

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

CONTEMPT PETITION NO. 58 OF 2010

AND

**FIRST APPEAL NO. 116 OF 2017
WITH
CIVIL APPLICATION NO. 4934 OF 2016**

AND

FIRST APPEAL NO. 117 OF 2017

M/s.Parag Corporation	...Petitioner
Vs.	
Gango Co-operative Housing Society Ltd. & Ors.	...Respondents

AND

**CIVIL APPLICATION NO. 358 OF 2017
IN
FIRST APPEAL NO. 117 OF 2017**

M/s.Parag Corporation	...Petitioner
Vs.	
Gango Co-operative Housing Society Ltd. & Ors.	...Respondents/Applicants

Mr.Prasad Dhakephalkar, Senior Advocate with Vivek Khemka I/b. Ashvin S. Bhalekar & Abdetaiyeb Q. Motiwala for Petitioner in contempt petition and Appellant in First Appeals.

Ms.Sumedha Rao for Respondent No.1 in First Appeals 116/2017 and 117/2017.

Ms.Madhuri Bhoir for Respondent No.15 in CP 58/2010 and Respondent No.2 in FA 117/2017, 117/2017.

CORAM : S.C. GUPTE, J.

28 APRIL 2017

P.C. :

Heard learned Counsel for the parties.

First Appeal Nos.116 of 2017 and 117 of 2017 :

2 The dispute between the parties concerns use of additional FSI in respect of the suit property.

2.1. Respondent No.1 society (of which Respondent Nos.2 to 14 are members) is the owner of the suit property. It is the case of the Respondent society (original Plaintiff in L.C. Suit No.1092/2002 filed before the City Civil Court at Bombay) that by a Package Deal Agreement dated 20 July 1983, the Petitioner herein (the developer, who is original Defendant No.2 to L.C.Suit No.1092/2002) agreed to sell to the Plaintiff society the suit property together with three completed buildings at or for a price mentioned in the agreement. This agreement was executed on behalf of the Plaintiff by its Chief Promoters.

2.2 Originally, there was a suit in respect of this property by the Plaintiff before this court, being original side Suit No.1272/1984. This suit came to be settled by the parties by filing of consent terms. The consent terms were accepted by this court and a decree was passed in terms thereof. This decree operated as a conveyance of the suit property in favour of the Plaintiff society. One of the terms of the consent decree mentioned that there was a likelihood of additional FSI being made available in respect of the suit property. As and when such additional FSI was made available, the developer was entitled to construct additional tenements on the new building or buildings in accordance with the sanctioned plans either by extending the existing floors or by constructing additional floors on the same terms and conditions as contained in the Package Deal Agreement.

The Plaintiff was bound to purchase this additional construction on the same terms and conditions as contained in the Package Deal Agreement. In the event of its failing to pay for this construction, the developer was at liberty to sell such additional FSI and / or additional tenements constructed by use thereof to third parties and in such event, the Plaintiff society was bound to admit such parties as additional members of the society.

2.3 After the consent decree was passed, the society got their name entered into the property register card as holders of the said land. After this consent decree, further plans were submitted in the name of the Plaintiff society as owners for additional construction and the developer started such construction. The construction was, however, left incomplete, despite passage of about three years and nine months. It is the case of the Plaintiff society that, in the premises, the Plaintiff society terminated the Package Deal Agreement between the parties. It is their case that this termination was deemed to be accepted by the developer. The Plaintiff society, in the premises, resolved in its AGM held on 27 July 1997 to carry out the additional construction itself in such way that each member of the Plaintiff would get one additional room attached to his or her flat. The Plaintiff accordingly proceeded to have its layout plan approved by the Municipal Corporation on 19 January 1999. Due to objections raised by the developer, however, the Municipal Corporation refused to sanction the Plaintiff's construction plan and issue commencement certificate. The Plaintiff then filed a writ petition before this court, being Writ Petition No.605 of 2001 seeking requisite orders for sanction of plans. The intervention application of the developer in that petition was rejected by this court.

2.4 In the backdrop of these facts, the present suit was filed by the Plaintiff society, when the Municipal Corporation entertained the construction plan submitted by the developer as a constituted attorney of the Plaintiff by use of the additional F.S.I. It was the case of the Plaintiff society that the developer was not entitled to represent the Plaintiff or file or submit any plan or proposal in the name of the Plaintiff or in its own name after termination of the Package Deal Agreement. It was their grievance that despite not being so entitled, the developer had proceeded to submit plans and the same were illegally and unauthorizedly sanctioned by the MCGM. It was their case that the developer was not entitled to carry on any construction on the suit land in pursuance of the approved plan and that any such construction would amount to encroachment upon the Plaintiff's land. The Plaintiff, in the premises, sought a perpetual injunction restraining the developer from carrying out any work of development or putting up any construction on the suit property. The developer filed a counter-claim in this suit seeking a mandatory injunction to permit him to carry out the construction by utilizing the additional F.S.I. and restraining the Plaintiff from using the F.S.I.

2.5 By a decree passed on 28 September 2016, the City Civil Court at Bombay decreed the Plaintiff's suit holding that the construction plan submitted by the developer and sanctioned by the Municipal Corporation of Greater Mumbai was illegal and bad in law and not binding on the Plaintiff and restraining the developer by permanent injunction from carrying out any construction on the suit property in pursuance of such approved construction plan. The counter claim of the developer was dismissed with costs. This order is challenged by the developer in the

present two first appeals.

3 On these facts, the first appeals deserve to be considered at length. Hence, **Admit.**

Contempt Petition No.58 of 2010 :

4 This contempt petition alleges breach or disobedience of an order passed by this court on 29 August 2009 in a civil application filed in an appeal from order pending the suit herein.

