

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

**APPEAL FROM ORDER NO. 327 OF 2018
WITH
CIVIL APPLICATION NO. 430 OF 2018
IN
APPEAL FROM ORDER NO. 327 OF 2018**

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|-----|--------------------------------|---|
| 1. | Mr.Ranjit B. Pillai |] |
| | Residing at Flat No.602, |] |
| 2. | Mr.Parmeshwar R. Gupta |] |
| | Residing at flat No.702, |] |
| 3. | Mr.Dharamshi Dubariya, |] |
| | Residing at flat No.703, |] |
| 4. | Mr.Sadabahadur Gupta |] |
| | Residing at flat No.802, |] |
| 5. | Mr.Narsimhalu R. Chirabonia |] |
| | Residing at flat No.803, |] |
| 6. | Mr.Dharmendra Singh |] |
| | Residing at flat No.901, |] |
| 7. | Mr.Nischal Dewoolkar |] |
| | at Flat No.902 |] |
| 8. | Mr.Raghupati R. Chirabonia |] |
| | residing at flat No.903 |] |
| 9. | Mr.Ulhas G. More |] |
| | residing at flat No.1001, |] |
| 10. | Mrs.Jyotsna S. Sawant |] |
| | residing at flat No.1002, |] |
| 11. | Mr.Sadananda Kallaja |] |
| | residing at flat No.1101, |] |
| 12. | Mrs.Hansa A. Patel, |] |
| | residing at flat No.1102/1103, |] |
| 13. | Mr.Raghu A. Dubariya |] |
| | at flat No.1201, |] |
| 14. | Mr.Balan J. Sawant |] |
| | residing at flat No.1202, |] |

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| 15. Mr.Ganesh N. Ravariya |] | |
| residing at flat No.1203, |] | |
| |] | |
| All having address at Siddharth Nagar, |] | |
| Abhiman CHS Ltd., Building No.25, |] | |
| Siddharth Nagar – IV, Near Vivek |] | ...Appellants |
| College, Goregaon, Goregaon (W), |] | (Original |
| Mumbai 400 062. |] | Plaintiffs) |

Versus

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|--|---|
| 1. Mumbai Shelter Housing Development |] |
| Pvt. Ltd. |] |
| A company registered under the |] |
| Companies Act, 1956, having its |] |
| registered office at 103, Kalpaka C.H.S. |] |
| Ltd., Building No.1, Road No.16, |] |
| Siddharth Nagar-IV, |] |
| Goregaon (West), Mumbai – 400 062. |] |
| 2. Mangesh Y. Wagle |] |
| 3. Ganesh K. Sane |] |
| Both adult Indian Inhabitant, |] |
| Director of M/s. Mumbai Shelter |] |
| Housing Development Corporation Pvt. |] |
| Ltd., |] |
| at 103, Kalpaka C.H.S. Ltd., Building |] |
| No.1, |] |
| Road No.16, Siddharth Nagar -IV, |] |
| Goregaon (West), Mumbai 400 062. |] |

AND

- | | |
|---|---|
| 8, Andheri Ekta C.H.S. Ltd., |] |
| Four Bungalows, Andheri (West), |] |
| Mumbai – 400 053. |] |
| 4. Siddharth Nagar 'Abhiman' Co-operative |] |
| Housing Society Ltd. |] |
| Through its Secretary/Chairman |] |
| A society registered under the provision |] |

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|---|---|-------------|
| of Maharashtra Co-operative Societies |] | |
| Act, 1960 having office address at |] | |
| Building No.25, Siddharth Nagar-IV, |] | |
| Near Vivek College, Goregaon (West), |] | |
| Mumbai – 400 062, |] | |
| 5. Municipal Corporation of Greater |] | |
| Mumbai |] | |
| Having their office at Municipal |] | |
| Corporation Building, Mahapalia Marg, |] | |
| Mumbai – 400 001. |] | |
| 6. Municipal Corporation of Greater |] | |
| Mumbai |] | |
| Assistant Engineer Building and Factory |] | Respondents |
| P South Ward Office, S.V. Road, |] | (Org. |
| Goregaon (West), Mumbai – 400 104 |] | Defendants) |

Mr.Mayur Khandeparkar, Advocate a/w. Mr.Omkar Khanvilkar, Ms. Drasti Jain, Ms. Priyanka Rathi, Advocates for appellants.

Mr.Vijay Thorat, Senior Advocate I//b Lancelot Lewis for respondent Nos.1 to 3.

Mrs.Madhuri More, Advocate for respondent Nos.6 and 7- MCGM.

Mr.Vishal Kanade, Advocate I/b Sanjay Shivram Gawde, Advocate for respective No.4.

CORAM : A.S. CHANDURKAR, J.
ARGUMENTS WERE HEARD ON : 4TH DECEMBER 2018
JUDGMENT PRONOUNCED ON : 10TH DECEMBER 2018

JUDGMENT :

1 This appeal has been filed by the original plaintiffs who are aggrieved by the order passed by the trial Court rejecting the Notice of Motion as filed and refusing to grant the interim prayers as prayed for.

