

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

APPEAL FROM ORDER (STAMP) NO. 22143 OF 2019

Goregaon Pearl CHSL	...Appellant
vs.	
Dr.Seema Mahadev Paryekar & Ors.	...Respondents

Mr.Mayur Khandeparkar with Mr.Tushar Gujjar, Mr.Vikram G., Mr.Deepak Singh and Mr.Darshil Shah i/b. Solicis Lex for Appellant.
Mr.Amardev J. Uniyal for Respondent No.1.
Mr.Rajiv Narula with Ms.Ekta Pandav i/b. Jhangiani Narula & Associates for Respondent No.2.

CORAM : S.C. GUPTE, J.

DATE : 14 OCTOBER 2019

ORAL JUDGMENT :

1 The appeal is admitted and taken up for hearing forthwith by consent of counsel.

2 This appeal from order challenges an order passed by Bombay City Civil Court at Dindoshi, Mumbai on a notice of motion. By the impugned order, the Appellant (original Defendant) was restrained from alienating, or creating any third party interest in, the suit flat. This was by way of an ad-interim protection to the Respondents (original Plaintiffs). This order has since been perpetuated and obtains till date. On these bare facts, ordinarily I should have asked the parties to go for an expeditious hearing of the notice of motion instead of entertaining this appeal from an ad-interim order. Considering, however, the peculiar facts of the case and particularly, having regard to the fact that this controversy has had a long and chequered history, where the parties have already gone right upto the Supreme Court, I am of the considered view that I should hear the parties at length and

consider the case threadbare at the stage of ad-interim relief itself. Learned Counsel for both sides have showed their inclination to go in for a detailed hearing. I have accordingly heard Counsel and propose to dispose of the appeal by a detailed order.

3 The controversy in the present matter concerns redevelopment of a property owned by the Appellant, who is a co-operative housing society of about sixty members, who have already handed over possession of their respective flats for redevelopment and are currently said to be roofless. The redevelopment was entrusted by the Appellant society to Respondent No.2 developer (original Defendant No.2) under a development agreement. Under this agreement, the developer was duty bound to complete the project within twenty-two months from the date of receipt of commencement certificate with a three months grace period. The project involved construction of two wings of the new building, Wings A and B. Both wings were to partly accommodate the members of the Appellant society and partly third party purchasers of the free sale component of the project. In pursuance of the agreement, all members of the Appellant society vacated their respective flats by handing over possession to Respondent No.2 developer. Respondent No.2 had executed a bank guarantee in favour of the society in the sum of Rs.5 crores for fulfilling his commitment under the agreement. On or about 17 June 2008, a commencement certificate for construction of the new building was issued by the Municipal Corporation of Greater Mumbai ('MCGM') to the developer. Though construction was undertaken in pursuance thereof, it was nowhere near completion even as late as by August 2016, that is to say, even after passage of eight years from issuance of the commencement certificate. In the premises, by their notice dated 16 August 2016, the Appellant revoked the Power of Attorney given by it to the developer for development of the suit

property. This was followed by an arbitration petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") by the Appellant society seeking *inter alia* appointment of a court receiver for taking over the redevelopment project and completing it. Various breaches on the part of Respondent No.2 developer were alleged in the arbitration petition. These included non-completion of the project within the stipulated period of 25 months, change of plans without the society's consent and unauthorised construction of two additional floors for which stop-work notice was issued by MCGM. In the meantime, the bank guarantee of Rs.5 crores was invoked and encashed by the Appellant society. After various interim orders passed by this court on that arbitration petition, finally, on or about 7 July 2017, the parties entered into consent terms. Under these consent terms, the total liability of the developer was fixed at about Rs.7.62 crores. It was agreed that Rs.2.5 crores would be adjusted, from out of the bank guarantee amount of Rs.5 crores, towards arrears of rent and balance Rs.2.5 crores towards share of profits of the Appellant society. The consent terms provided for completion of Wing A with part OC on or before 31 December 2017 with a grace period of three months and completion of Wing B with part OC on or before 30 June 2018. The consent terms had a termination clause in the event of breach, if any, on the part of the developer. Post-dated cheques were issued by Respondent No.2 developer in pursuance of the consent terms. Respondent No.2 committed breaches of the consent terms. Not only was construction of A and B Wings not completed within the respective stipulated periods, but even the cheques issued in pursuance of the consent terms were dishonoured. This resulted into the Appellant society filing a contempt petition against Respondent No.2. This court passed an order in that contempt petition requiring Respondent No.2 to pay a sum of Rs.5.42 crores in instalments, and a bar chart, filed with the affidavit of Respondent No.2, was taken on record requiring

