

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 758 OF 2015
WITH
CIVIL APPLICATION NO. 923 OF 2015

Alpana Apartments Coop Hsg Soc Ltd & Anr	...Appellants
<i>Versus</i>	
Alpana Builders & Ors	...Respondents

Mr Yahya Gogare, *with Ruchit Dave, i/b Vigil Juris, for the Appellant.*

Mr Rajiv Narula, *i/b Jhangiani Narula & Associates, for Respondent No. 2.*

Mrs Madhuri More, *for Respondent No. 4-MCGM.*

CORAM: G.S. PATEL, J

DATED: 21st July 2017

PC:-

1. Heard.

2. The Appeal is directed against an interim order dated 26th March 2015 that is now over two and half years old. This was the Plaintiffs' first Notice of Motion No. 3004 of 2009. In this, the Plaintiffs, a cooperative society, sought a restraint against Defendants Nos. 1 and 2 from putting up further construction on plot Nos. CTS 3195 to 3202 and 3207 at village Ghatkoper, Kirol,

Ghatkopar (West), Mumbai. In particular, the Plaintiffs wanted an injunction against the construction of a structure known as “C” wing.

3. The 1st Defendant contested the notice of motion and is contesting the suit. At the time of the Notice of Motion, “C” wing had proceeded up to the basement and ground floor. The Plaintiffs; case was that the FSI was fully utilized in the existing buildings and that this so-called “C” wing was without FSI and was not shown in the sanctioned plan or the sanctioned original lay-out or scheme. The Plaintiffs alleged that the Defendant/developer was using additional FSI in contravention of the provisions of the Maharashtra Ownership Flats Act to carry on construction of “C” wing.

4. Both sides were heard extensively and a large volume of material was examined by the learned Judge of the City Civil Court. He found *inter alia* that the 2nd Defendant’s construction was being done in a phased manner and that the Plaintiffs had given an undertaking that the balance FSI if any would vest in the developer. More importantly there was a specific finding returned that the layout plan of the suit property made it clear that the project envisaged the construction of a wings called “A”, “B” and “C” in phases, and that there was a full disclosure of construction of the building made to the purchasers from the builder at the time they entered into flat purchase agreements.

5. Mr Narula for the Respondents is at some pains to point out that from the sanctioned plans annexed at pages 180-A and 97, it is

evident that wing “C” is clearly shown and demarcated. In the plan at page 180-A it is shown in the drawing itself while in the plan at page 97 in the proforma statement in items 11 and 12 there is a clear mention of wing “C” and its location.

6. Having regard to these factors, in my view, the learned Judge of the City Civil Court was completely correct in his assessment that no *prima facie* case was made out for the grant of injunctive relief.

7. It seems that thereafter the Plaintiffs filed a second Notice of Motion No. 4302 of 2009 and asked for an order to ensure that the construction of this “C” wing be done in accordance with the Development Control Regulations. This Notice of Motion was disposed of before the present impugned order was passed on 19th March 2010 with a direction to the MCGM to make a report.

8. Before me in Court today the grievance is that neither the parking spaces nor the recreational areas have been provided. Mr Narula points out that the MCGM, the planning authority, has in its communication dated 9th February 2011 addressed to the Secretary of the Appellant society and pursuant to the directions of this Court, said that a demarcation has been carried out on site in accordance with the last amended plan and this shows that the recreational ground and stack parking are duly provided. In view of this, a statement across the bar that this is not demarcated is not one that I can accept.

9. It seems that when the Plaintiffs previously obtained an interim order on 5th July 2014 *ex parte*, Appeal from Order No. 1223 of 2014 was filed by the developer. On 6th February 2015, this Court directed the Notice of Motion be re-heard and granted an ad-interim relief restraining the original Defendants Nos. 1 and 2 from disposing of, parting with possession or creating third party rights in respect of the construction then from the first to ninth floor in wing “C”. In other words, the 1st and 2nd Defendants were allowed to carry construction but not to sell the units in wing “C”. There was even an earlier order by which the developer agreed not to claim any equities in the construction but that was clearly superseded by the order dated 6th February 2015.

10. The question, therefore, today is whether now that the Plaintiffs’ Notice of Motion has been dismissed, and there being no substance in this Appeal, there is any ground to allow the continuance of the previous interim/ad-interim order of 6th February 2015 restraining the same of the premises in wing “C” pending the final disposal of the suit. In the suit, written statements have been filed. It is at the stage of framing issues. Having regard to the finding of the learned Judge, with which I am entirely in agreement having regard to the considerable material on record, and especially the sanctioned plans that are shown to me, I do not think that there is any ground made out to continue the ad-interim order. On any assessment of a *prima facie* case, the balance of convenience and irreparable injury a finding must be returned in favour of Respondents Nos. 1 and 2/original Defendants Nos. 1 and 2.

11. The appeal is dismissed. There will, however, be no order as to costs.

12. The Trial Court is requested to list the suit for framing issues at the earliest. Parties will appear before the Trial Court on 21st August 2017 and obtain the necessary directions for listing the matter for framing issues and thereafter for filing evidence and for trial.

13. The Civil Application does not survive and disposed of as infructuous.

(G. S. PATEL, J)