

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

**APPEAL FROM ORDER NO.1197 OF 2015
WITH
CIVIL APPLICATION NO.1511 OF 2015**

Narottam Sharma : Appellant.

Versus

**Eldora Co-operative Housing
Society Limited and ors.**

: Respondents.

Ms. Gauri Godse a/w Mr. R D Joshi for the Appellant.

**Mr. Mayur Khandeparkar with Mr. Z A Jariwala i/by M/s. Thakore Jariwala
& Associates for the Respondent No.1.**

Mr. Nikhil Randive for the Respondent No.3.

CORAM : R. M. SAVANT, J.

DATE : 27th June 2016

P.C.

1 The order dated 13/10/2015 passed by the learned Judge of the City Civil Court, Greater Mumbai is taken exception to by way of the above Appeal from Order. By the said order Notice of Motion No.1930 of 2015 filed by the Plaintiffs i.e. the Respondent Nos.1 and 2 herein came to be allowed in terms of prayer clause (a).

2 The bone of contention in the above Appeal from Order is the use of the 11 mtrs. wide internal road by the Appellant herein who is the original Defendant No.2 to the suit. The said internal road is abutting the building of the Respondent No.1 herein i.e. the Plaintiff No.1 Society on the eastern side and a compound wall is running alongside it. The building of the Plaintiff

Society has been constructed on plots bearing CTS No.104-A/1 and 104-A/3. To the south of the said internal road is the 27 mtrs. wide Development Plan Road ("D.P. Road" for short). In the original sanctioned layout, apart from the Plaintiffs' building, two other buildings i.e. Building No.2 and Building No.3 were to be constructed. In so far as Building No.2 is concerned, it seems that the said building has already been constructed. In so far as Building No.3 is concerned, it seems that the construction of the said building is yet to begin. The said original layout was amended and a separate plot bearing CTS No.104-A/4 came to be carved out on 05/12/2005 which is the plot with which the Defendant No.2 is concerned. However, the layout of the land on which the building of the Plaintiff No.1 Society is constructed would continue to have 3 buildings that is the building of the Plaintiff No.1 Society, Building No.2 and Building No.3. The Defendant No.2 has proposed to develop the said plot No.104-A/4 by putting up a building thereon. The said plot is towards the eastern side of the Plaintiff No.1 Society's building and is outside the compound wall which was erected abutting the 11 mtrs. wide internal road. It seems that the plan came to be sanctioned in respect of the sub-divided plot being CTS No.104-A/4. The Defendant No.2 whilst putting up the application for development has shown the access through the 27 mtrs. wide D.P. Road. However, it seems that he got the plan amended and thereby showed the access also from the 11 mtrs. internal road which, as indicated herein above, is the road within the layout of the Plaintiff Society and abutting the building of

the Plaintiff Society on the eastern side. This amendment of the plan showing the access through the said 11 mtrs. wide internal road has triggered of the filing of the instant suit being S C Suit No.1215 of 2015 by the Respondent Nos.1 and 2 herein i.e. the original Plaintiffs.

3 A perusal of the plaint discloses the case set up by the Plaintiffs. It is their case that the plan for development could not have been amended in respect of the said sub-divided plot being CTS No.104-A/4 so as to show the access from the said 11 mtrs. wide internal road of the Plaintiffs layout. The Plaintiffs have therefore prayed to the effect that the plan bearing No.CE/1302/BPES/AS dtd 18/11/2013 be declared illegal, bad in law and liable to be revoked as it infringes upon and violates the rights of the Plaintiffs under Section 7 of the Maharashtra Ownership of Flats Act (“MOFA” for short); that it be declared that the Defendants are not entitled to derive additional access through the property of the Plaintiffs as shown in plan at Exhibit “I”; that the Court be pleased to pass an order and direction upon the Defendant No.2 forthwith to remove the gate erected as reflected in the photographs at Exhibit “H” and restore the common wall to its original position as per the amended plans of 2006; and an order of injunction be granted restraining the Defendant No.2, his servants, agents, representatives or any person/s claiming through or under them from in any manner using the access through the Plaintiffs's property being C.T.S. No.104-A/1 and 104-A/3 situated at village

Tirandaz, Taluka Kurla, Powai, MSD.

4 To the said Notice of Motion, the Defendant No.1 has filed affidavit in reply and the sum and substance of its contention is that the original layout is for the plot admeasuring 10003.20 sq.mtrs. and that the common areas including the road in the said sub plot A is for the benefit of the three buildings including the building of the Plaintiffs. The Defendant No.1 has contended in its reply that it has no concern with the newly carved out plot being CTS No.104-A/4 and that the Defendant No.1 is entitled to change the plan without affecting the rights of the flat purchasers.

5 The Defendant No.2, who is the main contesting Defendant, contended that the MCGM has approved and sanctioned the plan of the Defendant No.2 wherein the road which is the subject matter of the suit has been shown as approach road and the Plaintiffs have not challenged the approval of the said plan by the MCGM. On behalf of the Defendant No.2 an objection was also raised to the filing of the suit by the Plaintiff No.2 on behalf of the Plaintiff No.1 without there being any authorization.