5 By this order dated 29 August 2009, passed in an appeal from an order passed in the Plaintiff's notice of motion in the suit, this court ordered status quo to be maintained in respect of the suit property as of the date of the order. This status quo was operative during the pendency of the suit and has since been continued by this court by an ad-interim order passed in the present first appeals on a civil application by the Appellant (Civil Application No.835/2009).

6 The case of the Petitioner is that this status quo has been breached by the Respondent society and its members. The Petitioner submits that after the status quo order was passed by this court on 29 August 2009, the Respondent hurriedly commenced construction of work during the weekend of 5th and 6th December 2009 and carried out further construction on the suit property. It is submitted that not only was the construction work carried out, which was *inter alia* by way of extension to the existing flats of members of the Respondent society, but that after creating openings through their respective flats, the Respondents actually

started making use of this additional construction. The Petitioner thus claims that the Respondents are in breach of the status quo order passed on 29 August 2009.

7 In reply, it is submitted by the Respondents that after the filing of the suit and obtaining orders from the City Civil Court at Bombay, there was no embargo on the construction to be carried out by the society on the suit property. It is submitted that for the first time, status quo was ordered by this court on 29 August 2009. It is submitted that the work of additional construction on the suit property began in right earnest in February 2009, though it actually commenced even earlier to that. The additional construction presently standing on the suit property was completed till the passing of the status quo order on 29 August 2009.

8 It is borne out by record that the additional construction was commenced in the month of April 2006. The plan for this construction was sanctioned sometime in April 2005. The plinth was completed by February 2007. There is a plinth completion certificate issued by the Consulting Civil Structural Engineer. After completion of plinth, the Municipal Corporation granted further commencement certificate for construction above the plinth. Nothing is placed on record to indicate that the additional construction, which exists at the site, was made after 29 August 2009 and not between February 2009 and 29 August 2009. There is, thus, no case to proceed in the contempt jurisdiction of this court against the Respondents / contemnors.

9 The contempt petition is, accordingly, dismissed.

Civil Application Nos.4934 of 2016 and 358 of 2017 :

10 We may now consider the civil application filed by the Appellant developer for continuation of the status quo order operating in the matter, namely, Civil Application No.4934 of 2016, and the civil application filed by the Plaintiff society, namely, Civil Application No.358/2017, for varying that status quo order by permitting the society to carry out and complete the construction. From the photographs relied upon by both parties, it is clear that the construction has already been substantially carried out. Insofar as extensions of the existing flats of the members of the Plaintiff society are concerned, no useful purpose would be served if the status quo order is continued in the present form and the construction at site is allowed to stand in its present condition. The civil work, including brick work of the extensions, has already been carried out. There are openings made through the respective flats to which this additional construction forms an extension. The balance of convenience is clearly in favour of the society being allowed to complete the remaining construction so that the extensions can be put to use by the members of the Plaintiff society. As far as the Appellant is concerned, a suitable protection can be ordered in terms of a monetary deposit to be made by the Plaintiff society and making the completion of additional construction and use thereof by the members of the Plaintiff society subject to the final outcome of the first appeals without allowing the society and its members to claim any equity towards the same. This court, by its earlier order dated 9 February 2017, had sought response from the Plaintiff society as to whether they would be willing to deposit a sum of Rs.5 lakhs per member, who is getting such extension, as an ad-hoc compensation to be deposited in court with a view to permit them to complete the work and start making

use of the additional construction.

11 Ms.Sumedha Rao, learned Counsel for the Plaintiff society, after taking instructions from her clients, submits that from whatever sum the members of the Plaintiff are in a position to raise, she can offer to deposit a sum of Rs.90 lakhs as an ad-hoc amount to be kept aside towards protective relief to the Appellant. Learned Counsel also submits that her clients are willing to subject themselves to the outcome of the present first appeals and will not claim any equity as a result of being allowed to complete the construction and make use of the additional construction. She also submits that as and when the society's members create any third party rights in respect of these flats, including additional construction, suitable undertakings will be sought from such third parties to subject themselves to the rigour of the undertakings and statements recorded herein.

12 In the peculiar facts and circumstances of the case, this court is of the view that setting apart of this amount coupled with the undertakings given on the part of the society and an arrangement as to the two additional flats in Wing 'C' referred to hereinbelow, shall be an adequate interim protection as far as the Appellant is concerned.

13 The status quo order granted earlier on Civil Application No.4934 of 2016 is, accordingly, varied by permitting the society to complete the existing construction undertaken by the society and to use such additional construction through the respective members. This variation shall be subject to the final orders that may be passed in these First Appeals. The society and its members shall not claim any equity for having carried out and completed and thereafter used the additional

construction. As and when any member of the society creates any third party rights in respect of his or her flat, suitable undertakings shall be obtained by the member and the society from such third party to subject itself to this order.

13 It is made clear that this permission to further construct on the suit property, that is to say, complete the existing construction undertaken by the society, shall only operate *qua* the extensions proposed to the existing flats of the members of the society and not regarding the two additional flats being constructed in Wing 'C' of the society's building. As far as the two additional flats in Wing 'C' are concerned, the society shall not only maintain status quo in respect of construction of the same, but shall also not create any third party right with respect to the same. The amount of Rs.90 lakhs shall be deposited by the Respondent society within four weeks. This amount shall be invested by the Registry in Fixed Deposit/s of a Nationalized Bank initially for a period of two years and thereafter, to be renewed from time to time until further orders that may be passed in the First Appeals.

14 The present status quo order shall stand substituted by this order only after the Respondent society deposits in this court the sum of Rs.90 lakhs in accordance with this order.

15 Civil Application Nos.1358/2017 and 4934/2016 are disposed of in the above terms.

(S.C. GUPTE, J.)