

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

APPEAL NO.580 OF 2015
IN
NOTICE OF MOTION NO.588 OF 2013
IN
SUIT NO.109 OF 2013

Chetak Co-operative Housing Society Ltd.,	]	
a co-operative housing society registered under	]	
the Provisions of the Maharashtra Co-operative	]	
Societies Act, 1960 having its office at	]	..Appellants
35, Pali Hill, Bandra (W), Mumbai 400 050.	]	(Org.Plaintiffs)

Versus

- | | | |
|---|---|--|
| 1] Sandhu Builders, |] | |
| A partnership firm registered under the |] | |
| Provisions of the Indian Partnership Act, |] | |
| 1932, having its office at 41, Pali Hill, |] | |
| Bandra (W), Mumbai 400 050. |] | |
| | | |
| 2] Kanwarjeet Singh Sandhu, |] | |
| | | |
| 3] Kanwar Shersingh Sandhu, |] | |
| | | |
| 4] Kanwar Dilersingh Sandhu, |] | |
| Nos.2, 3 and 4, the partners of Defendant |] | |
| No.1 above, having registered or |] | |
| administrative office at 41, Pali Hill, |] | |
| Bandra (West), Mumbai 400 050. |] | |
| | | |
| 5] Poonam Housing & Finance Pvt. Ltd. |] | |
| | | |
| 6] National General Agencies Pvt. Ltd. |] | |
| | | |
| 7] Dilersingh Estate Pvt. Ltd. |] | |
| Nos.5, 6 and 7, the private limited |] | |

- companies registered under the provisions
of the Companies Act, 1956 having their
registered or administrative offices at
41, Pali Hill, Bandra (West), Mumbai 400 050.]
- 8] K. V. Shah,]
- 9] Sunila K. Shah,]
Both No.8 and 9 are having their address]
at Tejal, 35, Pali Hill, Bandra (West),]
Mumbai 400 050.]
- 10] Municipal Commissioner,]
MCGM, Mahapalika Bhavan,]
Mahapalika Marg, opp. CST,]
Mumbai 400 001.]
- 11] Executive Engineer Building Proposals]
Department (WS), Municipal Corporation]
of Greater Mumbai, Having address at]
Municipal Office, R. K. Patkar Marg,]
Bandra (West), Mumbai 400 050.]
- 12] Municipal Corporation of Greater]
Mumbai, a statutory body incorporated]
under the provisions of Mumbai Municipal]
Corporation Act, 1888 having its address at]
Mahapalika Bhavan, Mahapalika Marg,]
Opp. C.S.T., Mumbai 400 001.]
- 13] V. K. Chari Consultants,]
Consulting Engineers, Architects and]
Surveyors, 501/502, Embassy Towers,]
Seven Bungalows, Andheri (West),]
Mumbai 400 061.]
- 14] Shiv Lila Co-operative Housing]
Society Ltd., Pali Hill, Bandra (West),]
Mumbai 400 050.]..Respondents
(Org. Defendants)

AND
CONTEMPT PETITION NO.79 OF 2014
IN
APPEAL (L) NO.82 OF 2014
IN
NOTICE OF MOTION NO.588 OF 2013
IN
SUIT NO.109 OF 2013

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Societies Act, 1960 having its office at]
35, Pali Hill, Bandra (W), Mumbai 400 050.]..Petitioners

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- 14] Shiv Lila Co-operative Housing]
Society Ltd., Pali Hill, Bandra (West),]
Mumbai 400 050.]..Respondents

AND
NOTICE OF MOTION (L) NO.347 OF 2014
IN
APPEAL (L) NO.82 OF 2014
IN
NOTICE OF MOTION NO.588 OF 2013
IN
SUIT NO.109 OF 2013

Chetak Co-operative Housing Society Ltd.,]
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Societies Act, 1960 having its office at]
35, Pali Hill, Bandra (W), Mumbai 400 050.]..Applicants

IN THE MATTER BETWEEN

Chetak Co-operative Housing Society Ltd.,]
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35, Pali Hill, Bandra (W), Mumbai 400 050.](Org.Plaintiffs)

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Mumbai 400 061.]
- 14] Shiv Lila Co-operative Housing]
Society Ltd., Pali Hill, Bandra (West),]..Respondents
Mumbai 400 050. (Org.Defendants)

Mr. Pravin Samdani, Senior Advocate a/w Mr. J. P. Sen, Senior Advocate and Mr. S. B. Pawar, Ms. Nikita Jacob, Ms. Shital Kutwal I/by M/s. S. K. Legal Associates LLP, Advocate for the Appellants and Applicants in NMAL No.347 of 2014 and for Petitioners in CONP No.79 of 2014.