completion of construction in accordance with it. Since even this order was breached by Respondent No.2, by their notice dated 9 June 2018, the development agreement and power of attorney were terminated by the Appellant society. Further to this termination, an arbitration petition under Section 9 of the Act was filed by the Appellant, seeking various injunctive reliefs against Respondent No.2. These included a restraint on the Respondent from interfering with appointment of a third party developer and handing over possession of the project to such developer. At the hearing of this arbitration petition, by consent, disputes between the parties were referred to a sole arbitrator, converting the petition under Section 9 into an application under Section 17 of the Act. Even after this reference, there were settlement talks between the parties but nothing came out of those. Finally, by his order dated 17 September 2018, passed under Section 17 of the Act, the arbitrator allowed the Appellant society's application *inter alia* allowing the Appellant to appoint a new developer or contractor for completion of the project. Respondent No.2 was restrained from interfering with the redevelopment process through such new developer or contractor. Respondent Nos.3 and 4 herein were appointed as private receivers to facilitate the balance redevelopment; and Respondent No.2 was directed to handover possession of the suit property to these private receivers. The arbitrator *inter alia* noted the decision taken by the General Body of the Appellant society, which required all its members to be accommodated in Wing B, which was at a much more advanced stage of completion around the time. So far as Wing A was concerned, the Appellant society was to ensure that no third party rights were created in respect thereof by sale of any flat in Wing A to any new purchaser. This was evidently to take care of the claims of Respondent No.2 developer as well as various third party purchasers claiming under him. This order was carried in appeal under Section 37 of the Act by Respondent No.2. By an order dated 14

December 2018 passed by this court, the appeal was rejected. The learned Single Judge of this court, who heard the appeal, was of the view that the arbitrator's order was well-reasoned and fully justified. Being dissatisfied, Respondent No.2 carried the matter in a Special Leave Petition ('SLP') before the Supreme Court. The Supreme Court, by its order dated 21 January 2019, rejected the SLP. At that stage, considering the fact that some of the flat purchasers under Respondent No.2 developer had also challenged the order of the arbitrator passed under Section 17 of the Act, by a separate order dated 21 January 2019, the court, whilst rejecting the SLP of these flat purchasers *inter alia* observed that though it found no ground to interfere as the SLP of the developer against the very same order had been dismissed, the third party purchasers were given liberty to approach the arbitral tribunal and seek appropriate remedies, if so advised. (Respondent No.1 herein is also a flat purchaser in the free sale component under Respondent No.2 developer, having the same interest as the flat purchasers, who approached the Supreme Court by their separate SLP.) The flat purchasers thereafter approached the arbitrator by an application seeking modification of his order dated 17 September 2019. The arbitrator, after hearing the parties at length, by his order dated 27 February 2019, rejected the application made by the free sale component purchasers, requiring *inter alia* Respondent No.2 developer to circulate the order to all third party purchasers with whom flat purchase agreements or other contracts were entered into by the developer. It is in the backdrop of these facts that on or about 30 March 2019, Respondent No.1 herein filed her own suit for specific performance of her agreement for sale with Respondent No.2 developer (agreement dated 8 June 2015) before the City Civil Court at Dindoshi. On her ad-interim application, the City Civil Court passed a temporary injunction, restraining the Appellant herein from alienating or creating third party interest in the flat allotted to Respondent No.1

by Respondent No.2 developer in B Wing of the new building. Being aggrieved, the Appellant moves this court by the present appeal from order.

