

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

SUIT NO. 2949 OF 1993

1. **Mahesh Ramchandra Natekar,**
of Mumbai Indian Inhabitant in
his capacity as Chief Promoter
of Shree Swami Samarth Prasad
Co-operative Housing Society (proposed)
having office at : 11-A, Suyash,
Near Amar Hind Mandal,
Gokhale Road (North), Dadar,
Mumbai – 400 028.
2. **Samartha Development Corporation,**
a Partnership firm duly registered under
the Partnership Act, 1932, having its
registered office at 11-A, Suyash,
Near Amar Hind Mandal,
Gokhale Road (North), Dadar,
Bombay – 400 028.

Plaintiffs

Versus

- 1) **Kanubhai Ashabhai Patel**
in his capacity as Chief Promoter of
Shree Swami Samartha Prasanna
Co-operative Housing Society (proposed)
Unit Nos.151 to 250 having his address at
C/o. Indian Film Combines, 4th floor,
Kamal Mahal, Mathew Road, Opera House,
Mumbai 400 004.
- 2) **M/s. Arkay Builders, A sole**
proprietary concern having its
registered office at 236/238,
Samuel Street, Masjid Bunder,
Bombay – 400 003.

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| 3) | Lilitchandra L. Dholakia |] |
| | of Bombay Indian Inhabitant |] |
| | having his office at 236/238, |] |
| | Samuel Street, Masjid Bunder, |] |
| | Bombay – 400 003. |] |
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| 4) | M/s. K.K. Developers, |] |
| | A Partnership Firm having its office at |] |
| | 29, Aryan Mahal, C Road, Churchgate, |] |
| | Bombay 400 020. |] |
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| 5) | The Municipal Corporation of Greater |] |
| | Bombay established under the Bombay |] |
| | Municipal Corporation Act, 1888, A |] |
| | Statutory Corporation, having its office at |] |
| | Mahapalika Marg, Bombay 400 001. |] |
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| 6) | Oshiwara Land Development Co. Pvt. Ltd. |] |
| | A Company incorporated under the |] |
| | Companies Act, 1956 having its registered |] |
| | office at 71-73 Botawala Building, |] |
| | Appollo Street, Fort, Mumbai 400 001. |] |
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| 7) | Poonam Builders, |] |
| | through its Sole Proprietor, |] |
| | Umesh Himmatlal Gandhi |] |
| | B/203, Goyal Shopping Arcade, |] |
| | S.V.Road, Borivali (West), |] |
| | Mumbai – 400 092. |].. Defendants |

Mr.Dinyar Madon, Senior Advocate a/w. Mr. Atul Daga i/b Mr. Kunal Bhanage for plaintiffs.

Mr.Sagar Patil for respondent No.5-MCGM.

Mr.Aurelius D'silva i/b PMM & Co. for defendant No.7.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 11th NOVEMBER 2019
PRONOUNCED ON : 27th FEBRUARY 2020

JUDGMENT :

1. This suit is instituted, inter-alia, for a declaration that the plaintiffs are the owners of the lands bearing C.T.S.No.No.1/190E (Old C.T.S.Nos.1/202 (part) and 1/205) of village Oshiwara, Taluka Andheri, Mumbai Suburban admeasuring 10,924.3 square metres, forming part of Shree Swami Samartha Lay-out (hereinafter referred to as ‘the suit property’) and, conversely, the defendant Nos.1 to 4 and 7 have no right, title and interest and therein and they be restrained by a decree of permanent injunction from encroaching upon or trespassing on any portion/part of the suit property.

2. Initially, the suit was instituted by Oshiwara Land Development Company Private Limited (“OLDC”) as plaintiff No.1, V.P. Mahahan (plaintiff No.2), in his capacity of the Chief Promoter of Shree Swami Samartha Prasanna Co-operative Housing Society (Proposed), and Samartha Development Corporation, as plaintiff No.3. Shri K.A. Patel, the then Chief Promoter of Shree Swami Samartha Prasanna Co-operative Housing Society (Proposed), Unit No.151 to

250, was impleaded as defendant No.1; Arkay Builders was joined as defendant No.2; Lalitchandra L. Dholakia was joined as defendant No.3, K.K. Developers was joined as defendant No.4 and Municipal Corporation of Greater Mumbai was jointed as defendant No.5. Subsequently, in view of the *inter-se* disputes between the plaintiffs, OLDC (Original plaintiff No.1) came to be transposed as defendant No.6 in pursuance of the order of Court dated 29-06-2015. Mr.Mahesh Natekar came to be substituted as plaintiff No.1 in place of Mr.V.P. Mahajan, who resigned as Chief Promoter of the Society. In view of the devolution of interest, during the pendency of the suit, Poonam Builders came to be impleaded as defendant No.7.

