

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10620 OF 2015

Jamiat Co-operative Housing
Society Ltd. and Ors

Petitioners

Vs

Rizwan Irshad Ansari and Ors

.. Respondents

Mr. V.A.Thorat, Senior Advocate with Mr. Sandip J. Ghogare,
Advocate for Petitioners.

Ms. Gauri Godse, Advocate for Respondents.

CORAM : R.G.KETKAR,J.

DATE : 02/03/2016

PC:

1. Heard Mr. V.A.Thorat, learned senior counsel for the petitioners and Ms. Gauri Godse, learned counsel for the respondents at length. In view of order dated 29.2.2016, Rule. Ms. Godse waives service for the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 10.2.2015 passed by the learned Ad-hoc District Judge-1 Kalyan in Misc.Civil Appeal No.94 of 2014. By that order, the learned District Judge allowed the Appeal preferred by the respondents, hereinafter referred to as 'plaintiffs', and quashed and set aside the judgment and order dated 29.10.2014 passed by the learned Civil Judge, Jr. Dn., Ulhasnagar, below Exhibit-5 in

Regular Civil Suit No.15 of 2013. The learned District Judge issued injunction restraining the petitioners from carrying out construction over the suit plots, namely, Plots No. 4(A) admeasuring 260 sq.meters, 4(B) admeasuring 278.09 sq.meters and 4(C) admeasuring 246 sq.meters, situate at village Khoj, Kuntavali, Ambarnath, District-Thane (for short, 'suit property') and creating third interest till the decision of the suit. The parties shall hereinafter referred to as per their status in the trial Court.

3. The plaintiffs instituted suit for declaration that the Development Agreement dated 27.2.2008 executed by defendants no. 1, 2 and 3 is unlawful, illegal, invalid, inoperative, bad in law, void, to the extent of its application to the suit property of plaintiffs no. 1 to 4 and the same be cancelled to the extent of its application to the suit property; for declaration that defendants no. 2 and 3 are not entitled to develop the suit property of the plaintiffs no. 1 to 4 or to carry out any construction on it or any part thereof pursuant to Development Agreement dated 27.2.2008; for perpetual injunction restraining defendants no. 2 and 3 from creating any third party interest and/or dispossessing or in any manner interfering with the possession of the plaintiffs or commencing or carrying out any construction over the suit property.

4. During the pendency of the suit, the plaintiffs took out application Exhibit-5 for temporary injunction restraining

defendants no. 2 and 3 from creating any third party interest and/or dispossessing or in any manner interfering with the plaintiffs or commencing or carrying out any construction over the suit property. By the judgment and order dated 29.10.2014, the learned trial Judge rejected the application and directed the defendants that in case they are creating third party interest in the suit property, the deeds in question shall clearly stipulate that the matter is sub-judice and subject to ultimate decision of the suit. Aggrieved by that decision, the plaintiffs preferred appeal before the learned District Judge. By the impugned order, the learned District Judge allowed the appeal and issued injunction restraining the defendants from carrying out construction over the suit property and creating any third party interest till decision of the suit. It is against this decision, the defendants have instituted the present petition.

5. Mr. Thorat submitted that on 26.6.2005, defendant no.1 society passed resolution no.2 in Annual General Meeting. It was resolved that each member of defendant no.1 society must start the construction/development activity within six months from the date of Annual General Meeting, otherwise the Managing Committee is authorised to cancel/transfer their plots in the disputed land and allot the same to the prospective members. The members of defendant no.1, however, did not start the

construction within six months. In view thereof, Special General Body Meeting was convened on 17.12.2006. By majority, resolution no.5 was cancelled. It was further resolved that resolution no.1 forwarded by Managing Committee is unanimously accepted, resolutions no. 2 and 3 were also accepted by the members. As per resolution no.3 development work of society be given to M/s Mukul Developers, Ambarnath. He submitted that in pursuance thereof, defendant no.1 executed Development Agreement in favour of M/s Mukul Developers on 27.2.2008 in respect of all plots, except plots no. 18 and 19 as well as plots no. 5 and 6. On 19.6.2009, commencement certificate was obtained by the defendants. Defendants have completed construction to the extent of 95% which also includes construction over the suit property. Only minor internal works, such as tiling, painting, wiring is remaining. He further submitted that initially in the Cooperative Court, Thane, dispute was instituted, inter-alia, for declaration that the resolution dated 17.12.2006 is illegal, among other reliefs. The learned Judge of the Cooperative Court held that the disputant therein did not prove that the resolution passed in the Managing Committee dated 19.11.2006 superseded by Annual General Meeting dated 17.12.2006 is illegal. By order dated 8.7.2011 the Cooperative court dismissed the dispute. Aggrieved by that decision, Appeal was preferred before the Cooperative Appellate Court which was

