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

WRIT PETITION NO. 13611 OF 2018

Mr Jose Thomas & Anr.

...Petitioners

vs

Mr Suresh Padansi Rajda & Ors.

...Respondents

.....

Mr Yogesh R. Mehta for the Petitioners.

Mr Kunal Bhanage a/w Janhavi Karnik for Respondent Nos.1,2,4,6 to 19.

.....

**CORAM : B.P.COLABAWALLA, J.
DECEMBER 18, 2018.**

P.C. :

This Writ Petition challenges the order dated 26th October, 2018 passed by the learned District Judge in Miscellaneous Civil Appeal No. 233 of 2018 and the order dated 14th June, 2017 passed by the Trial Court below Exh.5 in Regular Civil Suit No. 701 of 2017.

2 Regular Civil Suit No. 701 of 2017 was filed by the Plaintiffs (the Respondents herein) seeking a declaration that the Defendants (the Petitioners herein) have no right to change the use of Row House Nos. 4 and 4A from residential to commercial. A permanent injunction was also sought restraining the Defendants, their servants, agents or anybody claiming through them from using Row House Nos.4 and 4A for commercial purposes.

3 In this suit, the Plaintiffs filed an application for injunction (Exh.5). The Trial Court whilst considering this application, came to a conclusion that the Plaintiffs had made out a *prima facie* case for grant of an injunction. It is in these circumstances that the Trial Court restrained the Defendants from using Row House Nos.4 and 4A for any commercial purpose till the decision of the suit.

4 Being aggrieved by this order of the Trial Court, the Defendants approached the Court of the District Judge, Pune (Appeal Court) by filing Miscellaneous Civil Appeal No. 233 of 2018. The Appeal Court, after giving detailed reasoning, dismissed the appeal filed by the Defendants and confirmed the order of the Trial Court. It is aggrieved by these two orders, that the present Writ Petition has been filed.

5 The learned advocate appearing on behalf of the Petitioners (original Defendants) submitted that the Defendants could not have been restrained from running the pre-school in the suit premises considering that the Development Control and Promotion Regulations for Pune Municipal Corporation (DCPR-2017), and specifically regulation 16.1.1(viii) thereof, permit running of primary and secondary schools including students hostel in individual

buildings in residential zone R-1. He submitted that these DCPR-2017 came into effect from 5th January, 2017. This being the case, the Defendants could not have been restrained from running a pre-school in Row House Nos.4 and 4A respectively. Learned advocate submitted that once the D.C.PR-2017 permitted the running of a pre-school, then notwithstanding anything contained in any undertaking that the Defendants or their predecessor might have been given, or any deed of declaration that was entered into would not bind the Defendants. He submitted that any restriction that was agreed to by the Defendants or their predecessor was much prior to coming into force of the DCPR-2017 and hence would have to give way to the stipulations as mentioned in the DCPR-2017. In support of this proposition the learned advocate relied upon a decision of this Court in the case of **Gladhurst Co-op. Housing Society Ltd. & Ors. Vs. V.B.Shah (Dr.Mrs) & Anr.** reported in **2006(4) Bom. C.R. 97** and a decision of the Supreme Court in the case of **Dadar Avanti Co-operative Housing Society Ltd. Bombay Vs Municipal Corporation of Greater Bombay & Ors.** reported in **(1996) 2 Supreme Court Cases 695.**

6 On the other hand, the learned advocate appearing on behalf of the Respondents (original Plaintiffs) submitted that the

injunction has been granted by both the Courts below after considering the entire material on record and coming to a categorical finding that a *prima facie* case has been made out by the Plaintiffs for grant of interim reliefs. In this regard, the learned advocate took me to the order of the Trial Court as well as that of the Appeal Court wherein it has been clearly mentioned that the Defendants do not dispute the description of the suit property and the description of the land and building, as well as the description of the project made in the plaint. Neither the documents of (i) the Deed of Declaration dated 26th April, 2002; (ii) the Apartments Deed dated 11th January, 2008; (iii) Agreement to Sale dated 14th March, 1996; (iv) Occupancy Certificate dated 29th December, 1999; and (v) the N.A. order dated 2nd January, 1989 are in dispute. Learned advocate submitted that these documents and which are binding on the Defendants clearly state that the Row Houses are to be used only for residential purposes. Running a pre-school is not one which would fall as being used for residential purposes and hence the Trial Court as well as the Appeal Court rightly granted the injunction. As far as the decisions of this Court and of the Supreme Court relied upon by the Petitioners are concerned, the learned advocate for the Respondents submitted that these decisions had absolutely no applicability to the facts and circumstances of the present case. They were clearly distinguishable

on facts, and therefore, were of no assistance to the Petitioners.

