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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3269 OF 2009
IN
SUIT NO.2318 OF 2009

1. Dheeraj Gaurav Heights III Co-operative Housing Society Limited, registered under The Maharashtra Co-operative Societies Act, 1963, having its office at CTS No.587, Survey No.41(part) Behind Morya Estate, Off Link Road, Andheri(West), Mumbai-400 053.

2. Udaya Shankar Jena, residing at Flat No.1001, 10th floor, at Dheeraj Gaurav Heights III Co-operative Housing Society Limited situated at CTS No.587, Survey No.41(part), Behind Morya Estate, Off Link Road, Andheri(West), Mumbai-400 053. ...Plaintiffs

Versus

1. Sapphire Land Development Private Limited, a Private Limited Company registered under the provisions of the Companies Act, 1956 and having its Registered Office at Dheeraj Natwar Nagar Road 1, Dias Compound, Jogeshwari (East), Mumbai-400 092 and also having address at Dheeraj Arma, Anant Kanekar Marg, Bandra (East), Mumbai-400 051.

2. Dheeraj Consultancy Private Limited, having its corporate office at Dheeraj Apartments II, P.P.Dias Compound, Natwar Nagar Road No.1,

Dias Compound, Jogeshwari (East),
Mumbai-400 092
and also having address at Dheeraj
Arma, Anant Kanekar Marg,
Bandra (East), Mumbai-400 051.

3. Ravi Builders & Developers
Laxmi Palace, 76, Mathuradas Road,
Kandivali (W), Mumbai-400 067.

4. Brihanmumbai Mahanagar Palika
having its office at
Mahapalika Road, Mumbai-400 001.

5. The Executive Engineer,
Building Proposal (Western Suburbans)
H & K Wards, Brihanmumbai Mahanagar
Palika, Municipal Office, R. K. Patkar,
Marg, Bandra (W), Mumbai-400 050.

..Defendants

....

Mr. S. U. Kamdar a/w Mr. C. S. Kamdar, C.H. Vakil, Rohit Gupta, M/s. Mulla & Mulla Co. for the Plaintiffs.

Mr. Sanmish Gala i/b. M/s. Markand Gandhi & Co. for Defendant Nos.1 and 2.

Mr. Jhangiani Narula i/b. M/s. Jhangiani Narula & Associate for Defendant No.3.

Mr. R. Y. Sirsikar for Defendant No.4 and 5-MCGM.

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CORAM : A.K.MENON, J.

RESERVED ON : 21ST AUGUST, 2015

PRONOUNCED ON : 23RD SEPTEMBER, 2015

J U D G M E N T:

This Notice of Motion is taken out by the plaintiffs for an injunction restraining the defendant nos.1 to 3 and their servants and agents from in any manner encumbering, alienating, transferring and creating any third party rights or parting with possession or carrying on any construction of any nature in the suit plot of land through their workers or agents. The facts leading to the present notice of motion are as follows:-

The plaintiff no.1 is a co-operative housing society duly registered under the Maharashtra Co-operative Societies Act which consist of its members who are flat purchasers in a building known as Dheeraj Gaurav Heights III situated at CRS No.587, Survey No.41(part), behind Morya Estate, Off Link Road, Andheri (West), Mumbai. Plaintiff no.2 is one of the members and flat purchaser. Defendant no.1 was the original promoter builder under the provisions of the Maharashtra Ownership Flats Act, 1963. Defendant no.3 claims to be the present promoter/ builder of the project and on that basis he proposed to put up further construction on the second floor podium of the said building. It is a plaintiffs case that defendant nos.1 and 2 have not disclosed the nature of their relationship.

2. It is the plaintiffs case that some time in 2001-02 the defendant no.1 proposed to construct the said building. The defendant no.1 offered flats for sale in the said building. Defendant no.2 acted as an agent of defendant no.1 and issued a brochure in respect of the building to be constructed. In the brochure, a representation was made that the building to be constructed would be a 14 storey tower consisting of 3 and 4 BHK flats with various amenities including two level podium parking. The brochure also mentioned that a swimming pool and health club were to be provided as also two level podium and other facilities. A total of 29 flats were sold. The list of these purchasers is provided in Exhibit-C to the plaint. They are all individuals almost of whom continue to reside in the premises. The plaintiffs have relied upon the contents of the standard Agreement for Sale under Maharashtra Ownership Flats (Regulations of Promotion Construction Sale, Management & Transfer) Act, 1963 (MOFA) The plaintiffs submitted that pursuant to the Intimation of Disapproval on 28th January, 2002 a plan came to be sanctioned. This plan also provided for construction of 5 floors. Later on the defendant no.1 continued construction and completed construction upto the 10th floor apparently without requisite sanctions but these sanctions were later obtained legitimately by the contractor. The plaintiff no.2 has purchased flat no.1001 on the 10th floor for a sum of Rs.35,00,000/- and was put in

possession on 8th November, 2003.