dismissed on 12.9.2012. It is only thereafter the present suit is instituted on 8.1.2013. He submitted that as the construction work is completed to the extent of 95% which also includes construction over the suit property, the learned District Judge was not justified in interfering with the discretionary order passed by the learned trial Judge. He submitted that the very fact that the plaintiffs have challenged the Development Agreement dated 27.2.2008 by instituting the suit in the year 2013 and claiming injunction, disentitles them from claiming relief of injunction which is equitable in nature. Having regard to delay in approaching the Court, the learned District Judge ought to have dismissed the appeal. In support of this submission, he relied upon the decision of the Apex Court in the case of Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727.

6. On the other hand, Ms Godse supported the impugned order. She submitted that defendant no.1 society had purchased two sets of lands as described in Annexure A and B in the plaint on 28.10.1979 and 31.10.1979. On 29.4.1979, defendant no.1 also agreed to purchase lands described in annexure C to the plaint. However, the said property is disputed for want of conveyance in favour of the defendant no.1-society. In the year 1979, all three sets of lands (in Annexures A, B and C) were subdivided in 57 plots. Out of 57 plots, 2 plots were reserved for

play ground and market and remaining 55 plots were allotted to 55 members of the society. In 1987, defendant no.1 society entered into Development Agreement with M/s Shaheen Builders. However, that agreement was cancelled by issuing notice.

7. In 1993, it was decided to accommodate all members in 20 plots comprising of lands in annexures A and B. Accordingly, each member was allotted 2/3rd area of plot originally allotted in 1979. On 1.7.2001 and 8.9.2001 defendant no.1 allotted suit property to the plaintiffs and delivered possession by executing possession receipt. Plaintiffs no.1 to 4 executed registered Development Agreement in favour of plaintiff no.5 in respect of the suit property on 9.4.2002. On 9.6.2002, defendant no.1 granted no objection certificate to plaintiffs no. 1 to 4 for developing suit property through plaintiff no.5. On 19.10.2002, Ambarnath Municipal Council called upon the plaintiffs to comply with the requisitions contained therein for granting building permission as per application dated 15.6.2002. She submitted that allotment made on 1.7.2001 as also no objection given by NOC to plaintiffs 1 to 4 to develop suit property through plaintiff no.5 is not cancelled by defendant no.1 till date. Plaintiffs are in possession of the suit property. She submitted that basically the developer has not acted as per the Development Agreement dated 27.2.2008. She, therefore, submitted that as the allotment letter as also NOC given by the society is not cancelled, the

defendants cannot be allowed to proceed with the construction. She invited my attention to the written statement filed by the defendants and in particular paragraphs 36 and 37 thereof. She further submitted that the defendants took out application under Order VII, Rule 11 (d) for rejecting the plaint on the ground that suit is barred by limitation. By order dated 7.2.2014, the learned trial Judge rejected the application. She, therefore, submitted that it cannot be said that the plaintiffs did not approach the court within the prescribed period of limitation.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As is evident from the record, on 26.6.2005, Annual General Meeting of defendant no.1 society was convened. Resolution no.2 is to the following effect:

RESOLUTION NO.-2

“Further resolved that all the members of Jamiat Cooperative housing Society Ltd must start the construction/development activity within 6 months from time from the date of A.G.M. otherwise Managing Committee is authorized to cancel/transfer their plots in the disputed land and allot the same to the prospective members.”

9. Perusal of Resolution no.2, extracted herein-above, shows that time of six months was given to all the members to start construction/development activities from the date of Annual General Meeting. In case the members do not commence construction, the Managing Committee was authorized to

cancel/transfer their plots in the disputed land and allot the same to the prospective members. On 19.11.2006, Managing Committee passed following Resolutions:

- (1) It is resolved that in the resolution no.5 passed in the AGM dated 26/6/2005 regarding development of land is hereby cancelled and the members of the society must start developing their respective plots within 6 months should be cancelled.
- (2) Land with clear title plus land under litigation excluding plot no.18 and 19 be given to Mukul Developers for development.
- (3) Managing Committee is empowered to prepare and do the development agreement with M/s Mukul Developers in consultation with Advocate.

