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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1699 OF 2016
IN
SUIT NO.551 OF 2016

- 1). Dharmshi D. Bhanushali,)
Aged 69 years, Occupation Business)
Devkunj Parimal Co-operative)
Housing Society Ltd. R.B.Mehta)
Road, Ghatkopar (East), Mumbai – 77))
- 2). Haridas D. Bhanushali,)
Aged 63 years, Occupation Business)
Nos.1 and 2 residing at Row House)
No.1 Ghatkopar Parimal Co-operative)
Housing Society Limited, 353/1,)
R.B.Mehta Road, Ghatkopar)
(East), Mumbai – 400 077.))
- 3). Vasantlal D. Bhanushali,)
Aged 61 years, Occupation Business))
- 4). Anilkumar D. Bhanushali)
Aged 57 years, Occupation Business)
Nos.3 and 4 residing at Row House)
No.2,Ghatkopar Parimal Co-operative)
Housing Society Limited, 353/1,)
R.B.Mehta Road, Ghatkopar)
(East), Mumbai – 400 077.))
- 5). M/s.Hasmukh Properties And)
Holding Limited, Row House No.3,)
Being a public Limited company)
having its registered office at 1,)
Laxmi Nivas, M.G. Road, Gharkopar)
(West), Mumbai – 400 086.))
- 6). Narendra R. Kamdar)

- Aged 74 years, Occupation Business)
)
- 7). Bharti Narendra Kamdar,)
aged 73 years, Occupation Housewife)
Nos.6 and 7 residing at Row House)
No.4,Ghatkopar Parimal Co-operative)
Housing Society Limited, 353/1,)
R.B.Mehta Road, Ghatkopar)
(East), Mumbai – 400 077.)
)
- 8). Heena Harkchand Rambhia)
Aged 66 years, Occu. Retired Teacher)
)
- 9). Harakchand Narshi Rambhia)
Aged 70 years, Occupation Business)
)
- 10). Hiren Harakchand Rambhia,)
Aged 38 years, Occupation Business)
Nos.8 to 10 residing at Row House)
No.5,Ghatkopar Parimal Co-operative)
Housing Society Limited, 353/1,)
R.B.Mehta Road, Ghatkopar)
(East), Mumbai – 400 077.)
)
- 11). Nitin Bhawanji Sawla)
Aged 52 years, Occupation Business)
)
- 12). Harshita Nitin Sawla)
Aged 51 years, Occupation Business)
Nos.11 and 12 residing at Row House)
No.6,Ghatkopar Parimal Co-operative)
Housing Society Limited, 353/1,)
R.B.Mehta Road, Ghatkopar)
(East), Mumbai – 400 077.)

...Applicants

IN THE MATTER BETWEEN :

- 1). Dharmshi D. Bhanushali,)
Aged 69 years, Occupation Business)
Devkunj Parimal Co-operative)
Housing Society Ltd. R.B.Mehta)
Road, Ghatkopar (East), Mumbai – 77)
)
- 2). Haridas D. Bhanushali,)

- Aged 63 years, Occupation Business)
 Nos.1 and 2 residing at Row House)
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Housing Society Limited, 353/1,)
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(East), Mumbai – 400 077.)
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Aged 51 years, Occupation Business)
Nos.11 and 12 residing at Row House)
No.6,Ghatkopar Parimal Co-operative)
Housing Society Limited, 353/1,)
R.B.Mehta Road, Ghatkopar)
(East), Mumbai – 400 077.)
...Plaintiffs

....Versus....

- 1). Municipal Corporation for Greater)
Bombay, A body corporate duly)
constituted under the provisions of)
the Mumbai Municipal Corporation)
Act, 1888, having their head office)
at Mahapalika Building, Mahapalika)
Marg, Mumbai - 400 001.)
)
2). The Executive Engineer,)
Building Proposals, Eastern)
Suburbs – I, Near Raj Legacy)
Residential Complex, Paper Mills)
Compound, LBS Mag, Vikhroli (W))
Mumbai – 400 083.)
)
3). Ghatkopar Parimal Co-operative)
Housing Society Limited,)
Being a co-operative housing)
society, having its registered office)
at 353/1, R.B. Mehta Road,)
Ghatkopar (East), Mumbai – 400 077.)
)
4). Roseate Real Estate Private Limited)
Being a private limited company)

having its registered office at 604,)
6th Floor, Siddhi Apartment, Shimpoli)
Road, Chikuwadi, Borivali (Wast),)
Mumbai – 400 092.) ...Defendants

Mr.D.D. Madon, Senior Court with Mr.Amol Kishor Tembe for the Applicants / Plaintiffs.

Mr.R.Y. Sirsikar for the Defendant No.1.

Mr.Praveen Samdani, Senior Counsel with Mr.Mangesh Sawant and Mr.Saurabh Chitnis I/b Mr.Arun Panickar for the Defendant No.3.

Mr.Prateek Seksaria with Mr.Nivit Srivastava, Mr.Harsh Behany and Ms.Hiral Vora I/b Maniar Srivastava & Associates for the Defendant No.4.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 22ND NOVEMBER, 2018
PRONOUNCED ON : 18TH DECEMBER, 2018

JUDGMENT :-

1. By this notice of motion the applicants (original plaintiffs) have prayed for an order of injunction against the defendant nos.3 and 4 from taking any action in furtherance of the Development Agreement annexed at Exhibit – SS, from disturbing exclusive possession and use of building no.1 open space of the plaintiffs, from encroaching upon any portion of building no.1 land in general and on the site open space of the plaintiffs and for various other reliefs. The plaintiffs have filed a suit *inter-alia* praying for declaration that the Development Agreement dated 29th September, 2015 between the defendant nos.3 and 4 is not binding upon the plaintiffs, for permanent injunction against those defendants from taking any action in furtherance of the said Development Agreement, for a declaration that the plaintiffs are entitled to the exclusive use and

occupation of building no.1 open space which is alleged to be in exclusive possession of each of the plaintiffs and for declaration that the defendant no.3 and 4 are not entitled to disturb the exclusive possession and use of the plaintiffs in respect of building no.1 open space and for various other reliefs.