3. All along the plaintiffs, various purchasers were made to believe that the construction was completed in accordance with the plans. Later, the flat purchasers of the building did not receive the occupation certificate, as a result they were required to pay the extra charges for water supply. The defendant no.1 did not form a co-operative society as required under the provisions of Section 10 of the MOFA. As a result, the flat purchasers themselves came together and formed the co-operative housing society on 31st December, 2007. The plaintiffs are, therefore, claiming their rights as a registered co-operative housing society of the flat purchasers.

4. According to the plaintiffs, the defendant nos.1 and 2 have committed several breaches. They did not finish the podium level parking and also not complete other amenities or execute a Deed of Conveyance in favour of the plaintiff no.1. The defendant no.1 did not furnish or disclose the necessary documents. It is the case of the plaintiffs that without the consent of the plaintiffs and other flat purchasers, defendant nos.1 and 2 made an application for modification of the initial 2002 building plan sometime in 2006 and obtained a modified sanction on 27th

December, 2006. The plaintiffs members were kept in dark of the said modified plan. It is the plaintiffs case that none of the members had given consent to the modification of the plan as required under section 7 of MOFA. The plaintiffs have further learnt that defendant nos.1 and 2 had granted certain rights to defendant no.3 in respect of construction in the said building. It is the plaintiffs case that on 17th June, 2009 the plaintiffs members noticed a large amount of construction materials being brought onto the site and there was indication that some construction work would commence. These materials were then, dumped on site and was being used for carrying out some work on the first and second floor podium levels.

5. On 19th June, 2009 defendant no.3 wrote a letter to the Secretary of the plaintiffs society contending that they have obtained further sanctions to the original plan on 10th December, 2008 and had also revised a commencement certificate dated 18th April, 2009 in respect of further construction in the said building. The plaintiffs have further contended that neither this modified plan nor the earlier modified plan were made with their consent. Defendant nos.1, 2 and 3 have allegedly annoyed with each and every modified sanctioned plan originally shown to the plaintiffs in 2002. Based on the alleged modification to the plan,

the defendant nos.1 to 3 are continuing construction work and seeking to build upon the podium level. Defendant nos.1 and 2 have not provided the facilities as promised in the Annexures I to IV of the Sale of Agreement and now defendant no.3 was intending to carry on further construction to first and second floor.

6. Mr. Kamdar, learned Senior Counsel for the plaintiff submitted that the Defendant had failed to make a true and proper disclosure. He referred to the order of the Division Bench of this Court dated 9th September, 2009 whereby the present motion was fixed for final hearing and the ad-interim injunction was continued and the motion was finally heard with the consent of the parties. He submitted that the injunction was initially granted pursuant to the ad-interim order which may be continued and that he is not pressing for any further reliefs apart from continuation of the said injunction. Mr. Kamdar however submitted that in 2003 there was no encroachment and para 7 page 8 of the affidavit in reply a statement has been made to the effect that in accordance with the sanctioned plan under IOD dated 28th January, 2002 and the sanctioned plan also contemplate construction of flats on the first and second floors. He submitted that the defendant’s contention that sanctioned plan contemplated construction of flats on first and second

floor is wholly incorrect. He submitted that there is no reason whatsoever to permit the respondents to carry out any further construction. The fact remains that the layout plan of 2002 did not show any encroachment removal of which resulted in the 2006 plan being approved on 27th December, 2006.

7. Mr. Kamdar, then, submitted that in the case of ***White Towers V/s. S. K. Builders and Others,*** division bench of this Court has held by relying upon the decision of the Apex Court in ***Jayantilal Investments V/s. Madhu Vihar Co-operative Housing Socie***ty that at the time of execution of the agreement with various purchasers, a promoter is statutorily bound to place before all purchasers, the entire project be it a single building or multiple number of buildings. Mr. Kamdar submitted that in the present case it has not been done as evident from the conduct of the respondents and a true and full disclosure was required under provisions of section 6 and 4 of the MOFA. That the obligation to make a full disclosure remains unfettered, since the purchasers will have a right to registration of the society and conveyance of title in the land.

