

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

**WRIT PETITION No. 3731 OF 2018**

M/s.Noble Construction & Ors.

...Petitioners

Versus

Suryakant Sharadprasad Sharma & Ors.

...Respondents

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Mr. Sanjay Jain a/w. Ms. Tejashree Parab i/b. Rajesh S. Sharma and Associates for the Petitioners.

Mr. Surel Shah a/w. Mr. A.K. Kharcor i/b. Ashoka Law Firm for Respondent No. 1.

Mr. Pradeep Patil for Respondent No. 3- BMC.

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**CORAM: MRS.MRIDULA BHATKAR, J.  
DATED: JULY 19, 2018**

**P.C. :**

1. Petitioner No.1 is a builder/ developer and petitioner Nos. 2 and 3 are the partners, who are the original defendant Nos. 1 to 3. Respondent No.1 is the original plaintiff. Respondent No.2 is the original defendant No.4 i.e., Co-operative Housing Society.

2. The original plaintiff is the owner of the suit plot i.e., land bearing Plot No.4, Survey No. 44, Hissa No.5, CTS No. 376 of

Village Kondivita, Taluka Andheri, Mumbai Suburban District. He has filed a Suit No. 658 of 2008 for permanent injunction that the defendants shall not carry out construction activity on the suit plot and also not to sell, transfer or dispossess in any manner with the reserved rights or any other benefit arising out of the suit plot and also prayed that the Municipal Corporation i.e., defendant No. 5 to cancel and terminate the sanctioned plans put up by defendant Nos. 1 to 4 and other reliefs pursuant to these main reliefs were sought. The petitioners/ defendant Nos. 1 to 3 took out Notice of Motion No. 2595 of 2017 praying that “No Cross” order passed by the learned Judge of the trial Court on 18<sup>th</sup> July, 2013 in the said suit be set aside and the second prayer was made that defendant Nos. 1 to 3 be permitted to file examination in chief alongwith list of documents. The said Notice of Motion was resisted by respondent No.1/ original plaintiff mainly on the ground of delay in making such application so also this issue has already been decided by this Court in the similar Notice of Motion No. 643 of 2014, which was taken out by defendant No. 4 i.e.,society. After considering both the sides, the learned Civil Judge, City Civil Court, Borivali Div. Dindoshi, Mumbai by order dated 5<sup>th</sup> January, 2018

dismissed Notice of Motion No. 2595 of 2017 with costs of Rs. 3000/- Hence, this Writ Petition.

3. The learned Counsel for the petitioners has submitted that petitioner No.1 is a builder/developer, who has constructed the building on the suit plot. He has further submitted that earlier the building was standing on some other plot, however, other CTS number was mentioned and thus, there is confusion. The original plaintiff is taking advantage of this error and is opposing reconstruction of the building of the society i.e., defendant No. 4. He has further submitted that earlier the building of the society i.e., defendant No.4 was standing on the suit plot, but it was in dilapidated condition so it was demolished and contract of development was given to the present petitioners. The present petitioners had entered into an Agreement with the flat owners of the building and also the flat purchasers. Now, the building is constructed. The plaintiffs' suit is pending. He has further submitted that in the said suit, the society i.e., defendant No.4 is the main contesting party and no written statement order was passed against the society. The said order was challenged by the

society before this Court in Writ Petition No. 2286 of 2016. The order of the trial Court was upheld and it was taken up to the Supreme Court and it was maintained. He has further submitted that the petitioners are also directly affected parties, as the original plaintiff has pleaded that the sanction given to the plans is shame and the building is unauthorized and, therefore, the petitioners want to file written statement and also want to lead evidence. He has further submitted that in the earlier Notice of Motion, which was taken out by the society i.e., defendant No.4, they did not ask relief of allowing them to lead evidence. In fact, that issue was not before the High Court or Supreme Court. However, the petitioners are not pressing the prayer that “No Cross” order is to be set aside, but they have limited prayer that they be allowed to lead evidence. He has relied on the judgment of the Supreme Court in the case of *Maria Margarida Sequeria Fernandes and Others Versus Erasmo Jack de Sequeria(Dead) through L.Rs.* reported in *(2012) 5 SCC 370*.