2. The original owners M/s.Parimal Construction Company proposed a development of the land bearing CTS Nos.353/1-A and 353/1B of the village Ghatkopar. It is the case of the plaintiffs that the said owners proposed to develop the said land by dividing into building no.1 on which the land owners proposed to construct six row houses and building no.2 on which a building consisting of various flats was proposed to be constructed.

3. Prior to 1968, the construction of six row houses and the said building came to be completed. It is the case of the plaintiffs that the original owners constructed a compound wall between building no.1 land and building no.2 land. It is the case of the plaintiffs that the said six row houses were constructed on the portion of the land and were identified as building no.1, whereas the separate building consisting of flats was identified a building no.2. Some time in the year 1968, the defendant no.3 society came to be registered. In the year 1971 the building was constructed by the said owners. All the purchasers of the row houses were admitted as the members of the defendant no.3 society On 30th July, 1972, the then owners executed a Deed of Conveyance in favour of the defendant no.3 society for the entire plot of land.

4. On 13th October, 2003, the defendant no.3 society issued

a circular amongst the members of the society proposing to redevelop the land. On 13th February, 2004, the plaintiff nos.1, 5, 6 to 12 and the predecessor-in-title of the plaintiff nos.2 to 4 informed the defendant no.3 society that they were interested in bifurcation of the defendant no.3. On 3rd April, 2004, the defendant no.3 held a meeting for discussing the proposed redevelopment.

5. On 30th March, 2005, the plaintiff nos.1, 5, 6 to 12 and the predecessor-in-title of the defendant nos.2 to 4 sent a notice through their advocate to the defendant no.3 ascertaining their alleged right in the said land and the benefits arising out of the redevelopment of the said land. On 14th May, 2005, the subject of bifurcation raised by the plaintiffs came to be discussed at the Annual General Meeting of the defendant no.3 society.

6. On 26th September, 2005, the plaintiff nos.1, 5, 8 to 12 and the predecessor-in-title of the plaintiff nos.2, 3 and 4 sent a notice through their advocate to the defendant no.3 society calling upon to furnish various requisitions and to provide several clarifications. On 1st October, 2005, the defendant no.3 society passed a resolution for appointing M/s.Value Developers Private Limited for undertaking redevelopment of building no.2.

7. On 21st December, 2006, the plaintiff nos.1, 5, 6 to 12 and the predecessor-in-title of the plaintiff nos.2 to 4 sent another notice to the defendant no.3 society to permit bifurcation of the defendant no.3. society. On 25th July, 2007, the plaintiff nos.1, 5, 6 to 12 and the predecessor-in-title of the plaintiff nos.2 to 4 sent a notice to the defendant no.3 society seeking permission of bifurcation of the

defendant no.3 society.

8. On 8th February, 2008, the defendant no.3 society informed the plaintiffs that they should submit a feasibility report about the bifurcation. On 19th November, 2009, the defendant no.3 society issued a public notice in Free Press Journal informing the public at large about its intention to undertake the redevelopment of building no.2.

9. On 8th December, 2009, the plaintiffs through their advocate sent a notice to the defendant no.3 society and raised an objection to the redevelopment of building no.2 on various grounds. On 25th February, 2010, the defendant no.3 society sent a reply to the notice dated 8th December, 2009 denying the allegations made thereunder and made various alleged commitments on behalf of the defendant no.3.

10. On 18th June, 2013, the plaintiffs were served with a notice by the defendant no.3 about holding a General Body Meeting on 15th July, 2013 for deciding the name of the developer. On 2nd July, 2013, the plaintiffs through their advocate sent a notice to the defendant no.3 calling upon the defendant no.3 to cancel the Special General Body Meeting proposed to be held on 5th July, 2013 and not to take any decision prejudicial to the interest of the plaintiffs. On 5th July, 2013, the defendant no.3 society however, held the said Special General Body Meeting and selected the defendant no.4 as a developer for the purpose of carrying out redevelopment of building no.2.

11. It is the case of the plaintiffs that the plaintiffs subsequently came to know that in the month of March, 2015, the defendant no.3 had submitted a building proposal to the defendant no.1 Corporation for sanction. On 6th March, 2015, the Municipal Corporation for Greater Bombay sanctioned parking lay out in respect of the redevelopment of building no.2. On 30th March, 2015, the plaintiffs addressed a letter to the Municipal Corporation raising various objections to the building proposal of building no.2 being processed. On 3rd June, 2015, the plaintiffs through their advocate sent a notice to all the defendants. On 29th September, 2015, the defendant no.3 executed a Development Agreement with the defendant no.4. On 28th December, 2015, the plaintiffs filed this suit.

12. Mr.Madon, learned senior counsel for the plaintiffs invited my attention to the Agreement for Sale dated 25th May, 1971 between the original owners and one of the purchasers of the row houses in building no.1 and more particularly clauses 3, 9, 10, 15 to 17 and would submit that the said agreement would clearly indicate that the building no.1 consisting of the row houses was already proposed to be separated with building no.2 proposed to be constructed on the said building of land. It was clearly provided that each of the tenements would be deemed independent unit of the purchaser of the tenement. The purchaser of the tenement in building no.1 was entitled to the portion comprising their respective tenements which would be separated from the other tenements in the building and from building no.2 and neither the owners of the other tenements of the building nor the building no.2 shall have right of passage or access to the tenements as and by way of right. Learned senior counsel also placed reliance on an identical agreement entered into

by the original owners with one of the flat purchasers in the building identified as building no.2.

13. Learned senior counsel placed reliance on Deed of Conveyance dated 13th July, 1972 between the original owners and the defendant no.3. He placed reliance on various recitals in the said Deed of Conveyance and more particularly recital no.8 stating that each of bungalow on the front or road side would have an independent open space for garden at the rear of the bungalows, that the bungalows would be separated from the building on the rear portion by a compound wall, and that neither the owners nor occupants of the rear building nor the purchasers or occupants of tenements of building on the rear side have a right of access through any of the bungalows on the road side. It was mentioned that the road side building will be known as building no.1 and the rear building would be known as building no.2.

