

21/01/2015 passed by the learned 2nd Joint Civil Judge, Senior Division, Thane below Exhibit 5 in Regular Civil Suit No. 625 of 2014 as also the judgment and order dated 28/09/2015 passed by the learned District Judge-12, Thane in Misc. Civil Appeal No. 47 of 2015. By these orders, the Courts below partly allowed the application made by respondents No. 1 to 7, hereinafter referred to as plaintiffs, and issued injunction restraining the petitioner, hereinafter referred to as defendant No.1, or any other person claiming through it from constructing building in violation of 2nd plan dated 01/09/1997 and creating third party interest or parting with possession of flats and other premises in the building described in paragraph 15 i.e. D-type 5 buildings and shops till disposal of the Suit.

3. Respondents No. 1 to 7 (original plaintiffs) have instituted Suit in or about June 2014 against the petitioner (defendant No.1) and respondents No. 8 to 11, hereinafter referred to as defendants No. 2 to 5 inter alia praying for declaration that defendant No.1 is under the statutory obligations to form and register the co-operative housing societies of the buildings described at serial Nos. 3 to 11 of the table mentioned in paragraph 10 and convey the land and buildings in favour of the respective societies of the said buildings; directing defendant No.1 to specifically perform the agreements executed by them in favour of the members of the

plaintiffs No. 1 and 2 and also in favour of the respective purchasers of the flats in the said buildings under the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer), Act 1963 (for short 'MOFA') and in default, through a proper person appointed as a Court Commissioner for completion of a conveyance in favour of respective societies of the said buildings; for declaration that the 3rd plan dated 11/08/2010 sanctioned by defendant No.2 – Mira Bhayander Municipal Corporation (for short 'Corporation') is in contravention of the exemption order, development control regulation and the statutory provisions contemplated under the MOFA and the rules made thereunder; for declaration that defendant No.1 has no right and/or authority to construct the buildings in the layout of the said property in contravention of the 2nd plan dated 01/09/1997 sanctioned by defendant No.2 among other prayers.

4. During the pendency of the Suit, plaintiffs took out application at Exhibit 5 praying for temporary injunction restraining defendant No.1 or any person claiming through them from constructing the buildings in violation of the 2nd plan dated 01/09/1997 and exemption order dated 25/02/1994 passed by defendant No.3 i.e.the Government of Maharashtra, through Housing and Special Assistant Department, Mantralaya, Mumbai under Sub-Section (1) of Section 20 of the Urban Land (Ceiling and Regulation)

Act, 1976; for temporary injunction restraining defendant No.1 or any person claiming through them from creating third party interest in respect of the flats and other premises in the buildings, more particularly described in the table mentioned in paragraph 15 and also parting with possession of the flats and other premises in the said buildings to any one.

5. It is the case of the plaintiffs that the erstwhile Mira Bhayander Municipal Council had sanctioned layout plan of land bearing survey No. 154 admeasuring 48310 sq. meters situate at Village Ghodbunder, Taluka and District Thane (for short 'the said property') on 27/04/1995 (for short 1st plan). The 1st plan consisted of total 18 buildings, 7 core houses, 3 sites and services. Without complying with the conditions imposed in the exemption order, defendant No.1, in collusion with the officers of the defendants No.2 had got revised/amended the 1st plan from the erstwhile Council on 01/09/1997 (for short 2nd plan). The 2nd plan consists of total 18 buildings, 2 halls, Library, primary school, 7 core houses, 3 sites and services and 4 Recreation Gardens. In that plan, defendant No.1 had referred the said 18 buildings, 7 core houses, 3 sites and services as existing buildings, when in fact, at the time of granting approval to the 2nd plan, the said buildings as shown in the 1st plan were not in existence on the said property.

