

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3414 OF 2019

Asif Abdullah Khan Pathan

and Another

..Petitioners

Vs.

Bhiwandi Nizampur Municipal

Corporation and Others

..Respondents

WITH

CIVIL APPLICATION (st) NO. 8989 OF 2019

IN

WRIT PETITION NO. 3414 OF 2019

Asif Abdullah Khan Pathan

and Another

..Applicants

IN THE MATTER BETWEEN

Asif Abdullah Khan Pathan

and Another

..Petitioners

Vs.

Bhiwandi Nizampur Municipal

Corporation and Others

..Respondents

Mr. Prasad Dani, Senior Advocate a/w Mr. Deepak Y. Chitnis, Ms. Sonali S. Dalvi I/b M/s. Deepak Chitnis-Chiparikar and Co, for the Petitioners.

Mr. N. R. Bubna, for Respondent Nos.1 and 2.

CORAM:-**S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**
DATE :- **MARCH 25, 2019.**

P. C.:

By this Writ Petition, the Petitioners are contesting the claim of the Municipal Corporation and particularly the contents of the notices dated 26th February, 2019 and 28th February, 2019. The Petitioners say that they are carrying on business and are purchasers of two flats more particularly described in paragraph 1 of the Petition.

2 These flats are in a building constructed by 3rd Respondent. It is stated that the Full Occupation Certificate has been granted. There is a Co-operative Society registered under the Maharashtra Co-operative Societies Act, 1960 which is impleaded as Respondent No.4. It is claimed that the Writ Petition has been filed challenging certain actions of the Municipal Corporation. It is claimed that the owners of the plots granted certain development cum sale rights and that is how Respondent No.3 developed the property. The property was developed by constructing buildings and flats or units therein have been sold to various flat purchasers including the present Petitioners. The buildings have been constructed in accordance with the sanctioned plans and Full

Occupation Certificates have been issued.

3 It is claimed that in the plan, 8th floor was kept open and shown as refuge area for both Wings “A” and “B” building. The flat purchasers of the two Wings have formed separate Co-operative Housing Societies. The Petitioners are purchasers of flats in the “B” Wing building.

4 It is claimed that the entire FSI was utilized by the 3rd Respondent and an objection was raised by the 4th Respondent Society for sanction of the plans and pertaining to shops. A written No Objection Certificate was issued based on which the amended plans were sanctioned and thereafter it is claimed that the 3rd Respondent acquired Transferable Development Rights (TDR) admeasuring 165 sq.mtrs and loaded that on to the present premises/construction.

5 The events leading to the amended plans being sanctioned, the construction being carried out are referred and then it is stated that the authorities have despite no unauthorized construction being carried out have now taken the subject action.

Such an action could not be taken in law and even the Petitioners can successfully assail the same.

6 We have perused this Writ Petition with the assistance of the advocate for the Petitioners and we find on reading of the same that a Regular Civil Suit No. 119 of 2018 is filed in the Court of Civil Judge, Junior Division at Bhiwandi. That Suit has been filed by the 4th Respondent against the 3rd Respondent. Thus, the Suit has been filed by the Co-operative Housing Society against the developer and builder as also the owner. The Petitioners claim that they were not members of the 4th Respondent Society and they are not aware of the resolution being passed by the 4th Respondent initiating the action against the 3rd Respondent for construction of shop premises on the ground floor of “B” wing building. The entire sequence of events leading to institution of that suit and order therein and even filing of Miscellaneous Civil Appeal by the 3rd Respondent are set out.

7 We are, therefore of the firm opinion that in the event two separate societies have been registered and the Petitioners are mere flat purchasers of a flat or unit in “B” wing, which has a

separate society, then, it is entirely for this Society to take a call. It can alone decide whether to initiate the appropriate legal proceedings. We cannot at the instance of the Petitioners examine any challenge to the notices which have been issued by the Municipal Corporation.

8 The entire Petition after the events leading to the construction and issuance of approval are set out contains allegations and specifically by naming Respondent Nos. 3 and 4. The Petitioners in paragraphs 7 and 8 have made vague statements by alleging that the Society has approached the Civil Court at a very belated stage and therefore with a view to cover up the delay, the authorities of Respondent Nos.1 and 2 are acting in collusion and connivance with Respondent No.4 Society. They have conducted a sham inquiry and their decision of cancellation of the Occupation Certificate which is already issued to Respondent No.3 is predetermined. The *malafides* are attributed to private parties as also these statutory authorities.

9 Be that as it may, there is a clear factual dispute. We cannot at this stage interfere with the impugned notices on a one

sided version of the Petitioners - flat purchasers. On our repeated query as to how the Petitioners have an identify separate and independent that of a Co-operative Housing Society, the only answer given was that the Petitioners are not enrolled as members and rather they have not been allowed to be enrolled as members. Even if that is the position, the Petitioners are not remedyless.

10 The impugned notice dated 26th February, 2019 is addressed to Shri Ajit Tanna and three others through their Power of Attorney holders M/s Sai Shraddha Enterprises and Partners of M/s. Sai Shraddha Enterprises. This notice says that the construction at Mauje Gauri pada, City Survey No. 8415 to 8431 is also based on the revised Development permission and Occupation Certificate of 6th September, 2012 and 2nd November 2017 respectively.

11 Though the Municipal Corporation is stated to have issued a development permission covering refuge area, still, Civil Suit No. 139 of 2018 is pending. This notice itself says that the permission for the construction is based on false documents and equally the construction is affected by Section 7 of the

Maharashtra Ownership Flats Act (for short “MOFA”).

12 In such circumstances, these two entities were called upon to show cause as to why the development permission should not be cancelled.

13 Then, we have another notice informing them that there will be a hearing held on 21st March, 2019 and these persons should remain present.