Mr. Mahendra Ghelani a/w Mr. Parikshit Desai and Mr. Vikramsinh Yadav, Advocate for Respondent Nos.1 to 4.

Mr. Joaquim Reis, Senior Advocate a/w Mr. R. Y. Sirsikar and Mr. Dadasaheb Shingade, Advocate for Respondent Nos.10 to 12 – MCGM.

**CORAM : B. R. GAVAI &
RIYAZ I. CHAGLA, JJ.**

**JUDGMENT RESERVED ON : 27th NOVEMBER 2018.
JUDGMENT PRONOUNCED ON: 11th JANUARY 2019**

JUDGMENT (Per B. R. Gavai, J)

1] The present Appeal challenges the order passed by the learned Single Judge of this Court dated 29th January 2014, vide which the learned Single Judge has rejected the Notice of Motion

filed by the present Appellants. However, while doing so, he has directed the Defendant Nos.1 to 4 to fulfill certain assurances given by them.

2] The facts in brief giving rise to the present Appeal are as under :-

The parties will be referred to as they were referred in the original proceedings. The Plaintiffs are a registered co-operative housing society and are owners of the suit property. The suit property consists of land admeasuring about 12599.12 sq.mtrs., comprised in four contiguous plots of land, together with structures standing thereon. The four plots bear CTS No.C 1629 – A1/10 (part), CTS No.1381, CTS No.C1382C and CTS No.C1378A. There were certain existing structures on the said plots including building called “Manju Mahal”, a bungalow known as “Tejal”, six “row houses” and three “shops” and other “two structures”.

3] By an agreement and Power of Attorney dated 31st December 2005, the Plaintiffs entered into an agreement, thereby allowing Defendant No.1 to construct a new building by utilizing

the TDR/FSI entitlement in respect of the said land. The construction of the building was to be made by demolishing two existing structures. In or around 2006, the construction was commenced by Defendant No.1. It was the case of the Plaintiffs that it was noticed during construction that Defendant No.1 was constructing the building in breach of several terms as incorporated in the agreement dated 31st December 2005. It was also the case of the Plaintiffs that they had brought these breaches to the notice of Defendant No.1, by addressing various communications. It is also the case of the Plaintiffs that they had also brought these breaches to the notice of the Municipal Corporation of Greater Mumbai (hereinafter referred to as "MCGM"). It is the case of the Plaintiffs that in spite of communicating the breaches to Defendant No.1, still Defendant No.1 went ahead with the illegal construction. The Plaintiffs terminated the agreement and Power of Attorney in November 2011. The Plaintiffs also communicated the fact regarding termination of agreement to MCGM and its officers (Defendant Nos.10 to 12).

4] It was the case of the Plaintiffs that there were illegal

and fraudulent use of TDR/FSI by Defendant No.1 as also violation of Development Control Rules (for short “DCRs”). It is stated that the said violations were also communicated to Defendant Nos.10 to 12. It is the case of the Plaintiffs that since in spite of communication to Defendant Nos.10 to 12 to stop illegal construction of Defendant No.1 and since there was no action on the part of Defendant Nos.10 to 12, they were required to file Writ Petition in this Court in the month of July 2012. This Court by an order passed in the Writ Petition dated 20th December 2012, directed Defendant Nos.10 to 12 to take a decision on the representation made by the Plaintiffs. It is the case of the Plaintiffs that by that time, construction work had substantially progressed, Wing A of the newly constructed building consisting of 19 floors was fully constructed and another Wing B was also constructed upto 5 floors. It is the case of the Plaintiffs that by the order dated 5th January 2013, the Municipal Corporation rejected the representation of the Plaintiffs. The Plaintiffs challenged the said order by amending their pending Writ Petition. In the meantime, the Plaintiffs also filed suit. By order dated 8th May 2013, this Court permitted the Plaintiffs to withdraw the Writ Petition with liberty to

agitate all their contentions in the suit and continued the ad-interim order of status-quo, which was granted earlier. As such, the Plaintiffs amended the suit and incorporated various challenges.

5] The Plaintiffs also filed a Notice of Motion seeking injunction against Defendant No.1 from proceeding further with the construction. The Notice of Motion was heard at length by the learned Single Judge. The learned Single Judge after hearing the parties, was of the view that the project need not be stalled at this prima-facie stage, on the basis of contention of the Plaintiffs. However, insofar as the grievance of the Plaintiffs regarding the members of Manju Mahal building being denied parking spaces is concerned, the learned Single Judge recorded assurance given by Defendant Nos.1 to 4 that the Manju Mahal members would not be denied any parking spaces and would get their entire entitlement according to the 1978 plan. In the premise, the learned Single Judge passed the order as aforesaid. Being aggrieved thereby, this Appeal.