6. On the basis of the 2nd plan, defendant No.1 had

constructed buildings, more particularly set out in paragraph 10 of the plaint (for short 'the said buildings'). Defendant No.1 was bound to develop 4 Recreation Gardens at the place demarcated in the 2nd plan. The details were given in paragraph 11 of the plaint. In the 2nd plan, provisions for construction of 2 halls on the portion of the area reserved for Recreation of Gardens No. 1 & 4 were also made as per rules prescribed by the Development Control Regulation for city of Mira Bhyander (for short 'DCR'). However, defendant No.1 had constructed a hall (Madrassa) in the portion of area reserved for Recreation Garden No.1. Defendant No.1 failed to construct a hall in the portion of area reserved for Garden No.1 as shown in the 2nd plaint. Defendant No.1 also failed to develop Recreation Garden No.1 to 4 as shown in the 2nd plain. Buildings at serial no. 11 of the table set out in paragraph 11 ("B" type) originally consisted of ground + 5 floors. However, defendant No.1 did not construct the buildings/structures in the 2nd plan, more particularly set out in paragraph 13 of the plaint.

7. As per the provisions contemplated under MOFA, it was mandatory on the part of the defendant No.1 to make true and full disclosure to the flat purchasers about the development/scheme undertaken by them in the layout of the said property. Defendant No.1 had not disclosed to the plaintiffs and other flat purchasers that they will get the 2nd plan amended from defendant No.2 either for

constructing additional buildings or making additions and alterations to the amenities provided in the 2nd plan. In the breach of term and conditions imposed in the exemption order and also without the consent of the plaintiffs and other flat purchasers in the said buildings, defendant No.1 in collusion with the officers of defendant No.2 got the 2nd plan amended on 11/08/2010 (for short 3rd plan). The 3rd plan consists of total 16 buildings including 11 buildings constructed by defendant No.1 as per the 2nd plan, 7 Recreation Gardens, a library, primary school and a community hall. Defendant No.2 had allowed defendant No.1 to construct additional buildings by amending the 2nd plan. Details whereof are set out in paragraph 15 of the plaint.

8. In paragraph 16 of the plaint, it is asserted that FSI of 'A' type building i.e. building No.2 admeasuring 1710.87 sq.mtrs. was increased to an area admeasuring 1726.13 sq.mtrs in the 3rd plan. Similarly 'A-2' type building i.e. building No.1 was originally consisting of ground+5 upper floors, totally admeasuring 1764.09 sq.mtrs as per the 2nd plan. However, in the 3rd plan, the number of floors of "A-2" type building i.e. building No.1 is increased from ground+5 upper floors to ground+7 upper floors and the area of the said building No.1 i.e. 'A-2' type building is increased from 1764.08 sq.mtrs. to area admeasuring 2239.86 sq.mtrs. Defendant No.1 had also raised two more floors above the 5th floor of 'A-2' type building

after obtaining sanction to the 3rd plan.

9. The building described at serial Nos. 3 to 8 mentioned in table in paragraph 15 of the plaint were not shown in the 2nd plan. The plaintiffs also alleged non- disclosure of construction of buildings at serial Nos. 3 to 8 of the table in paragraph 15 of the plaint in place of buildings no. 12, 13, 14, 15, 16, 17 & 18 as shown in the 2nd plan. The plaintiffs further alleged that defendant No.1 had changed the location of the Recreation Gardens of 2nd plan so as to construct additional buildings in the open space abutting to Recreation Gardens No. 5, 6 and 7 in the 3rd plan and for that purpose, defendant No.1 has intentionally kept FSI admeasuring 1687.70 sq. meters unutilized in the said plan. In short, the plaintiffs have alleged various additions and alterations in the 2nd plan and obtaining sanction to the 3rd plan dated 11/08/2010.

10. Defendant No.1 resisted the application by filing reply dated 20/06/2014. Defendant No.1 has inter alia contended that the Court has no jurisdiction to entertain and try the Suit. The plaintiffs have no legal right, title and interest in respect of the said property or any part thereof. They have not suffered any legal injury and that plaintiffs have not come to the Court with clean hands. The plaintiffs have suppressed material facts and have played fraud upon the Court. In short, conduct of the plaintiffs dis-entitles them from any equitable relief. The Suit also suffers from inordinate delay and

latches. The 3rd plan was sanctioned on 11/08/2010 and construction is continuously going on since then. Defendant No.1 has invested crores of rupees in the matter of construction and has already created third party interest by issuing allotment letters in respect of various units/flats/premises in both the buildings and accepted consideration by cheques. The construction of the substantial magnitude has already come up.