4. The learned Counsel for respondent No.1 has submitted that the petitioners have not come to the Court with clean hands. He

has further submitted that the petitioners have suppressed the order dated 17<sup>th</sup> October, 2016 passed by this Court in Writ Petition No. 2286 of 2016, which was between the society i.e. defendant No.4 and the original plaintiff. He has relied on the observations made by the learned Single Judge of this Court in paragraph Nos. 5 and 7. He has further submitted that the said order was confirmed by the Supreme Court. Now, the petitioners are seeking similar reliefs which have no merits and, therefore, their Notice of Motion was rightly rejected by the trial Court. He has further submitted that there was an inordinate delay on the part of the petitioners, who have expressed very adamant attitude towards the entire litigation by not filing written statement. He has further submitted that the petitioners have mentioned in their affidavit that initially they were not interested in litigation because it was only against the society i.e., defendant No.4. However, one of the flat owners has threatened the petitioners that they will be held responsible under RERA. Hence, they have filed this Petition.

5. Heard submissions. Perused relevant orders. It is true that respondent No.2 i.e., society earlier moved Notice of Motion

No. 643 of 2014. In the said Notice of Motion, in fact, the society only prayed for setting aside “No WS” order and there was no prayer of allowing defendant No.4 to lead evidence. Not allowing to file written statement is one cause of action and seeking permission to lead evidence is another cause of action. While dealing with Notice of Motion No. 643 of 2014, it is true that this Court in its order dated 17<sup>th</sup> October, 2016 has observed that the Civil Court has rightly taken strict view. The learned Single Judge of this Court has observed as under :

*“5. ....It may be that in a given cases there could be a genuine reason, but that just lost track of the matter, cannot be a justifiable ground. As far as prejudice to the Petitioner is concerned, due to passage of time, it is in fact the Plaintiff who stands prejudiced. The Petitioner and the Developer have gone ahead and constructed the building and the members of the Petitioner society are occupying the flats. The only question, therefore, is challenge to the plans sanctioned by the Municipal Corporation....”*

The said order was confirmed by the Supreme Court.

6. However, it is to be noted that in the said Notice of Motion the relief of leading evidence was not asked for.

7. In the present case, the petitioners are not pressing the relief of setting aside “No Cross” order, as there is order of this Court which is also applicable to the case of the petitioners. There is conditional prayer in Notice of Motion No. 2595 of 2017 that they be allowed to lead evidence.

8. In the case of **Maria Margarida Sequeria Fernandes and Others** (*supra*), the Supreme Court has held as under :

*“33. The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire creditability only when people will be convinced that justice is based on the foundation of the truth”.*

9. Let me advert to the chronology of the events. It is a suit of 2008 seeking injunction of different types. The petitioners/defendant Nos. 1 to 3 did not file written statement so “No Cross” order was passed. On 22<sup>nd</sup> January 2014, the matter was fixed for

arguments, as the petitioners remained absent. However, defendant No.4 in between challenged the order passed in Notice of Motion No.643 of 2014 before this Court and the Supreme Court and at that time, this Court has stayed the entire proceedings. It remained stayed till February, 2017 and in July 2017, the present petitioners moved Notice of Motion No. 2595 of 2017 seeking permission to lead evidence. Thus, considering this chronology though the matter was fixed for arguments in January 2014, it did not proceed till 2017 and for that purpose, the present petitioners cannot be held responsible.

10. It is to be noted that in this matter, the evidence of the plaintiff is not yet recorded. Only the issues were framed. Considering this stage of the matter and in view of the nature of the relief claimed by the petitioners, I am of the view that the petitioners/ defendant Nos. 1 to 3 are required to lead evidence, as the relief in respect of genuineness of the sanctioned plans is raised by the petitioners. Though there is a delay and though defendant Nos. 1 to 3 were found adamant and were negligent, in the interest of justice and in all fairness, I am of the view that defendant Nos. 1

to 3 are to be allowed to lead evidence in the trial Court. All the best evidence should come before the Court so the learned Judge of the trial Court is able to get correct prospect of the matter and can reach to the truth by adjudicating the issues effectively in a better way. However, for negligence and delay, the petitioners/defendant Nos. 1 to 3 are directed to pay an amount of Rs. 40,000/- to respondent No.1/ original plaintiff on or before 23<sup>rd</sup> July, 2018. The trial Court to expedite the matter, hear and conclude the suit till 30<sup>th</sup> November, 2018. The parties to appear before the trial Court on 23<sup>rd</sup> July, 2018 at 11.00 a.m. Parties shall not take any adjournment. Parties to cooperate.

11. Writ Petition is allowed and is accordingly disposed of.

**(MRIDULA BHATKAR, J.)**