7 In addition to the aforesaid arguments, learned advocate for the Respondents (original Plaintiffs) submitted that the orders passed by the Trial Court and which granted the injunction in favour of the Plaintiffs were on a finding that a *prima facie* case was made out by the Plaintiffs. It was in these circumstances that both the Courts below exercised their discretion in granting the injunction in favour of the Plaintiffs. He submitted that this Court under Article 227 of the Constitution of India cannot interfere with the exercise of such discretion unless it is wholly perverse or is contrary to the principles of law governing grant or refusal of injunctions. He submitted that no such case was made out in the facts of the present matter and hence on this ground also the Writ Petition was devoid of any merit and ought to be dismissed.

8 I have heard learned advocates for parties at length and have perused the papers and proceedings in the Writ Petition along with the orders impugned therein. The facts are really undisputed. Row House Nos. 4 and 4A were initially purchased by the Defendants' predecessor from a Developer M/s Nitron Associates. This developer had constructed five buildings, namely, 'A', 'B', 'C', 'D' and 'E' and four

semi-independent row houses. As per the occupancy certificate, the entire developable structure consists of four row-houses and 48 flats. Since this land was to be developed for residential purpose, an application was made to the Collector for N.A. use. This application was granted by the Collector. After disposal of all the tenements, a Deed of Declaration dated 26th April, 2002 was executed and registered with the office of the Sub-Registrar as per the provisions of the Maharashtra Apartment Ownership Act, 1970 and "Nitron Landmark Condominium" was formed as per the Deed of Declaration. This Deed of Declaration also had Bye-Laws annexed as Annexure-B to the said Declaration. I must mention here that all this was done much prior to the Defendants purchasing Row House Nos. 4 and 4A. These Row Houses were purchased by the Defendants from their predecessor sometime in the year 2007. Thereafter, Defendant No.1 also gave an undertaking dated 28th December, 2007 that they will use Row-Houses only for residential purposes and as per the Bye-Laws of the Condominium. In this undertaking, Defendant No.1 further stated and undertook that no change of user will be made without the previous permission in writing of the Managing Committee of the Condominium. Despite this in February 2017, the Plaintiffs noticed that the Defendants started painting the outside wall of the Row-Houses with various colour combinations and graffiti of school

children, which made it obvious that the suit property was being used for non-residential purposes, namely, for running a pre-school. It is, in these circumstances, that the Plaintiffs were constrained to file the above suit.

9 What is important to note is that the Deed of Declaration dated 26th April, 2002 clearly states that the development of the property consist of 52 residential flats and six Row-Houses to be used for residential purpose. It further states that the plot of land more particularly described in the first schedule to the said declaration together with the buildings in the house complex known as “Nitron Landmark” were submitted under the provisions of the Maharashtra Apartment Ownership Act, 1970 to form a Condominium of the purchasers of the units in the said buildings as provided in the said Act. It is also not in dispute that the Defendants are members of this Condominium. This Deed of Declaration further provides that each apartment owner shall comply with the provisions of the Declaration, Bye-Laws, decision and resolutions of the association of apartment owners and any failure to comply with any such provisions, decisions or resolutions shall be a ground for an action to recover sums due, for damages or for injunctive reliefs. This Deed further provides that all persons or future owners or any other persons using

the facilities of the building in any manner are subject to the provisions of the Deed and that by mere acquisition of any of the units shall signify that the provisions of this Deed are accepted and ratified by the subsequent owner.

10 Annexure “B” to this Declaration / Deed are the Bye-Laws of “Nitron Landmark Condominium”. Clause 41(1) clearly stipulates that all units shall be utilized for residential purpose only. Clause 41(2) further stipulates that the owner shall not make any structural modifications or alterations in his unit without previously informing the association in writing and the association shall have the obligation to answer the same within 30 days. Failure to do so by the association within the stipulated time would mean that the association has no objection to the proposed modification and/or alteration. I must mention here that no such notice has been given by the Defendants to the “Nitron Landmark Condominium” before carrying out any changes in Row House Nos. 4 and 4A respectively.