11. By the impugned orders, the Courts below have partly allowed the application as indicated earlier. It is against these orders, defendant No.1 has instituted above Writ Petition.

12. Mr. Samdani has taken me through the 2nd plan dated 01/09/1997. Survey No.154 is divided by 15 meters wide D.P. Road. Below that 15 meters wide DP road, defendant No.1 has proposed as under :

- 1) building Nos.1 to 11;
- 2) building 'A-2' – ground + 5 floors;
- 3) below 'A-2' type building, garden No.3 admeasuring 1680.00 sq.mtrs;
- 4) adjacent to this garden, core houses and service plot;
- 5) garden No.4 admeasuring 2500 sq. mtrs and one community hall.

. Above 15 meters wide DP road, defendant No.1 proposed as under :

- 1) building Nos.12 to 18 consisting of ground+7 floors;
- 2) recreation garden No.1 admeasuring 3364.50 sq.mtrs and one hall adjacent to it;
- 3) garden No.2 admeasuring 2880.00 sq.mtrs.;
- 4) library and primary school.

13. He submitted that below 15 meters wide DP road, as against building “A-2” type consisting of ground + 5 floors, defendant No.1 has constructed ground + 7 floors and plaintiff No.4 has flat on the 6th floor. He has also taken me through area statement of 2nd plan dated 01/09/1997 and in particular, i) net plot area ii) net gross plot area iii) total built up area proposed.

14. Mr.Samdani has also taken me through 3rd plan dated 11/08/2010. In the area below 15 meters wide D.P.Road, defendant No.1 has proposed i) “A-2” type building consisting of ground + 7 floors, ii) Recreation Garden No.3 admeasuring 111.26 sq.meters iii) Recreation Garden No. 4 admeasuring 58.67 sq meters. Defendant no.1 has not proposed construction of core houses as also not shown service plots below “A-2” type building. The Garden No.3 admeasuring 1680 sq.meters is also not shown below “A-2” type building. Defendant No.1 has proposed buildings i)consisting wings 12 to 16 and ii) buildings consisting wings 16 to 20.

15. Mr.Samdani submitted that plaintiffs have no legal right, title and interest in the suit premises or any part thereof. They have not suffered any legal injury and that plaintiffs have not come to the Court with clean hands. The plaintiffs have suppressed material facts and have played fraud upon the Court. In short, conduct of the plaintiffs dis-entitles them from any equitable relief. The Suit also

suffers from inordinate delay and latches. The 3rd plan was sanctioned on 11/08/2010 and construction is continuously going on since then. Defendant No.1 has invested crores of rupees in the matter of construction and has already created third party interest by issuing allotment letters in respect of various units/flats/premises in both the buildings and accepted consideration by cheques. The construction of the substantial magnitude has already come up.

16. He further submitted that the plaintiffs did not take any objection for over three and half years to the said construction activities which estoppes and precludes the plaintiffs now from challenging the legality of the construction of the said buildings. The inordinate delay and latches on the part of the plaintiffs amount to an acquiescence and waiver of the rights of the plaintiffs, if any, in respect of the subject matter of the Suit. This contention is in the alternative and without prejudice to the defendant No.1's case that plaintiffs have no legal rights in the said property. During the course of hearing, Mr.Samdani made following statements.

- I) During the pendency of the Suit, defendant No.1 will not carry out any construction over the open space survey No. 154 below and above 15 meters wide D.P.Road.
- II) The area of Recreation Garden No.3 will be increased by including the area of core houses and service plots.
- III) Defendant No.1 has not exceeded the permissible FSI .