10. On 17.12.2006, Special General Body Meeting was convened. Points no. 2 and 3 are to the following effect.

“Point No.2:- This is the Resolution forwarded by M.C., of the society regarding development of society land Resolution No.5 passed in the AGM held on 26.6.2005 is hereby cancelled. This point was discussed in detailed. Chairman of the meeting explained that in the Resolution No.5 it was requested by the members to develop their plots individual or by any builder. The construction work should be started within 6 months. Now nearly 1 and half year passed which seen that not many members have started there development work. Except for members who has given their plots to builder namely M/s Mukul Developers. The work on plot no. 5 and 6 is progress by M/s Mukul Developers. Since majority of the members have failed to start their construction work. Hence it is not worth while to give the further times to members. Hence the Chairman of the meeting requested the members to approve the Resolution forwarded by M C of the society regarding the cancellation of the Resolution No.5 passed on AGM 26.6.2005.

Shri Akhlaque and Shri Abdul Habib M.S.Khan objected the same. Stating that we have purchased the land for making our own house. We are not ready to accept the decision of the M.C He (Mr Akhlaque) also give his objection in writing. Chairman of the meeting explained the member that in past also we have given the society for development to builders. In the discussion members namely Shri Sayeed Mohd Mubin, Shri Haji Sayeed, Shri Ataur Rehman, Shri Usman Agha, Shri Nizamuddin Tajuddin took part in the discussion and supported to cancell the Resolution No.5 and hand over the society to some developers. To decide the matter, Chairman of meeting decided for voting, out of the present members, only two members opposed the Resolution, and hence by majority vote the resolution no.5 was cancelled. Therefore, it was resolved that Resolution No.1 forwarded by M.C is unanimously accepted, Resolution no.2 and 3 were also accepted by the members, as per the resolution no.3, that is to give the Development works of the society to M/s Mukul Developers Ambernath is accepted by the society members.

Point N.3: This is to accept the draft Development agreement and give powers to MC to finalize and make the development agreement to M/s Mukul Developers in consultation with same advocate, this draft agreement was discussed in detailed and the following discussion were taken."

11. Perusal of the Minutes, extracted herein above, shows that as against two members opposing the resolution, by majority vote, resolution no.5 passed in Annual General Meeting dated 26.6.2005 was cancelled and it was resolved that resolution no. 1 forwarded by Managing Committee be unanimously accepted and Resolutions no.2 and 3 was also accepted by the members. It was also agreed to give development works of society to M/s Mukul Developers. In pursuance thereof, by letter dated 24.1.2007, defendant no.1-society informed the members about cancellation of Resolution no. 5 passed in A.G.M. held on

26.6.2006 as also cancellation of allotment of plots/sub-plots to members made by the society, excluding plots no.18 and 19. It was further communicated to the members that the society's land including the land in litigation but excluding plots no. 18 and 19 were given for development to M/s Mukul Developers, Ambarnath.

12. It is also evident from the record that the dispute under section 91 of the Maharashtra Cooperative Societies Act, 1960 was instituted by Shri Mohd. Arif Bashir Ahmedr Ansari, inter alia challenging the Managing Committee's resolution dated 19.11.2006 and resolution dated 17.12.2006 passed in Spl. General Body Meeting. Issue no.4 and the finding against that issue no.4 is to the following effect.

<u>Issue</u>	<u>Finding</u>
"4. Does the disputant prove that the resolution passed in the managing committee meeting dated 19/11/2006 superseded by the AGM dated 17/12/2006? If yes, whether the disputant is entitled for the decree as prayed for?	In the negative.

13. Learned Judge of the Co-operative Court dealt with issue no.4 from paragraphs 39 onwards. In paragraph 45, the learned Judge also noted that the disputant therein was present in the managing committee meeting dated 19.11.2006. He presided over by Special General Body meeting dated 17.12.2006. After

considering the objections raised by members, resolution was passed by majority and the minutes of the said meeting were also confirmed in A.G.M. dated 11.11.2007. Learned Judge recorded that the disputant participated in the meeting and held that the disputant failed to establish illegality in the resolutions dated 19.11.2006 and 17.12.2006. Aggrieved by that decision, Appeal was preferred before the Cooperative Appellate Court and the same was dismissed on 12.9.2012.