14 Surprisingly, we have a response given to the above Communications/Notices by M/s. Sai Shraddha Enterprises. That is a response, a copy of which is annexed as Exhibit-P to the Petition dated 28th February, 2019. M/s Sai Shraddha Enterprises informed the Commissioner of Bhiwandi Municipal Corporation that Stone Floor Co-Operative Housing Society Limited had filed a Regular Civil Suit No. 19 of 2018 in Civil Court, Bhiwandi in which an order of injunction has been passed against developers. The developers have already filed an Appeal before the District Court, Thane being Miscellaneous Civil Appeal No. 207 of 2018.

15 It is stated that the construction of the building has been completed as per the sanctioned plans and the Occupation Certificate in respect of the construction has been issued by the Corporation as per the provisions of law. Though it is alleged that Section 7 of the MOFA has been violated, that is incorrect. There is absolutely no truth in that allegation.

16 It is, therefore, apparent from a perusal of the Writ Petition that if the Petitioners have a dispute against either of the Respondents, namely 3 and 4, as also Respondent Nos.1 and 2, they are not prevented from suing them in a competent court and claiming all reliefs as are permissible in law, more-so when cross proceedings are pending between Respondent Nos. 3 and 4 in Civil Court. This is not a case where the Petitioners can be allowed to prosecute a Writ Petition under Article 226 of the Constitution of India, particularly when they are only flat purchasers and secondly they are claiming to be the members of the Co-operative Housing Society. If that Co-operative Housing Society is not granting them membership or is violating their independent rights and contentions, nothing prevents the Petitioners from suing this Co-operative Housing Society in a competent court,

including a Co-operative Court. To such proceedings the Petitioners can implead all parties including the Co-operative Housing Society.

17 We do not see how, when there are clear disputed questions of fact and legal and civil proceeding already pending between the developer, builder and the Co-operative Society that the Petitioners can approach this Court in writ jurisdiction. We are not totally unfamiliar with situations of the nature now presented before us. As and when there are legal proceedings and particularly Civil Suits filed against the developers and builders by the Co-operative Housing Society alleging violation of certain legal provisions including development permission and reliance is also placed upon the agreements inter se, when there are any adverse orders or directions, the flat purchasers are introduced or independently put up by the developers and builders to get over the binding orders passed against them by the Civil Courts. Equally, the builders and developers, as in this case and to derive advantage in their legal proceedings, put up the Petitioners and take a chance in this Court. The attempt is to seek some directions from this Court and which can then be utilized in the pending legal

proceedings and either way. We do not intend to interfere with the show cause notices issued by the Municipal Corporation when such is the position emerging from the record. It will be highly unsafe and risky to interdict the proceedings pursuant to such show cause notices and the Municipal Corporation must be allowed to take them to their logical conclusion. Prima facie, the Petitioners are but a front and are put up by Respondent No.3.

18 By clarifying that we have neither upheld the action of the Municipal Corporation nor have we affected the inter se rights of the parties, we dispose off this Writ Petition. It is disposed off on the ground that a Writ Petition under Article 226 of the Constitution of India is not the remedy which the Petitioners could have availed of given the clear dispute on facts.

19 It is now pointed out to us that a Civil Application moved in this Writ Petition was also circulated and which was to be listed on our Board along with the Writ Petition on our production Board. Though the Civil Application is not formally listed, we have taken a copy of the same and on perusing that Civil Application and its Annexures, all that we can conclude is that

the Municipal Commissioner has now carried forward the impugned notices, according to the Petitioners and presently the Municipal Commissioner says that the development permission as also the Occupation Certificate is stayed.

20 A copy of this communication of 19th March, 2019 is annexed to the Civil Application. In its preamble reference is made to several communications but we find that there is absolutely no reference to the impugned notices. Be that as it may, there is a reference to the Development permission of 18th March, 2008. The carried out development is of the ground floor (commercial) plus first floor plus 4 upper floors (residential) and that development permission is also stated to be conditional.

21 Then, the same was revised by the development permission dated 30th May, 2011. After which, there is a reference made in the same communication to the Occupation Certificate of wing “B” building dated 28th October, 2015. Pertinently, there is a reference to the permission sought on 9th October, 2017. That was rather a sanction to the revised plans and based on that the Occupation Certificate was requested to be issued. The

Corporation says that on 2nd November, 2017, the Occupation Certificate is granted but the 4th Respondent to this Society, which is a Co-operative Housing Society of Wing “B” building raised objections to this revised sanction. In that regard hearings were conducted and opinion of the legal department was sought. Thereafter, the sanctions have been issued and particularly of 27th April, 2018. The matter is pending before a Civil Court being Regular Civil Suit No. 119 of 2018. This is an admitted position insofar as Respondent Nos. 3 and 4. After that, there is an order of 1st September, 2018 passed in this Civil Suit restraining the creation of third party rights and that is against 5th Defendant to that suit. There is a stop work order and direction insofar as the construction in refuge area of “B” Wing building. It is in these circumstances that the Commissioner says that he has powers to stay the development permission as also the Occupation Certificate temporarily.

22 We do not think that the allegations in the Civil Application and annexing of some documents improves the case of the Petitioners. We do not express any opinion on the contents of this communication nor we agree with the Petitioners, when they say that this is a culmination of the show cause notices or that the

show causes notices have been taken to their logical conclusion by this communication.

23 It will be highly risky and unsafe to make any observation and particularly when all parties to the Civil Suits and pending civil proceedings are not before us. Hence taking note of this Civil Application and its contents will not carry the case of the Petitioners any further. Rather it will reinforce our conclusion that the instant Petition is not the remedy of the Petitioners.

24 In these circumstances, the Civil Application also stands disposed off.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)