6 The Trial Court i.e. the learned Judge of the City Civil Court, Greater Mumbai considered the said Notice of Motion and, as indicated above, has by the impugned order dated 13/10/2015 allowed the same in terms of

prayer clause (a). The gist of the reasoning of the Trial Court is to the effect that permitting the use of the said 11 mtrs. wide internal road by the Defendant No.2 amounts to the breach of Section 7 of the MOFA. The Trial Court held that the use of the said internal road by the Developer of the plot being CTS No.104-A/4 i.e. the Defendant No.2 would certainly cause prejudice to the rights of the members of the Plaintiff Society including the Plaintiff No.2. The Trial Court observed that the Plaintiff No.2 who is the member of the Plaintiff No.1 Society has got a cause of action when such attempt is there causing prejudice to his right. The Trial Court observed that the said road is not a DP road or a public road which can be legitimately used by the public at large. As indicated above, it is the said order dated 13/10/2015 which is taken exception to by way of the above Appeal from Order.

7 The learned counsel appearing for the Appellant Ms. Gauri Godse would contend that the Plaintiff could not file the suit for the reliefs sought as there is no conveyance in favour of the Plaintiff No.1 Society. The learned counsel for the Appellant would contend that since there was one layout for the entire 10003 sq.mtrs, the Plaintiff Society cannot object to the use of the internal road by the Defendant No.2 who is to develop plot bearing CTS No.104-A/4. It is the submission of the learned counsel for the Appellant that the Plaintiffs are seeking injunction against the Defendant No.2 without challenging the plan of the Defendant No.2 which has been approved wherein

the said internal road has been shown as access road. It was the submission of the learned counsel for the Appellant that since there was a common layout, the amendment does not amount to violation of Section 7 of the MOFA.

8 Per contra, the learned counsel appearing on behalf of the Respondent No.1 i.e. the Plaintiff No.1 Society Shri Mayur Khandeparkar drew this Court's attention to the application made by the Defendant No.2 whilst obtaining sanction to the development proposal in respect of Plot No.104-A/4 wherein the 27 mtrs. wide DP road was shown as access road. The learned counsel for the Respondent No.1 also drew this Court's attention to the fact that the original layout was sub-divided so as to carve out a separate plot bearing CTS No.104-A/4 which is an independent entity and therefore, the internal road which is in the original layout cannot be permitted to be used as access road without the permission of the Plaintiff No.1 Society. The learned counsel for the Respondent No.1 drew this Court's attention to the sanctioned layout as also hand made sketch prepared on the basis of the sanctioned layout wherein CTS No.104-A/4 is shown as outside the said layout. In so far as conveyance is concerned, it was the submission of the learned counsel that in terms of the MOFA the Plaintiff No.1 Society has a vested right to get conveyance.

9 Having heard the learned counsel for the parties, I have

considered the rival contentions. As indicated above, the bone of contention in the present matter is the use of the 11 mtrs. wide access road which is the internal road. In so far as the layout wherein the Plaintiff Society's building is situated is concerned, there can be no dispute about the fact that the original layout was sub-divided and pursuant to the said sub-division a separate plot bearing CTS No.104-A/4 was carved out, which as indicated herein above, is now outside the layout of the plot of the Plaintiff No.1 Society and towards the bottom on the eastern side. The Defendant No.2 who is proposing to develop the said plot claims through the Defendant No.1 who is the original Developer in so far as the building of the Plaintiff No.1 Society is concerned. The Defendant No.2 whilst applying for development of the said CTS No.104-A/4 had shown the access to the said plot from the 27 mtrs. wide DP road when the initial plans were submitted. It seems that thereafter the plans which were submitted were amended so as to show the access also from the 11 mtrs. wide internal road. Once the original layout was amended and a separate plot was carved out, then the Defendant No.2 could not have shown access from the 11 mtrs. wide internal road without the consent of the Plaintiff No.1 Society and the same would therefore militate against the provisions of Section 7 of the MOFA. It is also required to be noted that the Plaintiffs have also challenged vide prayer clause (a) the plan submitted by the Defendant No.2 to the extent it shows the access from the 11 mtrs. wide internal road, therefore it is not as if the plans have not been challenged. There is also no substance in the

contention that since there is no conveyance in favour of the Plaintiff No.1 Society it it was not entitled to file the suit. It is required to be noted that in terms of the MOFA and especially Section 11 thereof the Society has a vested right to get conveyance from the promoter/developer. In my view, therefore, the Trial Court was right in allowing the Notice of Motion in terms of prayer clause (a) as the same prejudicially affects the rights of the Plaintiff No.1 Society and its members in so far as the use of the 11 mtrs. wide internal road is concerned.

10 In that view of the matter, no case for interference is made out. The above Appeal from Order is accordingly dismissed. In view of the dismissal of the above Appeal from Order, Civil Application No.1511 of 2015 does not survive and the same to accordingly stand disposed of as such. Needless to state that the observations made in the instant order are only for the purposes of deciding the above Appeal from Order and the suit in question would be tried on its own merits and in accordance with law.

[R.M.SAVANT, J]