14. Learned senior counsel tendered a copy of location plan during the course of arguments and would submit that the defendant no.3 has proposed to set up an electric sub-station of big portion of land which is in possession of the plaintiffs. The defendant no.3 has also proposed to demolish part of the compound wall constructed by the original owners dividing and separating building no.1 from building no.2. Various open spaces between road and rear side have been also proposed to be used by the defendant no.3 which would amount to encroachment on the land of the plaintiffs. He submits that if the defendant no.3 is allowed to put up any construction, FSI as well as TDR available to the plaintiffs on those row houses identified as building no.1 would be seriously prejudiced. The plaintiffs would

not be able to carry out any redevelopment of the row houses in future if the defendant no.3 is allowed to carry out construction as proposed in the plan submitted to the Municipal Corporation.

15. Learned senior counsel submits that the occupants of building no.2 have been already provided a separate access of 20 ft. and if the compound wall constructed by the original owners is allowed to be demolished and if the new construction is allowed to be put upon the portion of land transferred to the purchasers of the row houses, exclusive possession and right of user granted to the plaintiffs would be seriously affected.

16. It is submitted by the learned senior counsel that even if there is any urgent need of the occupiers of building no.2 to carry out any development which allegation of the defendant no.3 is seriously disputed by the plaintiffs, it is for the occupants of building no.2 to carry out construction in the portion of land on which the said building no.2 is constructed and cannot be allowed to carry out any construction on the land allotted to the occupants of building no.1 by the original owners in the Agreement for Sale as well as in the Deed of Conveyance. It is for the defendant no.3 to carry out construction in such a way that there is no encroachment on the land of the plaintiffs as well as there is no disturbance with the exclusive use, occupation and possession of the plaintiffs of the land and structure owned by the plaintiffs.

17. It is submitted by the learned senior counsel that it is thus clear that both the buildings i.e. building no.1 and building no.2 have been considered as separate units all through out. The occupants of

the row houses have been paying their taxes separately. Separate insurance policies have been taken out by the plaintiffs.

18. Learned senior counsel for the plaintiffs submits that insofar as the objection raised by the defendant no.3 in their affidavit in reply that no notice under section 164 of the Maharashtra Co-operative Societies Act, 1960 was issued by the plaintiffs before filing the suit is concerned, it is submitted by the learned senior counsel in the facts of this case, no such notice was required to be issued. The Development Agreement entered into between the defendant no.3 and defendant no.4 is totally illegal and is not binding on the plaintiffs. He submits that the plaintiffs were not required to file any dispute before the Maharashtra State Co-operative Court under section 91 of the Maharashtra Co-operative Societies Act, 1960 on the ground that the said resolution was totally illegal and also in view of the fact that the decision taken in the said Special General Body Meeting to carry out redevelopment of building no.2 is not a business of the defendant no.3 society. It is submitted that building no.2 is repairable and does not require any redevelopment. In support of this submission, learned senior counsel placed reliance on the structural audit report obtained by the defendant no.3 itself.

19. Learned senior counsel placed reliance on some of the provisions of the Development Agreement entered into between the defendant no.3 and defendant no.4 on 29th June, 2015 and would submit that the said agreement would clearly indicate that FSI and TDR available to the plaintiffs are not properly described and are shown less than what the plaintiffs are entitled to. It is submitted by the learned senior counsel that the plaintiffs did not attend the said

Special General Body Meeting.

20. Insofar the issue of jurisdiction is concerned, learned senior counsel placed reliance on an unreported judgment of this Court delivered on 1st August, 2012 in Appeal (Lodging) No.474 of 2012 in case of **Mohinder Kaur Kochar vs. Mayfair Housing Private Limited & Ors.** and in particular paragraphs 9, 13, 15 and 19 in support of the submission that since by virtue of redevelopment, the defendant no.3 has proposed to trespass upon the land of the plaintiffs, this Court has ample power to entertain, try and adjudicate upon the subject matter of the suit filed by the plaintiffs. He also placed reliance on bye-law no.5 of the bye-laws of the defendant no.3 society in support of submission that the object of the society is not to carry out redevelopment.

21. Learned senior counsel placed reliance on the judgment of this Court in case of **Alok Agarwal & Anr. vs. Punam Co-operative Housing Society Limited & Ors., 2013 (2) BCR 244** and in particular paragraphs 6, 11, 20 and 21 in support of the submission that in case of action of encroachment in respect of the property of the society, civil suit is maintainable.

22. It is submitted by the learned senior counsel that since building no.1 and the defendant no.3 are all through out treated as a separate buildings and imaginarily sub-divided and the plaintiffs having planted large number of trees, have been developing the garden on the plot of land on which the row houses are constructed this Court cannot permit the defendant no.3 to proceed with the redevelopment of building no.2. It would be irreversible situation

insofar as the plaintiffs are concerned.

23. Mr.Samdani, learned senior counsel appearing for the defendant no.3 submits that building no.2 was constructed in the year 1971 and is required to be redeveloped. The said building is in dilapidated condition. Most of the members occupying the flats in building no.2 are senior citizens and have no earning capacity. The defendant no.3 society was thus required to take the assistance of a developer for carrying out redevelopment.

24. Learned senior counsel invited my attention to the averments in paragraph 1 of the plaint stating that the defendant no.3 is the owner of a large piece of land bearing CTS Nos.353/1-A and 353/1B of the village Ghatkopar Kirol along with building no.1 comprising of six row houses and in building no.2 comprising of several flats. It is also admitted in the said paragraph that the plaintiffs are the members of the defendant no.3 society and as such members, are the holders of the six row houses comprising in the said building no.1 in the societies property. He submits that the ownership of the entire property of the defendant no.3 society is admitted by the plaintiffs in the plaint itself.