6] Perusal of the orders passed in the present proceedings would reveal that a detail order came to be passed by the Division Bench of this Court on 19th August 2014, while admitting the

Appeal. Perusal of the said order would reveal that the Learned Judges of the Division Bench observed that they do not intend stopping the construction altogether. It has further been observed that it was necessary to safeguard the rights of the parties. In order to protect the claim of the Plaintiffs, the Division Bench directed the MCGM not to grant the OC until and unless it certifies that car parking spaces that the Appellants are entitled to in accordance with law and the agreement will be available for allotment to the appellants and their members. The Court further directed that if for any reason the car parking spaces to which the Plaintiffs were entitled are not made available, they were directed to first make them available from the car parking spaces which are allotted or which are allottable to the occupants/members of the new building, being constructed by Defendant Nos.1 to 4. Insofar as the allegation regarding FSI violations is concerned, the Court clarified that the pendency of this appeal and suit would not prevent the MCGM from considering the issue at any stage and from passing necessary orders in accordance with law. The Court further directed that the Respondents shall not hand over possession of the flats in the new buildings, unless they obtain occupation certificate. It further

directed that Defendant Nos.1 to 4 and the purchasers of the flats in the new building be put to notice that their rights would be subject to the final orders in this appeal and in the suit.

7] In this background, we have heard the Appeal finally. It is the main contention of Mr. Samdani, learned Senior Counsel appearing on behalf of the Appellants that the entire construction carried out by Defendant Nos.1 to 4 is in utter disregard to the law. It is their case that Defendant Nos.1 to 4 in collaboration with Defendant Nos.10 to 12 have indulged into gross violation of the rules and have made construction much more than the permissible FSI. Mr. Samdani, learned Senior Counsel submitted that initially large open areas were shown on each floor as parking spaces for vehicles. An original plan also provided for car lifts. However, subsequently the plan came to be changed in 2011, whereby the car parking spaces and car lifts were abandoned and large open areas on each floor were shown as evacuation area and fountain and lilly ponds.

8] Mr. Samdani, learned Senior Counsel submits that on account of this, though large area are made available on each floor,

they are shown as construction free of FSI. He therefore submitted that the net result is that almost an area of 11668.52 sq.mtrs. is shown as construction free of FSI. Learned Senior Counsel therefore submits that as a result, each flat constructed in A Wing by Defendant Nos.1 to 4 is having an open area surrounding it, which is almost about 80% more than permissible one. Learned Senior Counsel submits that this is nothing else, but a fraud played by Defendant Nos.1 to 4 in collusion with Defendant Nos.10 to 12.

9] Mr. Samdani, learned Senior Counsel further submitted that there are various other breaches and contraventions made by Defendant Nos.1 to 4 while constructing building. He submits that environmental clearances which are required to be obtained, have also not been obtained by Defendant Nos.1 to 4 to make the construction. He therefore submits that the construction which is totally not permissible has been constructed by Defendant Nos.1 to 4 in collusion with Defendant Nos.10 to 12. He therefore submits that the Appeal deserves to be allowed and Defendant Nos.1 to 4 need to be enjoined from proceeding further with the further work. Mr. Samdani, learned Senior Counsel further submitted that since

the further construction which is carried out by Defendant Nos.1 to 4 has been constructed during the pendency of the Appeal under the orders of the Court, this Court can very well go into those issues.

10] Mr. Ghelani, learned counsel appearing on behalf of Defendant Nos.1 to 4 on the contrary would submit that the scope of the Appeal under Order XLIII Rule (1)(r) of the CPC is very limited. He submitted that the questions which are not raised before the learned Single Judge cannot be permitted to be raised in the present proceedings. Learned counsel further submitted that the learned Single Judge has considered the factors, which are required to be taken into consideration while considering the application under Order XXXIX Rules 1 and 2 of the CPC. He therefore submits that the Appeal is without merit and deserves to be dismissed.

11] The present Appeal is basically an Appeal from an order passed under Order XXXIX Rules 1 and 2 of the CPC. The law with regard to the scope of interference in such an Appeal has been crystallized by the Hon'ble Apex Court in the cases of **Wander Ltd. And another Vs. Antox India P. Ltd.**¹ and **Shivkumar Chadha Vs.**

¹ 1990 (Supp) SCC 727.

Municipal Corporation of Delhi and others². It will be relevant to

refer to paragraph 14 in the case of *Wander Ltd. (supra)* :-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph (1960) 3 SCR 713 : AIR 1960 SC 1156 (SCR 721)*

“....These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Jhanaton 1942 AC 130* 'the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well

² (1993) 3 SCC 161.

settled principles in an individual case'.”