11 It does not stop here. When the Defendants purchased Row House Nos.4 and 4A from their predecessors vide an Apartment Deed dated 11th January, 2008, the Defendants specifically undertook that they shall abide by the Bye-Laws and the Rules and Regulations

of the Condominium and shall pay the proportionate share or part of the common expenses required by the association of apartment owners. What is also important to note is that the Defendants declared that the Deed of Declaration dated 26th April, 2002 and the Bye-Laws and Rules & Regulations as contained in the said Deed of Declaration shall always be binding on the Defendants. When one looks at all this material and as also examined by the Trial Court as well as Appeal Court, I find considerable force in the arguments canvassed on behalf of the Respondents and that no interference is called for in the orders passed by the Courts below. All the documents that I have mentioned herein above, have been correctly examined by the Courts below before coming to a finding that a *prima facie* case has been made out for granting the injunctive reliefs.

12 This now only leaves me to deal with the submission on behalf of the Petitioners (original Defendants) that none of these documents are binding on the Defendants by virtue of the fact that the Development Control and Promotion Regulations for Pune Municipal Corporation (DCPR-2017) was brought into force with effect from 5th January, 2017 and which clearly stipulate that a primary or secondary school is permitted to be run in a residential zone R-1.

13 I find this argument to be wholly ludicrous. It is true that the DCPR-2017 permits running of a primary school in a residential zone. However, that does not mean that a primary school can be run contrary to the Bye-Laws of the Condominium and which were agreed to by the Defendants when they purchased the Row Houses from their predecessor. Nothing in the DCPR-2017 even remotely suggests that the Bye-Laws are set at nought by virtue of the New Development Control Regulations coming into force. What regulation 16.1.1(viii) only does is that it permits running of a primary school in a residential zone. This is obviously subject to any Bye-Laws that the Condominium may have in that regard. It does not, in any way, derogate from the Bye-Laws. In the facts of the present case, it is quite clear that the Bye-Laws only permit use of the Row-Houses for a residential purpose. It is not even the case of the Petitioners that by running the pre-school, the Row-Houses are being used for a residential purpose. Any such argument made would have been wholly ridiculous and that has been correctly not even been canvassed before me. This being the case, I find that the reliance placed by the Petitioners (original Defendants) on regulation 16.1.1(viii) to be wholly misplaced. What this regulation contemplates is that in a residential zone, a pre-school can be

permitted to be run, subject to the Bye-Laws of the Condominium in which the unit is situated and from which the pre-school is sought to be run.

14 As far as the decisions relied upon by the Petitioners are concerned, I find that both the aforesaid decisions are wholly inapplicable to the facts of the present case. The first decision relied upon was a decision of this Court in the case of **Gladhurst Co-op. Housing Society** (supra). If one goes through the facts of this case, it is clear that the facts and situation before the Court in Gladhurst's case was completely different from one before me. In fact in that case, the society itself had granted its N.O.C. for change of user and which was also approved by the Municipal Corporation. Aggrieved by this decision, the other members of the society filed a suit and which came up finally by way of the Writ Petition. It is in that factual matrix that the reasoning and the conclusion of this Court have to be read. When so read, it is clear that this decision has absolutely no application to the facts and circumstances of the present case.

15 Similar is the case with reference to the decision of the Supreme Court in the case of **Dadar Avanti Co-operative Housing Society** (supra). The appeal before the Supreme Court was directed

against the Judgment of the Bombay High Court dismissing the Writ Petition. The dispute centered around the question as to whether the Municipal Authorities, namely, Respondent Nos. 1 and 2 have permitted Respondent Nos.3 and 4 to convert their flats on the second floor of the building from residential purpose to that of commercial purpose for running a Nursing Home. The Co-operative society who was the appellant before the Supreme Court made a grievance that Respondent Nos.3 and 4 had converted their flats into a Surgical Nursing Home and thereby not only violated the terms and conditions of the sanctioned plan but having a Surgical Nursing Home in residential premises was unhygienic and hazardous to the common living of other members. It was this controversy that the Supreme Court was examining. After going through the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short "MRTP Act"), the Supreme Court came to a finding that on a combined reading of the provisions of the MRTP Act make it explicitly clear that a building or a part of a building, if it has been sanctioned for a specific purpose, user of the same for any other purpose, unless permitted by the Competent Authority, would be in contravention of the provisions of the Act. The Supreme Court also noted that the subsequent Regulations of 1991 permitted clinics in a residential area up to the second floor with the condition that there should be a