25. Learned senior counsel invited my attention to the prayers in the plaint and would submit that admittedly there is no prayer for declaration of the ownership of the land underneath building no.1 or any part of the open space of garden. He submits that the prayer is for declaration that the defendant nos.3 and 4 are not entitled to disturb the alleged exclusive possession and alleged exclusive use of building no.1 and shall not implement the resolution passed by the

defendant no.3 society.

26. It is submitted by the learned senior counsel that even under the said MOFA agreements referred to and relied upon by the plaintiffs, no part of any open space or garden could be sold by the developer under the provisions of Maharashtra Ownership Flats Act. In support of this submission, learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **Nahalchand Laloochand Private Limited vs. Panchali Co-operative Housing Society Limited, (2010) 9 SCC 536** and in particular paragraphs 52 to 58 and 65. It is submitted that the prayers in the plaint are drafted very cleverly without seeking any declaration of the ownership of the open space or garden or even in respect of building no.1. The plaintiffs have prayed for a declaration that they are entitled to exclusive use and occupation of the open space and garden.

27. Learned senior counsel invited my attention to the recitals as well as in the provisions of the Deed of Conveyance executed by the original owners in favour of the defendant no.3 society which document is not disputed by the plaintiffs. He submits that the operative part of the Deed of Conveyance restricts the rights of the flat purchasers and the purchasers of row houses only to possess their respective tenements and not to claim any exclusive right in respect of the open space or garden. The entire land including the structures thereon have been conveyed in favour of the defendant no.3 society by the original owners. He submits that the provisions of MOFA does not provide any rights in favour of the plaintiffs as claimed in the plaint. Once the Deed of Conveyance is executed, the

agreements entered into between the developer and the purchasers of the tenements under the provisions of the Maharashtra Ownership Flats Act merges with the Deed of Conveyance which deed only operates. Under the Deed of Conveyance, no exclusive right of any open space or garden in any portion of the land is created in favour of any of the occupants.

28. It is submitted by the learned senior counsel that it is not the case of the plaintiffs that the operative part of the Deed of Conveyance is vague and thus the recitals in the Deed of Conveyance have to be considered for interpretation of the operative part of the Deed of Conveyance. The recitals do not override or overtake operative part of the Deed of Conveyance. The use of the recitals of the Deed of Conveyance is only by way of historical background and cannot be considered as main provision of the contract. He submits that the recitals can be relied upon only if the operative part of the Deed of Conveyance or any provisions of the conveyance are vague and inconsistent, for the purpose of interpreting such inconsistency or vague provision in the main part of the contract. In support of this submission, learned senior counsel placed reliance on the judgment of the Privy Council in case of **Mackenzic & Ors. vs. The Duke Of Devonshire & Ors. 1896, House of Lords, 400 (Privy Council)** and in particular relevant pages on 408. He also placed reliance on the judgment of the Delhi High Court in case of **Bharti Televentures Limited vs. Crystal Technology Private Limited, 2011 (126) DRJ 611 (DB)** and in particular relevant paragraph on page 619, in support of the submission that the operative part of a deed cannot be controlled by recitals in the preamble if the operative words are clear.

29. Learned senior counsel for the defendant no.3 submits that even if these six members of the defendant no.3 society, who have filed this suit to seek injunction in respect of the redevelopment of the property of the defendant no.3 society are excluded for the purpose of considering the majority, more than 90% of the members have passed a resolution in the Special General Body Meeting to redevelop the building no.2. Six members of the society cannot be permitted to stop the process of redevelopment. It is submitted that the developer has already made offer to the plaintiffs that their row houses also can be redeveloped by the same developer which proposal has not been accepted by the plaintiffs.

30. It is submitted by the learned counsel that the agreement for sale is an executory document and once the Deed of Conveyance is executed, the agreement for sale is subserved with the Deed of Conveyance. In that event all the rights, objects and entitlement of the parties are governed by the Deed of Conveyance. The agreement for sale is transitory document. The purchasers under the agreements entered into under the provisions of the Maharashtra Ownership Flats Act being a special right of the occupants along with the membership of the society and do not have any other right in the open space and garden owned by the society.

31. Insofar as reliance placed by Mr.Madon, learned senior counsel for the plaintiffs on the *ad-interim* order passed by this Court in this notice of motion is concerned, Mr.Samdani, learned senior counsel for the defendant no.3 invited my attention to the order passed by the Division Bench of this Court in the appeal dated 21st

August, 2017 in Appeal (Lodging) No.282 of 2017 filed by the defendant no.3 society against the *ad-interim* order and would submit that the Division Bench of this Court has clarified in the said order that the observations made in the said *ad-interim* order passed by the learned single Judge on 19th June, 2017 would be construed as *prima-facie* in nature. He submits that this Court thus cannot be influenced by the observations made, if any, by the learned single Judge in the said *ad-interim* order.

32. It is submitted by the learned senior counsel that for granting any injunction under the provisions of Order XXXIX Rule 1 of the Code of Civil Procedure, 1908, the plaintiffs have to make out a *prima-facie* case, that balance of convenience is in favour of the plaintiffs and if interim reliefs are not granted, there would be irretrievable injustice to the plaintiffs. All these requirements are cumulative and have to be satisfied before grant of interim reliefs in favour of the plaintiffs. He submits that in this case, the ownership of the entire land including the structures thereon including building no.1 is admittedly owned by the defendant no.3 society. The plaintiffs cannot make any claim over the open space or the garden which also belongs to the defendant no.3 society. The plaintiffs have thus not made out any *prima-facie* case in their favour for grant of interim reliefs.

33. It is submitted that admittedly there is no sub-division of the suit property. The plaintiffs thus cannot claim any right over any specific portion of the open land from the suit property. Though the plaintiffs had at some stage made a request to the defendant no.3 society for bifurcation of the society, admittedly, no application is

made to the authority under the provisions of the Maharashtra Co-operative Societies Act, 1960 for bifurcation of the defendant no.3 society in two separate societies.