3 What emerges from narration of events set out above is that as of today, that is to say, after more than twelve years of entering into a development agreement and after more than eleven years of having surrendered their flats in the old building, sixty members of the Appellant society are still in pursuit of their new accommodations in the redeveloped building. This court referred the matters of dispute between the Appellant society and Respondent No.2 developer to arbitration. The arbitrator, by his order passed more than a year back (17 September 2018), appointed private receivers for facilitating balance redevelopment of the suit property. This redevelopment proposal, as reflected in the order passed by the learned arbitrator, envisages accommodation of all members of the Appellant society in B Wing, which is at a far advanced stage of completion than Wing A. Wing B consists of three podium floors plus 14 upper floors. These are said to 90% complete. The private receivers have already handed over possession of the incomplete construction of B Wing to the society in pursuance of the arbitrator's order dated 17 September 2018. M/s.Shetgiri & Associates, who are appointed as architects for the balance work, are expected to submit a report for balance construction and the society is expected to undertake the balance construction through a new developer or contractor. The new developer or contractor is expected to complete the construction of B Wing and house all sixty members of the Appellant society in flats therein. Balance construction of Wing B is expected to be financed from out of twelve flats, which are comprised in Wing B over and above the sixty flats to be allotted to the members of the Appellant society. The resistance of Respondent No.2 developer

as well as third party purchasers claiming flats in the free sale component of the redevelopment project under the developer, to completion of balance construction by the Appellant society in accordance with the order of the learned arbitrator, has been repelled right upto the Supreme Court. The question is, in the backdrop of these facts, should the project now be halted, since any restraint on third party rights in respect of flats in Wing B at the instance of a purchaser of free sale component under Respondent No.2 developer is but likely to inevitably result into halting of the project, or should it be permitted to go through. The answer appears to be an emphatic “no”. After all, the entire scheme of the arbitrator’s order, which has stood the scrutiny of courts right upto the Supreme Court, as noted above, is that all members of the Appellant society shall be rehoused in Wing B, leaving the remaining flats in Wing B to be sold so as to raise the requisite finance for completing the balance construction of Wing B, leaving entire Wing A, which is designed to comprise of 21 floors housing about 70 flats, untouched as and by way of protection of the interests of Respondent no.2 developer and third party purchasers claiming under him. If this scheme has been sustained by all courts including the Supreme Court, there is no reason why it should now be disturbed at the behest of a third party purchaser, whose arguments anyway have already been considered by the Supreme Court, though not at her instance, but at the instance of other purchasers similarly placed as her.

4 In the premises noted above, at the hearing of this petition, this court did inquire of learned Counsel appearing for Respondent No.1 whether specific protective orders should be passed in her favour reserving for her a comparable flat in Wing A of the new building. Learned Counsel, after taking instructions from his client, declines to accept the offer. Learned Counsel insists on protective

relief being extended to his client in Wing B alone, since, according to him, balance construction of Wing A is not on the immediate horizon and may take some time. Learned Counsel submits that it is Wing B, which is to be completed in the first instance in accordance with the orders of the learned arbitrator. Learned Counsel submits that since commitment made to his client by Respondent No.2 developer was in respect of a flat in Wing B, he would insist that his client be protected by reserving a flat for her in Wing B and not in Wing A. The court is informed that apart from Respondent No.1, there are various other flat purchasers, with whom Respondent No.2 developer had entered into agreements for sale in respect of flats in Wing B. If the case of Respondent No.1 is treated as a test case and other flat purchasers, who are similarly placed as her, jump into the fray, one can only imagine what the fate of this project would be. The project, after all, has been judicially formulated and has stood judicial scrutiny right upto the Supreme Court; it cannot be allowed to be jeopardised in this manner. Balancing of equities demands that it would rather be in the interest of justice that the project be allowed to go through with all flats for members of the society being provided in Wing B, the few additional flats in Wing B being treated as free sale component for financing the balance construction of Wing B, and protective reliefs be extended to Respondent No.2 developer and all third parties claiming under him including Respondent No.1 herein by injuncting the society from creating third party rights in the whole of Wing A.

5 In the premises, the impugned order of the trial court deserves to be quashed and set aside and substituted by a suitable protection in favour of Respondent No.1 *vis-a-vis* Wing A as in the case of other similarly placed flat purchasers. This relief, as noted above, has already been granted by the arbitrator by accepting a statement to that effect from the Appellant society. That, in my opinion, should

adequately protect the interest of Respondent No.1 just as it does the interests of other similarly placed flat purchasers.