17. He, however, fairly stated that those statements are not made in the Courts below.

18. In that regard, he submitted that the net gross plot area is 38900.80 sq.meters and permissible FSI is one. As against this, total built up area proposed is 38896 sq.meters in the 2nd plan dated 01/09/1997. He submitted that the area statement of sanctioned plan dated 11/08/2010 will show that balance FSI is to the tune of 1687.70 sq.meters. He further submitted that defendant No.1 has also not loaded T.D.R. in survey No. 154. In other words, he submitted that defendant No.1 has not exceeded permissible FSI and construction carried out and proposed is within the permissible FSI. He further submitted that the structures of the plaintiffs are in no way affected. He relied upon Sections 7 and 7A of the MOFA and submitted that the Courts below were not justified in issuing the injunction against defendant No.1. Mr.Apte supported Mr.Samdani.

19. As against this, Mr.Madan supported the impugned orders. He has taken me through the impugned orders and in particular, paragraph 25 of the District Court's order. The learned District Judge compared 2nd plan dated 01/09/1997 and 3rd plan dated 11/08/2010 and noted the changes in the 2 plans. While dismissing the Appeal, the learned District Judge directed the trial Court to dispose of the Suit within a period of 6 months from the date of the receipt of the order. He submitted that plaintiffs are

ready and willing to extend full co-operation for disposing of the Suit in a time bound manner. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India. Mr.Lokesh Zade appearing for newly added respondents adopted the contentions advanced by Mr.Madan.

20. I have considered the rival submissions made by the learned Counsel for the parties. I have also perused the material on record. After considering the material on record, as noted earlier, the Courts below have issued injunction restraining the defendant No.1 from constructing the building in violation of 2nd plan dated 01/09/1997 and creating third party interest and/or parting with possession of the flats and other premises in the buildings described in paragraph 15 i.e. “D” type 5 buildings and shops till disposal of the Suit. In other words, the Courts below have permitted defendant No.1 to carry on construction strictly in accordance with 2nd plan dated 01/09/1997. The injunction order is operating from 21/01/2015. While dismissing the Appeal, the learned District Judge has directed the trial Court to dispose of the Suit within a period of 6 months from the date of the receipt of the order.

21. That apart, the Courts below, after considering the material on record, have held that plaintiffs have made out a prima facie case in their favour; balance of convenience lies in favour of the plaintiffs and that plaintiffs will suffer irreparable loss if injunction is

refused. In particular, the learned District Judge has compared the 2nd plan dated 01/09/1997 and 3rd plan dated 11/08/2010 in paragraph 25, which reads thus :

25. The comparison of second and third plans are as under :	
Second plan dt. 01/09/1997	Third plan dt. 11/08/2010
1) 18 buildings	1) 16 buildings
2) 2 hall	2) Community hall
3) Library	3) Library
4) Primary school	4) Primary school
5) 7 core houses	5) 4 D type & 1 D1 type buildings
6) 3 site and services	6) 24 shops
7) 4 Recreation gardens	7) 7 Recreation gardens

The above table itself speaks regarding changes in two different plans but yet defendant No.1 dare to say that no change in the layout of the second plan and the third plan. What will be effect of changing the plan is to be considered only after leading evidence of both the parties and as such it is necessary to stop the further construction in the interest of the justice.

22. Perusal of the 2nd plan dated 01/09/1997 as also 3rd plan dated 11/08/2010, prima facie, bare out the findings recorded by the learned District Judge in paragraph 25.

23. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., 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. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Limited Vs. Pothan Joseph*, (1960) 3 SCR 713, (SCR 721)

“...These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. V. Jhanton*, 1942 AC 130' ... the law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'.”

24. If the tests laid down in the above decision are applied to the facts of the present case, it cannot be said that the Courts below have exercised discretion arbitrarily or capriciously or perversely or whether the Courts had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. This Court will not reassess the material and seek to reach the conclusion different from the one reached by the Courts below if the one reached by the Courts below was reasonably possible on the material. This Court will not be justified in interfering with the exercise of the discretion by the Courts below solely on the ground that if this Court had considered the material at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the Courts below reasonably and in the judicial manner,

the fact that this Court would have taken a different view will not justify interference with the exercise of the discretion by the Courts below.

25. In the light of the above observations, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. The learned trial judge will ensure disposal of the Suit in a time bound manner as ordered by the learned District Judge.

(R.G.KETKAR, J.)