34. It is submitted by the learned senior counsel that only 621 sq. mtrs. of FSI was used in constructing those six row houses. Substantial part of the FSI was consumed in constructing building no.2. If the defendant no.3 society is not allowed to redevelop the said property, there would be imbalance of FSI. He submits that the structures of the plaintiffs would not be demolished or would be affected by the proposed redevelopment in any manner whatsoever. The proportionate entitlement of TDR, if any, on the row houses purchased by the plaintiffs also are not being touched in the proposal for redevelopment. No such right is created by the defendant no.3 society in favour of the defendant no.4 developer.

35. It is submitted that the plaintiffs are also not deprived of carrying out any redevelopment of their row houses. The defendant no.3 society through their advocates have already clarified all these aspects in a letter addressed to the plaintiffs on 25th February, 2010. No prejudice of any nature whatsoever thus would be against the plaintiffs if the defendant no.3 society is allowed to carry out reconstruction. Serious prejudice is caused to the members of building no.2 in view of the ad-interim order passed by this Court. Pursuant to the resolution passed by the defendant no.3 society, the developer – defendant no.4 has taken various steps.

36. It is submitted that there is inconsistency in the case of the plaintiffs about their presence in the Special General Body Meeting

held by the defendant no.3 society, when a resolution for carrying out redevelopment of building no.2 came to be passed. It is not the case of the plaintiffs that they were not served with the notice of such meeting held by the defendant no.3 society nor that they were not allowed to attend the said meeting. It was the case of the plaintiffs that they abstained from attending the said meeting.

37. Insofar as the issue of jurisdiction raised by the defendant no.3 society in the affidavit in reply is concerned, it is submitted by the learned senior counsel that in view of deletion of section 9-A of the Code of Civil Procedure, 1908, the defendant no.3 society does not press that issue at this stage. He submits that the process of redevelopment cannot be stalled by minuscule minority.

38. Learned senior counsel placed reliance on the judgment of this Court in case of **Ashadeep Co-operative Housing Society Limited vs. M/s.Paresh Associates & Ors. 2014 SCC OnLine Bom. 482** and in particular paragraph 23 in support of the submission that the ownership rights in the land and the structure vests in the defendant no.3 society and thus the defendant no.3 society alone has power to decide whether to carry out any redevelopment in respect of any of the property of the defendant no.3 society.

39. Learned senior counsel also placed reliance on the judgment of this Court in case of **Sarita Nagari Phase – 2 Co-operative Housing Society Limited & Anr. vs. The State of Maharashtra & Ors. 2018 SCC OnLine Bom. 591** and in particular paragraphs 39 and 40 and the judgment of the Hon'ble Supreme

Court in case of **BEST Sellers Retail (India) Private Limited vs. Aditya Birla Nuvo Limited & Ors.(2012) 6 SCC 792** and in particular paragraphs 9, 30 and 35.

40. Insofar as the construction of sub-station on the left side corner of the plot reflected in the copy of plan submitted by the learned senior counsel for the plaintiffs is concerned, it is submitted that the said space for electric sub-station is earmarked in compliance with the provisions of the Development Control Regulations. However, on instructions, learned senior counsel states that the defendant no.3 society would shift the said sub-station to another portion of the land in question and thus the grievance, if any, of the plaintiffs would be met with. He submits that neither any FSI nor any portion of TDR available to the plaintiffs, if any, would be affected due to redevelopment of the building proposed to be carried out by the defendant no.3 society and all such rights would be kept intact. The plaintiffs cannot be allowed to claim exclusive use of any portion of the open land which belongs to the defendant no.3 society as a whole. The defendant no.3 society will not have any access through the row houses of the plaintiffs. The submissions made by the learned senior counsel for the defendant no.3 society are accepted.

41. Mr.Seksaria, learned counsel appearing for the defendant no.4 invited my attention to paragraphs 55 and 56 of the plaint and would submit that the letter addressed by the advocate representing the defendant no.3 society on 25th February, 2010 fully protects the interest of the plaintiffs. He submits that the plaintiffs have shown wrong area of the land on which building no.1 is constructed. He also

invited my attention to prayers (i) and (j) of the plaint and would submit that such reliefs claimed in those prayers cannot be granted by a Civil Court. Those prayers are nothing to do with the business of the redevelopment of the defendant no.3 society.

42. Learned counsel for the defendant no.4 invited my attention to the affidavit in reply filed by his client in this notice of motion and would submit that based on the resolution passed by the defendant no.3 society to execute a development agreement in favour of his client, the defendant no.4 has already taken various steps and has already spent Rs.10,24,11,726/- to the knowledge of the plaintiffs. The defendant no.4 has already got the plans submitted with the defendant no.1 for redevelopment of building no.2. The plaintiffs are fully aware of the entire development process since 2005 however, did not take any steps at the earliest. The plaintiffs have also admitted that they had participated in the process of appointment of the defendant no.4.

43. It is submitted that there is gross delay on the part of the plaintiffs to file this suit. No explanation is offered by the plaintiffs for the said gross delay. He submits that building no.2 is in very dilapidated condition. If *ad-interim* order passed by this Court is not vacated, serious prejudice would be caused to the defendant no.4. The balance of convenience is in favour of the defendant no.4 and not in favour of the plaintiffs. The defendant no.4 had made offer to the plaintiffs also to carry out redevelopment of their row houses but the plaintiffs have not given any response. He adopts the other submissions made by Mr.Samdani, learned senior counsel for the defendant no.3 society.

44. Mr.Madon, learned senior counsel for the plaintiffs in rejoinder, submits that it is not pleaded by the defendant no.3 society that any of the members of the defendant no.3 society are senior citizens or have retired from services or have no source of income. He strongly placed reliance on the report of the Structural Engineer obtained by the defendant no.3 society itself showing that the said building no.2 can be repaired. He submits that the row houses and the garden are part of the tenements under the agreements entered into between the plaintiffs and the original owner. He placed reliance on the third line of recital from the Deed of Conveyance and would submit that the garden was part of the row house. The majority of the flat purchasers cannot take away the existing rights of six row houses owner.