8. Mr. Kamdar made further reference to the decision of a

learned Single Judge of this Court in the case of ***Eternia Co-operative Housing Society*** and submitted that the Court had made reference to the various judgments that covered the field. In Jayantilal (supra) the Hon'ble Supreme Court had considered the amended provisions of MOFA in a first Appeal filed in this Court by the Co-operative Society. The Supreme Court directed the promoter to execute a conveyance in favour of the society and restrained further construction on the plot. This Court had held that the promoter was not entitled to put up further construction by way of additional wings. The Supreme Court observed that section 3 of the MOFA imposes statutory obligation to make a full disclosure of particulars mentioned in section 3(2) including nature, extent and description of common areas and facilities were to be disclosed. No part of the FSI was usable elsewhere and if used particulars of such FSI must be set out. The Supreme Court observed that activities of the promoter are to be regulated by enforcing sections 3 and 4 of the MOFA. Further it was observed that the construction cannot exceed to be development potential of the plot in question. Section 10 of MOFA pass an obligation on the promoter to form a co-operative society of flat takers as soon as the minimum number required is reached and further that under the MOFA one is required to balance the rights of the promoter to make alternations or additions in the structure of the building in accordance with the layout plan on the one hand vis-a-vis his obligations to form the society on the other and convey the right, title and interest in the property. The further obligations of promoter under MOFA to make a full and true disclosure to the flat purchasers remains unfettered even after the inclusion of section 7A and amendment to section 7(1)(ii) of MOFA. Further more, the obligations are strengthened by insertion of sub-section (1-A) in section 4. The Supreme Court observed that under clauses 3 and 4 of Form V of the Maharashtra Ownership Flats Act, 1964 the promoter is not required to make disclosure concerning the inherent FSI but he is also required to declare whether the plot in question is capable of being loaded with additional FSI, floating FSI or TDR at a later point of time. This Court held that the aforesaid obligations of the promoter in MOFA is under clauses 3 and 4 and Form V are unfettered.

9. Mr. Kamdar, then, referred to decision of the Single Judge in ***Nahalchand Laloochand Pvt. Ltd. V/s. Panchali Co-operative Housing Society Limited 2008 (3) Bom.C.R. 727*** and submitted that this Court had reiterated that under section 3(2) of the MOFA the promoter, who constructs or intends to construct a building shall disclose the nature of fixtures, fittings and amenities provided or to be provided, in writing and that all these particulars set out in section 3 must be

provided. Mr. Kamdar, then, relied upon the decision of this Court in the case of ***Noopur Developers V/s. Himanshu V. Ganatra & Ors. 2010 (3) Bom. C.R. 145*** wherein he relied upon paragraph 8 which made reference to the decision of this Court in ***Kalpita Enclave Co-operative Housing Society Ltd. V/s. Kiran Builders Private Ltd***. and submitted that in Kalpita's case section 7 was interpreted to mean that the promoter was prohibited from making any construction once the promoter hands over the property to the flat purchasers and that the consent of the flat purchasers was never applicable to the construction of additional building by the promoter.

10. Section 7(1)(ii) reads as follows:-

> *"Section 7:- After plans and specifications are disclosed no alterations or additions without consent of persons who have agreed to take the flats; and defects noticed within (three years) to be rectified*
> *(1) After the plans and specifications of the building, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take or or more flats, the promoter shall not make …....*
> *(i) …..............*
> *(ii) any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such*

building."

11. Relying upon the aforesaid, he submitted that the FSI if any remaining to be utilised must vest in the society, if the time to form the society statutorily fixed under Rule 9 has expired. Time fixed by Rule 4 is four months. Mr. Kamdar further submitted that if the building was to be put up as a wing, the permission of the society would be required and that Rule 8 of the Maharashtra Ownership Flats Act casts a duty on the promoter to ensure that the society should be registered within four months and Rule 9 casts a further duty on the promoter to convey the plot to the owners within a period of further 4 months. He submitted that although the words "whereas after the registration of the society, the residual FAR shall be available to the society" have been deleted from clause(4), the question is whether the promoter can indefinitely postpone the registration of society and thus retain FAR, if any, by himself. The Court held that inspite of the admission of the aforesaid Rules, clause (4) cannot give unfettered right to the promoter to postpone registration of the society and take away the right of the flat owners to avail FAR after a period of 4 months has expired.

12. The learned counsel for the plaintiffs relied upon the decision of the Division Bench judgment of this Court in the case of (Lakeview

Developers & Ors. V/s. Eternia Co-operative Housing Society Ltd. in Appeal(L) No.189 of 2015 and referred to page 47 of the order to submit that the full development plan potential has been utilized and the developer /promoter was an under obligation to convey the plot after construction. In that case, after construction of 10 buildings, the developer was trying to construct 4 further buildings by claiming and trying to load TDR on the 4 additional buildings. According to Mr. Kamdar in the present case also full development potential was already been utilized by the developer and the claim that additional FSI was available on account of removal of encroachment is baseless. He, then, referred to paragraph 66 of the judgment and submitted that if the construction is allowed to go on the plaintiffs right would be permanently affected and therefore it is necessary to continue an order of injunction granted by this Court at the interim stage. Applying the aforesaid principles in the instant case the building is a single building and has always been projected as a single building and the brochure initially showed by the first two floors would be utilized for the purpose of parking.