2 The case of the plaintiffs in brief is that they are members of the defendant No.4-Housing Society. That society is the owner and possessor of the building in question. In view of the dilapidated condition of that building, the housing society decided to re-develop the same. The defendant Nos.1 to 3 were accordingly appointed for the purposes of re-development and development agreement dated 21st October 2007 as rectified on 9th July 2008 was executed by the Housing Society with the defendant No.1. On the basis of Agreement of Sale dated 7th August 2013, the plaintiffs' claimed to have become owners of their respective flats in the said building. Initially, the Commencement Certificate was granted for the building having 13 floors. Despite completing that construction, the defendant Nos.1 to 3 did not obtain the Occupation Certificate. It is the grievance of the plaintiffs that despite making all payments, they were not handed over possession. After the old tenants started residing in the flats allotted to them, the plaintiffs took possession of their respective flats. It was found that the plaintiffs were given lesser carpet area than the area that was agreed to be given. Similarly, a dispute was sought to be raised as to their membership with regard to the Housing Society. It is also the case of the plaintiffs that various obligations that were required to be complied with by the defendant No.1 under the provisions of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale,

Management and Transfer) Act, 1963 (for short, 'the said Act') were not complied with and construction in excess of what was permissible in law was being undertaken. Suit was accordingly filed praying therein that the Commencement Certificate granted by the defendant No.5 in favour of defendant Nos.1 to 3 be cancelled and the said defendant Nos.1 to 3 be directed to procure an Occupation Certificate in respect of defendant No.4-Housing Society. A further prayer for handing over the letter of possession to the plaintiffs was also made.

3 Along with the suit, the plaintiffs filed Notice of Motion praying therein that by way of temporary injunction, the defendant Nos.1 to 3 be restrained from making any further construction on the upper floor of the building in question as Completion Certificate had been granted upto the 13th floor.

4 The defendant Nos.1 to 3 filed their reply to the aforesaid Notice of Motion. The manner in which the Development Agreement with the Housing Society was entered into was narrated. It was pleaded that the Commencement Certificate as issued by the defendant No.5, was for construction upto the 16th floor. It was stated that on the request made by the plaintiffs to give them fit-out possession, they were put in possession. All the plaintiffs were thus in occupation of their respective flats. In so far

as the prayer that the plaintiffs should not be dispossessed from the suit property was concerned, the said aspect was denied and it was stated that no such attempt was ever made by the said defendants to dispossess the plaintiffs. It was thus prayed that the plaintiffs were not entitled for any interim relief.

5 The trial Court, after hearing both the sides, found that the plaintiffs had failed to make out any *prima-facie* case in their favour. It found that the plaintiffs were already in occupation of their respective flats and that if it was found that any additional floor was occupied by any person without obtaining Occupation Certificate, the same could be regularized by charging penalty. The trial Court further held that the decision in ***Jayantilal Investments Vs. Madhuvihar Co-op. Housing Society and Others***¹ did not assist the case of the plaintiffs. On that basis, the trial Court dismissed the Notice of Motion.

6 Being aggrieved the plaintiffs have filed the present appeal.

7 Shri Mayur Khandeparkar, learned counsel for the appellants submitted that the trial Court was not justified in dismissing the Notice of Motion. According to him, the respondent no.1 was not complying with the

1 (2007) 9 SCC 220

obligations which was required to be satisfied under provisions of the said Act. Referring to the provisions of Section 7 of the said Act, it was submitted that the Clause No.15(XVI) in the Agreement between the parties was an omnibus 365 clause and it did not amount to giving informed consent as contemplated by law. Reference was made to the decision in *Eternia Co-operative Housing Society Ltd. Vs. Lakeview Developers* ² in that regard. It was then submitted that the judgment of the Hon'ble Supreme Court in *Jayantilal Investments* (Supra) was wrongly distinguished by the trial Court thereby causing prejudice to the legal rights of the appellants. In terms of the provisions of Section 7 of the said Act, the additional construction beyond the 13th floor could not have been permitted. It was further submitted that the entire consideration of the flats in question was paid by the appellants but there was a shortfall in the total area of the flats that were allotted to the appellants. Though a dispute with regard to the membership of the appellants in the defendant No.4-Housing Society was sought to be raised in proceedings under the Maharashtra Co-operative Housing Societies Act, 1960, orders had been passed in favour of the appellants. It was thus submitted that the trial Court ought to have granted prayer clause (a) in the Notice of Motion.