45. Insofar as inconsistency, if any, between the operative part of the Deed of Conveyance and the recitals is concerned, Mr.Madon does not dispute the proposition of law canvassed by Mr.Samdani, learned senior counsel for the defendant no.3 society. He submits that however, since the operative part of the Deed of Conveyance is not clear at all, the recitals can be considered for clarifying the operative part of the Deed of Conveyance. In support of this submission, he placed reliance on the last line of the Deed of Conveyance at page 192 and would submit that the said crucial part of conveyance is not at all clear and thus the said part of Deed of Conveyance has to be clarified only with the assistance of the recitals. There is no dispute that there is no sale of common area under the provisions of the Maharashtra Ownership Flats act. However, the defendant no.3 society has to prove that the garden or

open space is a common area. He submits that if any sub-station is constructed, the garden area allotted to the plaintiffs would be taken away which cannot be permitted at this stage. None of the judgments relied upon by Mr.Samdani, learned senior counsel for the defendant no.3 society deals with the common space in case of row houses. All the said judgments have dealt with common area of the building.

46. Insofar as the issue of jurisdiction raised by Mr.Seksaria, learned counsel for the the defendant no.4 is concerned, it is submitted by Mr.Madon, learned senior counsel for the plaintiffs that the issue of jurisdiction is not raised by the defendant no.3 society and thus cannot be allowed to be raised by the developer. The resolutions are *ex-facie* contrary to the reliefs sought by the plaintiffs. He submits that since the action taken by the defendant no.3 society is *ex-facie* illegal, the plaintiffs were not required to file any dispute under section 91 of the Maharashtra Co-operative Societies Act, 1960. The plaintiffs have also alleged that the defendant no.3 society would take away the garden of the plaintiffs. He submits that the so called assurances given by the defendant no.3 society through its advocate is not sufficient. He submits that *ad-interim* relief thus granted by this Court be confirmed by this Court.

REASONS AND CONCLUSIONS :

47. The defendant no.3 though has raised an issue of jurisdiction in the affidavit in reply filed to the notice of motion, Mr.Samdani, learned senior counsel appearing for the defendant no.3 society submitted that in view of deletion of section 9-A of the Code of Civil Procedure, 1908, his client does not press that issue at

this stage. The statement is accepted. Though Mr.Seksaria, learned counsel for the defendant no.4 has raised an issue of jurisdiction in the affidavit in reply and also at the time of his arguments, Mr.Madon, learned senior counsel for the plaintiffs rightly submitted that since the issue of jurisdiction has not been pressed by the defendant no.3 society at this stage, the defendant no.4 also cannot be allowed to raise that issue at this stage. This Court thus need not decide the issue of jurisdiction at this stage.

48. The next submission that arises for consideration of this Court is whether at this *prima-facie* stage, the plaintiffs were exclusively entitled to the open space and garden area as claimed in the plot or the same belongs to the defendant no.3 society. A perusal of the averments made in paragraph one of the plaint read with prayers in the plaint filed by the plaintiffs clearly indicates that it is admitted by the plaintiffs themselves that the defendant no.3 is the owner of a large piece of land bearing CTS Nos.353-A and 353-B of village Ghatkopar Kiorl along with building no.1 comprising of six row houses and another multi storied building no.2 comprising of several flats standing thereon.

49. The plaintiffs have also admitted that they are the members of the defendant no.3 society and as such members are the holders of six row houses comprising in the building no.1 in the property of the defendant no.3 society viz. (a) row house no.1 is held jointly by the plaintiff nos.1 and 2, (b) row house no.2 is held jointly by the plaintiff nos.3 and 4, (c) row house no.3 is held by the plaintiff no.5, (d) row house no.4 is held jointly by the plaintiff nos.6 and 7, (e) row house no.5 is held jointly by the plaintiff nos.8, 9 and 10 and (f)

row house no.6 is held jointly by the plaintiff nos.11 and 12.

50. A perusal of the prayers in the plaint clearly indicates that the plaintiffs have not prayed for a declaration of their alleged ownership in respect of the open space or the garden area. The declaration sought by the plaintiffs in the plaint is to the effect that they are entitled to exclusively use and occupation of building no.1 open space which is alleged to have been in exclusive possession of each of the plaintiff and which has been in exclusive possession of each of the row house from time to time and identified by the members nos.1, 2, 3, 4, 5 and 6 and has been marked in red coloured boundary lines, in green coloured boundary lines, in yellow coloured boundary lines, in brown coloured boundary lines, in blue coloured boundary lines and orange coloured boundary lines respectively on the plan annexed as Exhibit "S" to the plaint. The plaintiffs have also prayed for a declaration that the defendant nos.3 and 4 are not entitled to disturb the alleged exclusive possession and exclusive use of building no.1 open space. It is thus clear that the ownership of the defendant no.3 society in respect of the entire land bearing CTS Nos.353/1-A and 354/1-B along with building nos.1 and 2 is not disputed by the plaintiffs.

51. The next question that arises for consideration of this Court is whether *prima-facie* the plaintiffs are entitled to exclusive use of the portion of the open space or garden forming part of the land bearing CTS Nos.353/1-A and 353/1-B or not. Mr.Madon, learned senior counsel for the plaintiffs strongly placed reliance on the agreement for sale dated 25th May, 1971 annexed as Exhibit "E" to the plaint in support of the submission that each tenement was to

be deemed to be an independent unit of the purchaser of the tenement and was liable to pay the amount of municipal taxes for his / her tenement. It is also the case of the plaintiffs that each of the owner of the row houses was entitled to separate garden area. The original owners had already constructed the boundary wall between the two buildings i.e. building no.1 and building no.2 and had already separated two buildings.