separate access. The Supreme Court noted that the order of the Additional Commissioner was dated 18th December, 1987 allowing such change of user whereas the Regulations came into effect from 25th March, 1991. This being the case, the said Regulations could not have been pressed into service for deciding the legality of the order of the Additional Commissioner. It is in these circumstances that the appeal filed by the society was allowed by the Supreme Court.

16 I fail to see how this decision of the Supreme Court carries the case of the Petitioners any further. None of these decisions lay down that notwithstanding the fact that the party has agreed to use the premises only for a specific purpose, they can change the same unilaterally and without taking permission either of the Condominium and/or the society, as the case may be. If the Bye-Laws restrict the use of the units for residential purpose only, then, the said use cannot be changed without permission of the Condominium and/or the society. This is of course subject to the fact that the D.C. Regulations permit such change of user. If it does not, then naturally the Condominium and/or the society also cannot grant any such permission.

17 Thus, looking at the totality of the facts of the case, I find

that the impugned orders have proceeded on the correct footing and thereafter come to a *prima facie* conclusion that an injunction ought to be granted against the Defendants from running a pre-school in Row-House Nos.4 and 4A respectively. I do not think that the orders passed by the Courts below suffer from any perversity or are vitiated by any error apparent on the face of the record requiring my interference under Article 227 of the Constitution of India. I, therefore, find that there is no merit in this Writ Petition.

18 At this stage, the learned advocate appearing on behalf of the Petitioners states that the academic year of the pre-school comes to an end on 7th April, 2019. If the injunction is continued, grave prejudice would be caused to the young students who have been enrolled in the pre-school.

19 I am also informed that the pre-school is being run not by the Petitioners themselves but it has been given to licensees for the purpose of running the pre-school. The Licensees are also present before the Court and he has taken instructions that if the pre-school is allowed to function till 7th April, 2019, the licensees as well as the Petitioners undertake to this Court that-

- (i) They will thereafter not use Row-House Nos.4 and 4A

respectively for any other purpose other than for residential purpose as contemplated by the Bye-Laws of the Condominium; and

- (ii) They accept this order and do not propose to challenge the same.

20 This suggestion of the Petitioners was vehemently opposed by the learned advocate appearing on behalf of the Respondents.

21 Even though I have held that the Petitioners have not made out any case for vacating the injunction granted against them, considering the undertakings given by the Petitioners and keeping the interest of the young students in mind, which is of paramount importance, the Petitioners and their Licensees are permitted to run the pre-school till the end of academic year and which the Petitioners have stated, comes to an end on 7th April, 2019. The Petitioners have further undertaken that after the end of the academic year, the Petitioners shall not use Row House Nos.4 and 4A respectively for any other purpose other than for a residential purpose as contemplated in the Deed of Declaration dated 26th April, 2002 and the Bye-Laws of the Condominium. All the undertakings given by the Petitioners and the Licensees are accepted by the Court.

22 In view of all the above undertakings, and in these peculiar facts, it is ordered that till 7th April, 2019 the pre-school shall be allowed to run from Row House Nos. 4 and 4A respectively. Once the academic year is over, Row House Nos. 4 and 4A shall be used only for a residential purpose as contemplated under the Bye-Laws of the Condominium read with the Deed of Declaration dated 26th April, 2002. All the undertakings that have been recorded by me in this order shall be filed by way of an affidavit on behalf of the Petitioners as well as the licensees within a period of two weeks from today, failing which the injunction order granted by the Courts below shall immediately revive.

23 Learned advocate for the Petitioner, on taking instructions from his client on telephone, has further stated that the Petitioners undertake to clear all arrears due to the Condominium, if any, within a period of four weeks from today. This statement is also accepted as an undertaking given to this Court. The Writ Petition is disposed of accordingly. No order as to costs.

(B.P.COLABAWALLA, J.)