6 Learned Counsel for Respondent No.1, however, makes a few legal submissions based on the provisions of the newly enacted Real Estate (Regulation and Development) Act, 2016 ('RERA'). Relying on these provisions and in particular, the definition of "promoter" contained in Clause (zk) of Section 2 thereof, learned Counsel submits that the Appellant society is one, who has caused to be constructed a building consisting of apartments for the purpose of selling apartments to other persons and as much as Respondent No.2 developer, it must be treated as a promoter of the project under the provisions of RERA. I am afraid, *prima facie* it is not possible to accept this submission. This court, in its judgment delivered in the case of **Vaidehi Akash Housing Pvt.Ltd. vs. New D.N. Nagar Co-op. Housing Society Union Ltd.**¹, has considered a more or less similarly worded definition of "promoter" in Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA") in the context of a similar development agreement, where the landowner society had terminated the agreement on account of breaches of the developer and third party purchasers claiming under the developer had claimed that the society should be treated as a promoter and be asked to complete the project. This court held that there was no privity of contract in such a case as between the society and third party purchasers claiming through the developer. If, for any justifiable reason, the development agreement is terminated by the society and the developer is unable to obtain specific performance of the development agreement as against the society, no third party purchaser claiming under the developer can likewise seek specific performance against the society. This Court, in **Vaidehi Akash**, observed as follows:

1 2015 (3) ABR 270

“15.7 Let us now consider if these third party purchasers have any rights under MOFA against the Society. It is submitted on their behalf that the Society is very much a 'promoter' within the meaning of MOFA as regards their respective agreements for sale. Learned Counsel for the purchasers rely upon the definition of “promoter” contained in Section 2(c) of MOFA. The definition is in the following terms :

“promoter” means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats, or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both.”

It is submitted that the Society can at any rate be said to have caused the building of flats to be constructed for the purpose of selling the same, and as a person, who causes such building to be built, is as much a promoter as a person who sells premises in such building.

15.8 The Society is the owner of the property and has entered into an agreement with the developers, i.e. Vaidehi, for redevelopment of its property. The redevelopment envisages construction of the Society's building to accommodate its members and also construction of building/s of flats/premises to be sold to outsiders. The agreement authorizes or entitles the developers to construct such building/s and sell flats/premises therein to outsiders. Such authority or entitlement is to the developers' account and in their own right, and as an independent contractor. If in exercise of such authority or entitlement, a building is constructed by the developers, it cannot be said that such building is caused to be constructed by the Society within the meaning of Section 2(c) of MOFA.

15.9 Any other interpretation would lead to anomalous consequences, which could never have been contemplated by MOFA. The owners of lands entering into agreements for sale or development agreements with promoters/developers would be held as being subject all liabilities of a promoter, such as liability of disclosure of plans and specifications, outgoings etc. under Section 3 of MOFA, entering into agreements in accordance with

Section 4, giving possession of flats and suffering the consequences of Section 8, forming co-operative societies of flat purchasers under Section 10, and so on. This would be plainly inconceivable.

15.10 Prima facie, thus, there is no case to treat the Society, who is merely in the position of an owner vis-a-vis the third party purchasers, as a 'promoter' within the meaning of MOFA and foist the obligations of a promoter on the Society in relation to the purchasers."

7 Learned Counsel for Respondent No.1 proposes two answers to the law stated by this court in **Vaidehi Akash** case. Learned Counsel, firstly, submits that another prior judgment of this court, namely, the case of **Ramniklal Tulsidas Kotak Vs. Varsha Builders**², was not pointed out to this court when it delivered its judgment in **Vaidehi Akash**. Learned Counsel submits that in **Ramniklal Kothak's** case, this court effectively held a similarly placed society to be a promoter under the MOFA regime. Learned Counsel, secondly, submits that, at any rate, a qualitative change has been brought about in this law by RERA and the law stated by this court in **Vaidehi Akash case** in the context of MOFA does not hold good under the provisions of RERA. Neither of these submissions is *prima facie* acceptable to this court. The case of **Ramniklal Kotak** involved an altogether different controversy. One of the questions before the court, which called for a discussion of MOFA and rules framed thereunder concerned the validity of a title certificate appended to the agreements for sale entered into by the developer in that case with third party purchasers. This court, in that context, was considering the provisions of MOFA and its rules for construing the expression 'title of the promoter' used in Section 3(2)(b) of MOFA. It was particularly considering whether the expression envisaged a particular class of developers who were not owners of the freehold or leasehold land which was being developed, as promoters. Having