52. On the other hand, the learned counsel for the defendant no.3 society has strongly placed reliance on the Deed of Conveyance dated 30th July, 1972 annexed as Exhibit "R" to the plaint. There are 20 recitals in the said Deed of Conveyance. The operative part of the said Deed of Conveyance clearly indicates that the entire plot including the structures shall be transferred and conveyed to the defendant no.3 society including the open space and garden. The operative part of the Deed of Conveyance is absolutely clear and does not require any other interpretation. In my view, Mr.Samdani, learned senior counsel for the defendant no.3 society is right in his submission that the agreement for sale executed under the provisions of the Maharashtra Ownership Flats Act is executory document and once the Deed of Conveyance is executed, the agreement for sale is subsumed with the Deed of Conveyance. All the rights, objections and entitlement of the parties are governed under the Deed of Conveyance. The agreement of sale is a transitory document. Be that as it may, the plaintiffs themselves admitted in the plaint that the defendant no.3 society is the owner of the entire land including the structures thereon.

53. The Hon'ble Supreme Court in case of **Nahalchand**

Laloochand Private Limited (supra) has held that the promoter has no right to sell any portion of the building which is not a “flat” within the meaning of section 2(a-1) and then entire land and building has to be conveyed to the organization. The only right which remains with the promoter is to sell unsold flats. In my view, the principles laid down by the Hon'ble Supreme Court in case of **Nahalchand Laloochand Private Limited** (supra) squarely applies to the facts of this case.

54. This Court in case of **Ashadeep Co-operative Housing Society Limited** (supra) has held that the ownership rights of the member would culminate into the membership of the society. As such owner / member alone, could have right to recover rent, carry out repairs, put up electric cables etc. Those rights would relate to the structure and not the land. Consequently the land would belong to the plaintiff society and none other. Any other interpretation would make the contract / agreement between the parties void as being in contravention of MOFA. In the said judgment, this Court had considered the Deed of Conveyance proposed to be executed between the owner and the society. In my view, the principles laid down by this Court in case of **Ashadeep Co-operative Housing Society Limited** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

55. In my view, since the original owners had no right to sell any open space or garden area to the flat purchasers and had already conveyed the entire property including the said open space and the garden area including the structures on the land to the defendant no.3 society, the plaintiffs who are admittedly the members

of the defendant no.3 society and as such are entitled to occupy the row houses in their occupation are not entitled to claim any ownership right in respect of any open space or garden area, which exclusively belongs to the defendant no.3 society.

56. It is not in dispute that though the plaintiffs had requested the defendant no.3 society to bifurcate the land into two parts as far back as on 21st December, 2006, no application for such bifurcation has been made by the plaintiffs till date to any of the authorities under the provisions of the Maharashtra Co-operative Societies Act, 1960. The land which is owned by the defendant no.3 society has not been sub-divided so far though building no.1 comprising of six row houses and building no.2 comprising of several flats are standing on one undivided plot owned by the defendant no.3 society. In my *prima-faice* view, the plaintiffs thus cannot be allowed to claim any right of ownerships in any of the portion of open space or garden area forming part of the ownership of the defendant no.3 society.

57. In my view, after execution of the Deed of Conveyance in favour of the defendant no.3 society by the original owners, the agreements entered into between the original owners and the purchasers of the row houses or the purchasers of the flats in building no.1 and building no.2 respectively are merged with the Deed of Conveyance and thus no reliance could be placed by the plaintiffs on the recitals in the agreement for sale entered into under the provisions of the MOFA or the recitals set out in the Deed of Conveyance.

58. The Privy Council in case of **Mackenzie & Ors.** (supra)

has held that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention. The Delhi High Court in case of **Bharti Televentures Limited** (supra) has adverted to the judgment of the Privy Council in case of **Beli Ram & Bros. vs. Mohd. Afzal, AIR (PC) 168** in which it was held that the operative part of a deed cannot be controlled by recitals in the preamble if the operative words are clear. In my view, the principles laid down by the House of Lords in case of **Mackenzie & Ors.** (supra) and in case of **Beli Ram & Bros.** (supra) which is adverted to by the Delhi High court in case of **Bharti Televentures Limited** (supra) would apply to the facts of this Court. I am respectfully in agreement with the views expressed by the House of Lords in case of **Mackenzie & Ors.** (supra) and in case of **Beli Ram & Bros.** (supra) and the judgment of the Delhi High Court in case of **Bharti Televentures Limited** (supra).

59. In my view, the parties are bound by the operative part of the document and not the recitals unless the operative part of the contract is not clear on the plain interpretation of that part. The recitals can be relied upon only for the purpose of interpretation of the provisions of the main contract or the operative part of the contract if the same is not clear. The recitals cannot be construed as main part of the contract. In this case since the provisions of the operative part of the Deed of Conveyance are very clear, the plaintiffs cannot be allowed to place reliance on the recitals either in the agreement for sale or in the Deed of Conveyance.

60. Insofar as the reliance placed by the learned senior

counsel for the plaintiffs on the *ad-interim* order passed by this Court is concerned, in my view Mr.Samdani, learned senior counsel for the defendant no.3 society is right in his submission that the Division Bench of this Court had made it clear in the order dated 21st August, 2017 that the observations made in the said ad-interim order passed by the learned Single Judge on 19th June, 2017 would be construed as *prima-facie* in nature and this Court cannot be influenced by the observations made, if any, by the learned Single Judge in the said ad-interim order. This Court has heard both the parties at great length.

61. The next question that arises for consideration of this Court is whether the plaintiffs have made out any *prima-facie* case or has demonstrated that the balance of convenience is in favour of the plaintiffs and not in favour of the defendants or whether any irreparable injury would be caused to the plaintiffs if the reliefs as prayed in the notice of motion are not granted in favour of the plaintiffs.

62. A perusal of the record clearly indicates that the construction of building no.1 and the building no.2 were already completed some time in the year 1971. It is the case of the defendant no.3 society that several members of the defendant no.3 society are senior citizens and have no source of income. This submission of the learned senior counsel for the defendant no.3 society is opposed by Mr.Madon, learned senior counsel for the plaintiffs on the ground that there is no such averments in any of the affidavits filed by the defendant no.3 society on record. Be that as it may, the plaintiffs have disputed that the building no.2 requires to be redeveloped on

the ground that the said building is in dilapidated condition.