It could thus be seen that, Their Lordships of the Apex Court have held that the appellate court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. It has further been held that appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below, if the one reached by the Court was reasonably possible on the material. It is equally not permissible to interfere with the exercise of discretion under appeal solely on the ground that, if the appellate court had considered the matter at the trial stage, it would have come to a different conclusion. It has further been held that if the discretion has been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view, would not justify interference with the trial court's exercise of discretion.

12] It is equally well settled that while considering a prayer for grant or refusal of injunction, the Court is required to take into consideration the test of prima-facie case, balance of convenience and irreparable injury. It could thus be seen that a limited inquiry that is permissible for us would be as to whether the learned Single Judge while passing the impugned order has correctly applied the principles as are applicable while deciding the case under Order XXXIX Rules 1 and 2 of the CPC. If the Court finds that those principles have been correctly applied, it will not be permissible for this Court to interfere with the discretion exercised by the learned Single Judge, even if this Court finds that another view was a more probable view. Equally, even if this Court finds that, had it exercised the jurisdiction as a first Court, it would have taken a different view, would also not be a ground to permit an interference. The only ground on which we would be permitted to interfere with the order passed by the learned Single Judge is that the view taken by the learned Single Judge is perverse or impossible.

13] If we apply these principles, we are of the considered view that it cannot be said that the view taken by the learned Single

Judge is either perverse or impossible view. The learned Single Judge has taken into consideration various relevant factors. He has taken into consideration the stage of the advance construction, the investment made by Defendant Nos.1 to 4 and also taken into consideration the factor of balance of convenience. After taking into consideration the factual situation, he has found that it was not necessary to stall the project. Insofar as the grievance of the Plaintiffs regarding inadequate parking spaces is concerned, the same has been taken into consideration by the learned Single Judge as well as this Court while admitting the Appeal. We are therefore of the considered view that it cannot be said that the view taken by the learned Single Judge warrants interference in the present Appeal.

14] As already discussed herein-above, the main grievance of the Plaintiffs is with regard to the blatant violation of the DCRs. It is the main grievance of the Plaintiffs that the construction made by Defendant Nos.1 to 4 is almost double than the permissible FSI. It is the main contention of the Plaintiffs that by changing the plans in the year 2011, vide which the provision of car parking per flat and car lifts was done away with and fire escape evacuation area,

fountain and lily ponds were provided, Defendant Nos.1 to 4 have in effect illegally provided area which is almost double than the permissible FSI. It is thus the case of the Plaintiffs that the FSI free construction made by the Defendants is in violation of the relevant DCRs. It is the case of the Plaintiffs that the said construction is in contravention of the judgment and order passed by this Court in Writ Petition No.2223 of 2013 dated 22nd 25th and 27th January 2016. No doubt that the Division Bench in the aforesaid case has held that if an excessive refuge area is provided in the residential building, the Petitioners therein will not be entitled to the benefit of treating the entire refuge area as free of FSI. It is another contention of the Plaintiffs that though the environment clearance was required, the construction is made without obtaining the same. In effect therefore, it is the contention of the Plaintiffs that Defendant Nos.1 to 4 in blatant disregard to law have made excessive construction with connivance of Defendant Nos.10 to 12.

15] In our considered view, therefore, the case of the Plaintiffs would come within the domain of colourful exercise of power by Defendant Nos.10 to 12, so as to give undue advantage to

Defendant Nos.1 to 4. We are of the considered view that it will not be within our jurisdiction in an Appeal under Order XLIII Rule 1(r) of the CPC to go into all these issues. We are also of the considered view that such an exercise can be done by this Court only while exercising its jurisdiction under Article 226 of the Constitution of India. In the present case, the Plaintiffs have already invoked such a jurisdiction of this Court by filing a Writ Petition challenging the occupancy certificate granted in favour of Defendant Nos.1 to 4. We find that the said forum would be an appropriate forum to go into all these issues raised by the Plaintiffs. In that view of the matter, we find that the Appeal deserves to be dismissed. The Appeal is therefore dismissed.

16] We, however, clarify that we have not considered the merits and demerits of the issues raised by the Plaintiffs and resisted by the Defendants in this Appeal. We clarify that nothing observed herein should be construed to have touched the merits of the submissions made on behalf of Plaintiffs and resisted by the Defendants and the parties would be at liberty to agitate the same in the Writ Petition filed by the Plaintiffs.

17] In view of disposal of Appeal, Contempt Petition and Notice of Motion do not survive and accordingly stand disposed of.

18] No order as to costs.

[RIYAZ I. CHAGLA, J.]

[B. R. GAVAI, J.]