court as well as before the High Court and, therefore, no interference was called for in the matter. It was urged on behalf of the respondent that the respondent was ready and willing to deposit Rs.39 lacs at the earliest and that the board should be restrained from charging and recovering the entire amount of Rs.71 lacs, pending hearing and final disposal of the suit. In this connection, reliance was also placed on the decision of this Court in Indore Development Authority v. Sadhana Agarwal (Smt.) & Others reported in [(1995) 3 SCC 1] as also the decision of this Court in Kanpur Development Authority v. Smt. Sheela Devi & Others reported in [AIR 2004 SC 400].

Time has come when the Courts should be slow in interfering at interim stage with schemes which are based on costing. India is having cost-push economy. In a self-financing scheme based on costing, an interim injunction has a cascading effect. Failure on the part of even one contributory in contributing the amount to the cost results in total failure of the project. The developer, like the housing board, makes an initial investment by borrowing funds from the market. Therefore, an interim injunction at the initial stage of the project would result in the total collapse of the entire project. It would also affect the contributions made by other co-purchasers. Several components go into costing, including the lease rent payable to the State Government. These aspects have not been considered by the trial Court.

Our observations herein however should not be read to mean that the developer in the present case has an absolute right to increase the cost of flats initially announced as estimated cost. The final cost should be proportionate to the estimated cost mentioned in the offer keeping in mind the rate of inflation, escalation of the prices of inputs, escalation in the prices of the construction material and labour charges. These factors have got to be taken into account on the basis of the evidence which may be considered at the time of final hearing of the suit. In the present case, however, the appellant

has not placed before the trial Court the documents mentioned hereinabove and, therefore, we are remitting the matter to the trial Court for fresh decision, in accordance with law.

In the case of Gujarat Bottling Co. Ltd. v. Coca Cola Co. reported in [(1995) 5 SCC 545] this Court, while discussing the factors to be considered by the Courts in exercise of the discretion under order 39 rules 1 & 2 CPC, has observed as follows:

> "The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.
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> Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings."

The judgment of this Court in the case of Indore Development Authority (supra) supports the appellant herein. In that case, an advertisement was issued by the development authority in the year 1977 inviting applications from persons interested in purchase of flats on hire-purchase basis. The estimated cost for the LIG flat was mentioned at Rs.45,000/-. In the proforma attached to the application for registration, the development authority had stated that the price mentioned by them was a probable price and that the definite price shall be intimated at the time of allotment. The purchasers were given possession in the year 1984. They instituted writ petition before the High Court challenging the demand raised by the development authority based on escalation. The writ petition was allowed by the High Court. This Court, in the facts and circumstances of that case, came to the conclusion that the High Court should not have interfered with the hike in the cost of construction. This Court observed that the development authority owed a duty to explain and satisfy the Court the reasons for such high-escalation but this did not warrant the High Court while exercising the jurisdiction to examine every detail of the cost of construction. Accordingly, this Court allowed the appeal filed by the development authority observing:

> "9. . Although this Court has from time to time, taking the special facts and circumstances of cases in question, has upheld the excess charged by the development authorities over the cost initially announced as estimated cost, but it should not be understood that this Court has held that such development authorities have absolute right to hike the cost of flats, initially announced as approximate or estimated cost for such flats. It is well known that persons belonging to middle and lower income groups, before registering themselves for such flats, have to take their financial capacity into consideration and in some cases it results in great hardship when the development authorities announce an estimated or approximate cost and deliver the same at twice or thrice of the said amount. The final cost should be proportionate to the approximate or estimated cost mentioned in the offers or agreements. With the high rate of inflation, escalation of the prices of construction materials and labour charges, if the scheme is not ready within the time-frame, then it is not possible to deliver the flats or houses in question at the cost so announced. It will be advisable that before offering the flats to the public such development authorities should fix the estimated cost of the flats taking into consideration the escalation of the cost during the period the scheme is to be completed. In the instant case the estimated cost for the LIG flat was given out at Rs.45,000. But by the impugned communication, the appellant informed the respondents that the actual cost of the flat shall be Rs.1,16,000 i.e. the escalation is more than 100%. The High Court was justified in saying that in such circumstances, the Authority owed a duty to explain and to satisfy the Court, the reasons for such high escalation. We may add that this does not mean that the High Court in such disputes, while exercising the writ jurisdiction, has to examine every detail of the construction with reference to the cost incurred. The High Court has to be satisfied on the materials on record that the Authority has not acted in an arbitrary or erratic manner.
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> 10. So far the facts of the present case are concerned, it is an admitted position that in the pro forma attached to the application for registration, the appellant said that the

> price mentioned by them was a probable and estimated cost, the definite price shall be intimated at the time of the allotment. Thereafter, the appellant had been informing the respondents and others who had got themselves registered, from time to time regarding the escalation in the cost of the flat. One of the reasons for the rise of the price for the LIG flat from Rs.60,000 to Rs.1,16,000 appears to be the increase in the area of the flat itself from 500 sq. ft. to 714.94 sq. ft. From 1982 to 1984, possession of the flats could not be delivered because of the dispute pending in the Court which also contributed to the increase in the cost of the flat. Admittedly, the respondents came in possession of the flats in the year 1984. In the facts and circumstances of the case, we are satisfied that no interference was called for by the High Court."

The judgment of this Court in the case of Kanpur Development Authority (supra), on which reliance is placed on behalf of the respondent, has no application to the facts of the present case as in that matter there was an express clause in the brochure that the escalation shall not exceed 10%. In the present case, there is no such clause in the brochure. In the present case, we are concerned with a commercial complex constructed under a self-financing scheme and not with the residential houses as was the case in the matter of Kanpur Development Authority(supra). Hence, the said judgment has no application to the facts of the present case.

Before concluding, we may point out that the observations made herein are only to give reasons in support of this judgment and they will not bind the parties hereto in the proceedings before the trial Court.

Subject to above, both the appeals are allowed; the impugned judgment and orders are set aside and the matter is remitted to the trial Court for fresh decision, in accordance with law. However, in the facts and circumstances of this case, there will be no order as to costs.