63. A perusal of the record further *prima-facie* indicates that the defendant no.3 society had issued a circular amongst all the members of the defendant no.3 society as far back as on 13th October, 2003 proposing to redevelop building no.2. The plaintiffs had issued a notice through their advocates on 30th March, 2005 asserting their alleged rights in the said land and the benefits arising out of the redevelopment of the said land. On 1st October, 2005, the defendant no.3 society passed a resolution for appointing M/s.Value Developers Private Limited for undertaking the redevelopment of building no.2. On 19th November, 2009, the defendant no.3 society issued a public notice in the newspapers informing public at large about its intention to undertake the redevelopment of building no.2. On 8th October, 2009, the plaintiffs through their advocate sent a notice to the defendant no.3 society raising an objection to the redevelopment of the building no.2 by the defendant no.3 society on several grounds. On 18th June, 2013, the plaintiffs were served with a notice by the defendant no.3 society for holding a Special General Body Meeting on 15th July, 2013 for deciding the name of the developer.

64. The plaintiffs thereafter sent a notice on 2nd July, 2013, calling upon the defendant no.3 society to cancel the said Special General Body Meeting. It is not disputed that the said meeting was thereafter held. It is the case of the plaintiffs that the plaintiffs abstained the said meeting. It is not the case of the plaintiffs that the plaintiffs were not served with the notice of the said meeting proposed to be held by the defendant no.3 society. It is clear that the

suit is filed by the plaintiffs only on 28th December, 2015 though the defendant no.3 society had proposed to redevelop building no.2 at the first instance in the year 2003.

65. A perusal of the affidavits filed by the defendant no.3 and 4 indicates that the defendant no.4 has already taken various steps pursuant to the resolution passed by the defendant no.3 society and the development agreement entered into in their favour. It is the case of the defendant no.4 that the defendant no.4 has already spent Rs.10,24,11,726/- to the knowledge of the plaintiffs. The building plans are already submitted by the defendant no.4 with the defendant no.1 for redevelopment of building no.2. The plaintiffs have participated in the process of appointment of the defendant no.4. In my view, there is thus gross delay on the part of the plaintiffs in filing the suit. The plaintiffs did not bother to file a suit though were fully aware of the proposal of the defendant no.3 society much earlier. The plaintiffs have thus failed to make out any *prima-facie* case for grant of any interim relief. The balance of convenience also is in favour of the defendant nos.3 and 4 and not the plaintiffs.

66. The plaintiffs have not disputed that more than 90% of the members of the defendant no.3 society are in favour of the redevelopment of building no.2 and have passed a resolution in the Special General Body Meeting. In my view, the six members of building no.1 cannot be allowed to stop the process of the redevelopment against the wish of more than 90% members of the defendant no.3 society.

67. A perusal of the letter dated 25th February, 2010

addressed by the defendant no.3 society through its advocate to the advocate for the plaintiffs clearly indicates that the defendant no.3 society has made it clear in the said letter that the defendant no.3 society was ready and willing to join the plaintiffs in the redevelopment proposal. It is further stated that if the plaintiffs were not ready for redevelopment of building no.1, the proportionate share and TDR of the plaintiffs would not be utilized by the occupants of building no.2 for redevelopment and the structures of the plaintiffs would be kept untouched. It is further mentioned that even the proportionate TDR of the plaintiffs would not be used by the developer. The defendant no.3 society has also agreed to give an undertaking to the effect that the defendant no.3 society would not utilize the proportionate TDR of the area occupied by the plaintiffs in building no.1 having 6851 sq. ft. built up as per the records of the defendant no.3 society and not the encroached area.

68. Mr.Samdani, learned senior counsel for the defendant no.3 society made further statement before this Court that insofar as sub-station shown in the plan is concerned, the said sub-station is proposed to be set up to comply with the provisions of the Development Control Regulations. Learned senior counsel on instructions states that the said sub-station can be shifted from the proposed site to any other portion of the land and thus this grievance of the plaintiffs would be met with though such grievance is neither justified nor reasonable. The statement made by the learned senior counsel is accepted. In my view, various safeguards suggested by the defendant no.3 society in the letter dated 25th February, 2010 and the statements made by the learned senior counsel before this Court for the defendant no.3 society would sufficiently safeguard the

interest of the plaintiffs. The defendant no.4 has also made a proposal to carry out redevelopment of building no.1 separately which the plaintiffs have refused to accept.

69. The Hon'ble Supreme Court in case of **BEST Sellers Retail (India) Private Limited** (supra) and in case of **Dalpat Kumar & Anr.** (supra) has held that the plaintiffs who seek interim relief has to make out a *prima-facie* case, to demonstrate that balance of convenience would be in favour of the plaintiffs, irreparable injury would be caused to the plaintiffs if no interim reliefs are granted. All these conditions are cumulative. In my view, the principles laid down by the Hon'ble Supreme Court in case of **BEST Sellers Retail (India) Private Limited** (supra) and in case of **Dalpat Kumar & Anr.** (supra) squarely applies to the fact of this case. I am respectfully bound by the principles laid down by the Hon'ble Supreme Court in the aforesaid judgments. In my view, the plaintiffs have totally failed to prove any of the aforesaid mandatory requirements for grant of interim relief in favour of the plaintiffs.

70. I therefore, pass the following order :-

- a). The Notice of Motion No.1699 of 2016 is dismissed.
- b). There shall be no order as to costs.

(R.D. DHANUKA, J.)

71. Learned counsel appearing for the plaintiffs seeks continuation of the *ad-interim* order passed by this Court, which is

vehemently opposed by Mr.Samdani, learned senior counsel appearing for the defendant no.3 on the ground that building no.2 is in dilapidated condition. He further states that the defendant no.3 has not yet obtained the commencement certificate. The statement is accepted. In view of the statement made by the learned senior counsel for the defendant no.3, the application for continuation of the *ad-interim* order is rejected.

(R.D. DHANUKA, J.)