14. It is only thereafter the plaintiffs instituted the present suit on 8.1.2013. Perusal of paragraph 33 of the plaint shows that the plaintiffs have pleaded that cause of action for filing suit arose on 12.9.2012 when the Cooperative Appellate Court confirmed the findings of the Cooperative Court and that relief of cancellation of Development Agreement dated 27.2.2008 can only be granted by Civil Court.

15. Perusal of communication dated 19.10.2002 shows that Ambarnath Municipal Council called upon the plaintiffs to comply with requisitions made therein before considering their application dated 15.6.2002 for grant of building permission. No material is produced on record by the plaintiffs to show that they have complied with the requisitions made by the Ambarnath Municipal Council and thereafter have proceeded with the construction over the suit property. Perusal of the plaint also shows that it is only after the dispute was dismissed by the

Cooperative appellate Court, the suit is instituted in the year 2013 and injunction relief is claimed. As noted earlier, the Development Agreement was entered into on 27.2.2008. Commencement certificate is issued in favour of the defendants on 19.6.2009. Mr. Thorat states that 95% construction is complete which includes construction over the suit property as well. Only minor internal works, such as, tiling, painting, wiring is remaining. In other words, the suit property is not available for construction. Statements made by Mr Thorat, on instructions, are recorded.

16. The learned trial Judge rejected the application made by the plaintiffs and at the same time directed the defendants that if they create third party interest in the suit property, the deeds in question clearly stipulate that matter is sub judice and subject to ultimate decision of the case. The moot question is whether the learned District Judge was justified in interfering with the discretionary order passed by the learned trial Judge? Whether the learned District Judge was also justified in issuing injunction having regard to conduct of the plaintiffs in belatedly approaching the civil court for praying for injunction. In the case of Wander Ltd, (supra) the Apex Court has observed thus:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the

court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

17. In the case of Mandali Ranganna Vs T Ramchandra, (2008)

11 SCC 1. The Apex Court has observed in paragraphs 21 and 22 thus:

"21. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively."

18. Applying the tests laid down in the decisions extracted

herein above, prima facie, in my opinion, the plaintiffs are not entitled to any equitable relief. The plaintiffs have belatedly applied for injunction. Their conduct disentitles them from grant of any equitable reliefs. Applying the tests laid down in *Wander Limited*, the Appellate Court will not be justified in interfering with the discretionary order passed by the trial Court unless it records the finding that the trial Court exercised discretion arbitrarily, capriciously or perversely. As Resolution dated 26.6.2005 was cancelled by passing Resolution dated 19.11.2006 by Managing Committee and Resolution dated 17.12.2006 by Special General Body Meeting and the challenge to these resolutions failed before the Cooperative Court as also Cooperative Appellate Court and in the meantime, the defendants have completed 95% construction work which also includes suit property, in my opinion, the learned District was not justified in interfering with the discretionary order passed by the learned trial Judge. It cannot be said that the learned trial Judge while issuing injunction did not correctly apply the principles laid down for grant or refusal of injunction. The learned District Judge also failed to appreciate that by granting injunction, it will not only cause grave prejudice and hardship to defendants no.2 and 3 but also to the majority members of defendant no.1-society. The learned District Judge failed to appreciate that no prima facie case was made out by the plaintiffs; balance of convenience did

not lie in favour of the plaintiffs; and that no injury would be caused to the plaintiffs by refusing injunction. Hence, the impugned order is liable to be set aside, thereby restoring the order passed by the trial Court. Hence, the following order.

(1) Impugned order dated 10/2/2015 passed by the learned District Judge is set aside and Misc.Civil Appeal No.94 of 2014 is dismissed.

(2) Order dated 29.10.2014 passed by the learned trial Judge below Exhibit 5 in R.C.S. No.15 of 2013 is restored.

(3) Rule is made absolute in the aforesaid terms with no order as to costs.

19. At this stage, Ms Godse orally applies for continuation of the order passed by the learned District Judge on the ground that the same is operating since 10.2.2015. Mr. Ghogare. opposes the oral application. As I have already recorded the finding that the suit property is not available for development and that the plaintiffs have not obtained building permission and that 95 % construction work is complete, oral application is rejected.

(R.G.KETKAR, J.)