13. Mr. Narula, learned counsel appearing for defendant no.3 covering the interests of his client as well as the Defendants 1 and 2 submitted that the IOD was first issued on 28th January, 2002 and an

application for TDR was made on 10th April, 2002 and the same was granted only on 27th December, 2006. That the 2002 plan of the property showed an encroachment and it is only after the encroachment was removed and that additional TDR became available.

14. Mr. Narula had contended that the brochure is not relevant since the brochure is not a document that is contemplated at the time of applying for sanction of plans. The plans are not sanctioned on the basis of the brochure. The brochure contains the artists impression of what is the building will look like and the defendants are not bound to construct in accordance with the brochure. Mr. Narula may be correct to a point, but the fact remains that in the instant case defendant no.1 sold all floors from floor no.3. The Defendantno.1 did not construct on floor no.1 or 2. The flat on the third floor which the first usable floor for residential purposes was described as flat no.101. The flats on the 10th floor described as flat no.1001. This is a clear indication that the flats were at all stages to commence only from floor no.3. Had it been otherwise, the defendant nos.1 and 2 would not have commenced description of the flats on the third floor as flat no. 101 but as flat no.301.

15. To my mind, therefore, defendant no.1 had not made true and full disclosure. In the present case it is defendant no.3 who is now

proposing to construct further site and not the defendant no.1. Defendant no.1 has apparently assigned his rights to defendant no.3 but no details are forthcoming. In the circumstances, defendant no.3 cannot now seek to establish that defendant no.1 and 2 had made a full and proper disclosure. Defendant no.3's hands are tied and he cannot be heard to say as to what disclosure defendant no.1/2 had made at the material time.

16. Mr. Narula on the other hand relied upon paragraph 15, 16 & 17 of Jayantilal Investments (supra) and submitted that every promoter in the flat purchaser to comply with the prescribed Form V and that there is an explanatory note which, inter alia, provides clauses (3) and (4) shall be statute. He further submitted that the explanatory note I clarifies that a model form of agreement has been prescribed can be modified and adapted in each case depending upon the facts and circumstances of each case. In any event clauses (3)and (4) are statutory and mandatory and shall be retained in each and every case. The same cannot, therefore, be diluted in any manner. He further submitted that under Rule 4 if there is a residual FAR (FSI) in a plot or the layout which was not consumed, it will be available to the promoter till the registration of the society i.e. after registration of the society the FSI shall be available to the

society. In the instant case, Mr. Narula submitted that defendant no.3 is entitled to be FSI since the same was not utilized on account of encroachment. Mr. Narula submitted that in the present case the society having been registered on 31st December 2007 it cannot claim to be entitled to be FSI. Since the encroachment had existed earlier and came to be removed after the society was registered it still that does not deprive defendant no.3 of his right to utilise FSI/FAR available due to removal of encroachment.

17. Mr. Narula on behalf of respondent no.3 submitted that according to the relevant provision of MOFA the rights of the promoter and the flat purchaser required to be balanced to make possible alterations and additions to the structure according to the sanctioned plan. He, therefore, submitted that in the instant case on a fair reading of the agreement and the provisions of MOFA, his clients were entitled to modify the plans and use the TDR becoming available upon demolition of the encroachments on the property which were originally there when the 2002 plan was passed. But thereafter the 2006 plan was passed thereby entitling respondent no.3 to carry out further development of the property by creating flats on the second floor of the said building. According to Mr. Narula no permission of the society was required. In the instant case Mr.

Narula also relied upon the decision of the Division Bench of this Court in the matter of ***Manratna Developers V/s. Megh Ratan Co-operative Housing Society Ltd. Mumbai and others 2009 (2) Mh.L.J.*** in which the Court had to consider the effect of section 7A of the MOFA the respondent-plaintiff sought an injunction to restrain the appellant-defendant from carrying out construction and where the local authority had sanctioned a modified plan after being satisfied that the defendants were not constructing anything in excess of what is permissible. In that case the balance of convenience was in favour of the defendants in that it had prima facie complied with the requirements of true and full disclosure, and therefore, no injunction was granted.