2 AIR 1992 BOMBAY 62

regard, particularly, to Note No.2 of the Explanatory Notes forming part of the model flat purchase agreement in Form V, the Court held that a promoter must fall in either of the four categories: (1) owner of freehold land or (2) lessee of the land with authorization to construct flats and sell the same on ownership basis or (3) Agreement purchaser of the land to be developed under an agreement (not terminable) from a lawful owner thereof, who, in turn, must have a valid title to the land or (4) agent of the owner or lessee entitled to construct and dispose of flats on ownership basis. The promoter of such last-mentioned category was required to make the owner of freehold or leasehold interest as a confirming party to the agreements for sale of flats so as to bind him to the terms, conditions and covenants thereof. In the first place, the court has not come to any conclusion in that case that without being joined as a confirming party, the owner of land (whether freehold or leasehold) is bound by the covenants of the third party flat purchase agreement between the developer and the purchaser. Besides, this whole discussion has really nothing to do with the facts of our case.

8 The provisions of RERA do not make any difference either. RERA has been introduced to establish a regulatory authority for regulation and promotion of the real estate sector and to ensure sales in the sector in an efficient and transparent manner and to protect consumers of the sector. The definition of 'promoter' in RERA, for our purposes, is on similar lines as MOFA. Section 18 of RERA, on which strong reliance is placed by learned Counsel for Respondent No.1, requires promoters to discharge their obligations and provides remedies for the purchasers, without prejudice to the purchasers' other rights, in the event of the promoters' failure to discharge the obligations. Section 19, which follows, entitles the allottee to obtain possession of the flat or apartment. Any grievance of the purchaser

under RERA is redressed by the regulatory authority appointed under it. None of these provisions either make the owner of the freehold or leasehold interest in the land, who enters into a development agreement with a developer (who, in turn, enters into flat purchase agreements with third parties on the basis of such development agreement), liable for complying with the obligations of the developer under RERA. In fact, if at all there is any doubt in respect of the position of landowners *vis-a-vis* development projects registered under RERA, particularly where such landowners are entitled to a share in the total revenue generated from sale of apartments, the same has now been clarified by Maharashtra Real Estate Regulatory Authority that only such individuals/organizations would fall within the definition of 'promoter' in RERA, on account of being landowners, as would be specified as such at the time of on-line registration with the Authority. It is nobody's case that the Appellant society is such specified promoter in the on-line registration. Besides, grievance, if any, in this behalf must be addressed to the regulatory authority thereunder, and not to a civil court. There is, thus, no merit in any of the submissions of learned Counsel based on RERA.

9 In the premises, the appeal must succeed. The impugned order is, accordingly, quashed and set aside. It is, however, clarified that the protection afforded to Respondent No.2 developer in the order of the learned arbitrator dated 17 September 2018 shall also inure to the benefit of Respondent No.1 herein, who claims under Respondent No.2. The restriction ordered against the Appellant society so far as Wing A is concerned, shall accordingly be for the benefit of Respondent No.1 herein as well.

10 Learned Counsel for Respondent No.1 applies for stay of this order. Learned Counsel submits that the protection granted to his

client by the trial court extends till date; it should be continued for a limited period. Since this court has already provided for protection of Respondent No.1 in terms of the scheme ordered by the sole arbitrator on 17 September 2018, which is, as noted above, sustained by the Supreme Court, I am of the view that the interest of Respondent No.1 has been adequately protected for the time being and no further protection, which will have the effect of disturbing what has been ordered by the arbitrator and sustained by the Supreme Court, is called for at all. The application for stay is, accordingly, rejected.

(S.C. GUPTE, J.)