8 On the other hand, Shri Vijay Thorat, learned Senior Counsel for the

2 (2015) 5 Bom. CR 680

respondent Nos.1 to 3 supported the impugned order. It was submitted that the Completion Certificate as granted till the 16th floor was in the name of the Housing Society. The land in question belonged to Maharashtra Housing and Area Development Authority (MHADA) and one of the conditions imposed was that the existing tenants should be accommodated in the newly constructed building. It was submitted that the plaintiffs who had agreements in their favour from the saleable component of the area took possession of their respective flats without obtaining the consent of the respondent No.1. Moreover, the existing tenants had not joined the plaintiffs in the present suit and therefore in the light of the fact that the plaintiffs were already in possession of their respective flats/structures, there was no *prima-facie* case in their favour. It was further submitted that presently, the Completion Certificate upto the 16th floors stands granted and therefore, the legal rights of the Housing Society could not be affected by granting any injunction to carry out the construction beyond the 13th floor. It was further submitted that consent under Section 7 of the said Act was not necessary in view of the provisions of Section 7A of that Act. The trial Court, after considering the entire material on record, rightly refused to grant any injunction. Moreover, the construction, if any would always be subject to outcome of the suit and hence there was no justification for restraining the respondent Nos.1 to 3 from completing the

construction.

Shri Vishal Kanade, learned counsel for respondent No.4 supported the aforesaid contentions. According to him, the members of the Housing Society had no grievance of the nature of construction as sought to be raised by the plaintiffs. The flats, in which the plaintiffs had interest, were the flats from the saleable component of the area and in view of Clause No.15(XVI) of their agreements, they were not entitled for any benefit under the plans as modified. It was thus submitted that there is no reason to interfere with the impugned order.

9 I have heard the learned counsel for the parties at length and I have given due consideration to their respective submissions. Though in the Notice of Motion there were two interim prayers made, the defendants in their reply had made it clear that they had no intention to forcibly dispossess the plaintiffs. Thus, the only prayer that is contested between the parties is prayer (a) in the Notice of Motion seeking to restrain the defendant Nos.1 to 3 from constructing the upper floors of the building in question or from doing any other act in furtherance thereof. It is not in dispute that all the plaintiffs are in possession of their respective flats which fact is also not denied by the defendants. Initially, permission was granted to the defendant Nos.1 to 3 to undertake construction upto the 13th floor of the building in question. It is to be noted that thereafter on 11th

October 2017, a further Commencement Certificate has been issued by the Municipal Corporation on the basis of which permission of construction upto the 16th floor has been granted. That permission is valid for a period of one year. The construction in question is being undertaken by the defendant No.1 pursuant to the Agreement of Re-development with the defendant No.4. The documents on record further indicate that grant of pro-rata FSI has been made admissible only to the members of the defendant No.4-Housing Society and the plaintiffs under the Agreement of Sale in their favour, are not entitled to claim any such benefit as per Clause No.15(XVI) of their agreements. Another relevant aspect that is to be noted is that the tenants, who were occupying the building prior to its rehabilitation, are members of the defendant No.4-Housing Society in the suit. They have not joined hands with the present plaintiffs and they have supported the case of the defendant Nos.1 to 3. In their reply to the Notice of Motion as filed before the trial Court, it has been stated that none of the members of the defendant No.4-Housing Society had any objection to the construction being erected by the defendant Nos.1 to 3.

10 Though initially the Commencement Certificate was granted upto the 13th floor, further permission stands granted on 11th October 2017 as regards construction upto the 16th floor. Presently each plaintiff is

occupying his/her respective flat in terms of Agreement of Sale executed by defendant No.1. There are no equities in favour of the plaintiffs so as to restrain further construction above the 13th floor especially when the Municipal Corporation has issued the necessary Commencement Certificate. An injunction restraining completion of the construction would naturally result in financial repercussions to the defendant Nos.1 to 3. On the other hand, the aspect of alleged deficiencies in the area of the flats given to each plaintiff would be a matter to be considered after the parties lead evidence. The balance of convenience lies in favour of the defendants and irreparable loss would be caused to the defendants rather than the plaintiffs.

11 Though considerable emphasis was sought to be laid upon the provisions of Section 7 of the said Act on behalf of the plaintiffs and on the provisions of Section 7A of the said Act by the defendants, at this *prima-facie* stage, prior to the evidence being led, it would not be possible to record any finding on the aspect as to whether Clause 15(XVI) of the agreements between the plaintiffs and the defendant No.1 amounts to an informed consent or the same falls foul of the provisions of the said Act in the light of the decisions relied upon in that regard. At this *prima-facie* stage, existence of that Clause in the plaintiffs' agreements has material bearing. On the basis of the evidence as would be recorded, the trial Court

while deciding the suit, can take into consideration those aspects and decide the suit accordingly.

12 It is thus found that the trial Court, while taking a *prima-facie* view of the matter did not commit any error in refusing to grant any relief in the Notice of Motion.

13 By clarifying that the observations made in the impugned order as well as the observations made in the present order are only for deciding the prayer for grant of temporary injunction and by directing that the suit shall be decided on its merits and in accordance with law, the Appeal from Order stands dismissed. As a result, pending civil applications also disposed of.

(A.S. CHANDURKAR, J.)