18. In the facts of the case Mr. Narula pointed out further that original defendant no.1 was having large plot of land is comprising of some vacant area under the various plot structures occupied by the tenants. There are many structures and in a phased manner the defendant got the premises vacated and got certain plans approved in the year 1987 instead of constructing A & B wings only portion of Wing A was constructed. Later the sanctioned plans were modified after the remaining persons vacated. As a result modified plans came to be submitted which resulted in increase of area. The learned Single Judge

concluded that the proposed modification of plan reveals reduction in the common area depriving the plaintiffs society of amenities. The Court interpreted the various contentions in the case of Kalpita and Jayantilal Investments (supra) the Division Bench Court after taking into account an over all view of the matter concluded that the defendant therein had constructed any one wing of a building which was a small portion even according to the original sanctioned plan. The rest of the property was to be developed on a phased manner but could not since the premises were not vacated by the tenants. After a portion was vacated by tenants of dilapidated structures, the defendants commenced construction only to be obstructed when modified plans were approved. The Court found that the consent of the flat owners in the existing building after amendment of section 7 and insertion of section 7A was not necessary if additional buildings were to be constructed since the amenities were not reduced in any manner. The balance of convenience in the facts of that case was in favour of the defendants. Prima facie, therefore, it was found that the defendants had complied with the requirements of true and full disclosure. Relying upon the same, Mr. Narula submitted that in the instant case also the defendant no.1 had made a full and true disclosure and defendant no.2 was entitled to take advantage of the same.

19. Having considered the various submissions I am not persuaded to hold that in the instant case the defendant no.1 had made a true and full disclosure to the members/flat purchasers. It is not open for the defendant no.3 to contend that defendant nos.1 and 2 had made true and full disclosure nor is defendant no.3 competent to contend that it had made a true and proper disclosure since defendant no.3 was not at all involved in the project at the material time. In the present case it is obvious that there was no disclosure that the developer ever intended to continue any construction on the first or second floors. On the other hand, the flats disclosed clearly indicating that the developer intends to keep the first and second floors vacant. The further construction of the podium was probably contemplated as evident from the second plan. This is also can be gathered from the over all elevation of the building as seen from undisputed photographs produced by the plaintiff in the presence of the defendants representative wherein the flats from the third floor onwards were clearly seen as constructed beyond the recessed building line of the first and second floors.

20. Taking into account the elevation of the structure it becomes more than evident that the defendant nos.1 and 2 intended to leave the area open for common amenities which can be augmented by the

podium proposed to be constructed as per the amended plan of the year 2003 relied upon by the defendants. Mr. Kamdar learned counsel for the respondent in re-joinder had also submitted and in my view correctly, that assuming while denying Mr. Narula’s submissions are correct in that 2002 plans had not taken into consideration FSI becoming available after removal of the alleged encroachment, then, before 2006 plans can be approved, the Society's consent ought to have been taken since according to the defendant no.1 and 2 in 2003 encroachments were removed.

21. Mr. Kamdar also relied upon the contents of paragraph 15 of the affidavit of one Uday Shankar, Secretary of the plaintiffs society in rejoinder in which he has clearly stated that statements in paragraph 7 of the affidavit in reply are not believable and that the plans of 2002 only provided for 6 and 5th upper floors whereas defendant no.1 had constructed 12 storey building. It further says that as regards the encroachment referred to in paragraph 7 same has no basis and that since the flats were handed over to the purchaser in 2003 there has been no encroachment and the story of encroachment is a bogey. It is therefore submitted by Mr. Kamdar that FSI could only have to be utilized with the consent of the flat purchaser for constructing higher floors. The FSI was also utilized for regularisation of the unauthorized construction

put up by defendant from the 5th storey upward since originally the plans provided for ground plus 5 upper floors.

22. In view of the above, I have no hesitation in arriving at the conclusion that there is no justification in Mr. Narula contending that the presence of encroachments and their subsequent removal required the modification of the plans. In the circumstances and considering the totality of the facts, I am of the view that the defendant nos.1 and 2 had failed to make a full and proper disclosure. As far as defendant no.3 is concerned, it was not capable of making any disclosure when the building was first constructed since it came into the picture only in the year 2009 or thereabout although it contended that it was always a joint developer. In any event defendant no.3 ought to have taken the Plaintiffs into confidence before applying for modification of the plans. Not having done so amounts to failure to make a full disclosure assuming that defendant no.3 was competent to make such a disclosure. In the circumstances of the case, the interest of justice will be served by passing the following order:-

(i) Notice of Motion is made absolute in terms of prayer clause(a).

(ii) There will be no order as to costs.

(A. K. MENON, J.)

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