3. The material averments in the plaint can be summarized as under :-

(a) The suit property is a part of a larger piece of land over which the defendant No.5 has sanctioned Swami Samartha Lay-out. The lands of Swami Samartha lay out, Yamuna Nagar layout and Millat Nagar layout form part of Survey No. 41 of Village Oshiwara, Taluka Andheri which vested in OLDC-the defendant No.6. Under the Agreements

dated 5-12-1975, 8-02-1979, 21-09-1980 and Supplementary Agreement dated 30-06-1982, the plaintiffs acquired lands admeasuring 5,12,349.45 sq. metres, over which the defendant No.5 sanctioned Swami Samartha layout. There have been modifications to the layout over a period of time. The defendant No.5 also sanctioned Millat Nagar layout and Yamuna Nagar layout vide orders dated 4-11-1981, at the instance of defendant Nos.1 and 2.

(b) It is the claim of the plaintiffs that between the layouts of the plaintiffs and that of the Millat Nagar and Yamuna Nagar, there is a water course (Nala). On the northern boundary of the said water course, there is an area admeasuring 2638.69 square yards over which the defendant Nos.1 and 2 wrongfully claimed proprietary title. The defendants, while developing the above-named two layouts, sought to encroach upon the said land and the remaining portion of the water course by unlawful filling.

(c) The plaintiffs lodged grievance with the defendant No.5 that the defendant Nos.1 and 2 were attempting to submit amended layouts to include the suit property as a part of Millat Nagar and Yamuna Nagar layouts.

The plaintiffs, by communication, dated 28-04-1993 called upon defendant No.5 to cancel the approval granted to defendant Nos.1 and in respect of the said layout. The defendant No.5, vide letter dated 3-06-1993, refused to cancel the said approvals. The defendant No.5 took a stand that the plaintiffs were not in a position to establish their title over the suit property. Hence, the suit.

4. The plaintiffs took out a Notice of Motion No.177 of 1993 in the suit. Initially, an ad-interim order in the nature of appointment of the Court Commissioner came to be passed on 13-08-1993. A final order came to be passed on 18-03-1997 in the said notice of motion and the rights of the plaintiffs in respect of the suit property came to be protected.

5. Though defendant Nos.1 to 5 appeared, they failed to file their written statement. Thus, by orders dated 30-04-1998 and 23-07-1998, the suit as against defendant Nos.1 to 5 came to be transferred to the list of undefended suits. However, later on, the defendant No.4 filed written statement on 29-02-2008 and admitted that he has no right in the suit property.

6. The defendant No.6 contested the suit. By an order dated 12-09-2017, issues were framed. However, the defendant No.6 abandoned the contest and withdrew all contentions in the written statement by filing an affidavit dated 6-02-2018. By an order dated 31-07-2018 the suit, thus, stood decreed as against defendant No.6 in terms of prayer clauses (a) and (a-i) but without prejudice to the contentions of the other contesting defendants.

7. In the aforesaid order, the Court noted that the defendant No.4 has filed a written statement supporting the claim of the plaintiff; whereas, the defendant Nos. 1 to 3 had not filed the written statement and thus the suit to proceed undefended as against defendant Nos.1 to 3.

8. On 4-09-2018, when the suit was listed before the Court, the plaintiffs were directed to serve a fresh notice on the learned counsel for defendant Nos. 1 to 3. In the order dated 24-09-2018, this Court noted that defendant No.1 expired and the learned Advocate had no instructions about the date of death of defendant No.1 and legal representatives of defendant No.1. The learned advocate, who then represented defendant Nos.2 and 3, submitted that he had no instructions. It was further noted that no reliefs were sought against the Municipal Corporation-defendant No.5. Thus, the suit was directed to proceed ex-parte as against defendant Nos.1 to 3 and 5.

9. The plaintiffs published a notice in the newspapers, Business Standard (Mumbai Edition) and Mumbai Samachar. In response, a letter was received on 11-04-2019 from defendant No.7 that there was an assignment in respect of the suit property in favour of defendant No.7. Ultimately, pursuant to an order dated 11-11-2019 passed in Chamber Summons (Lodg.) No. 785 of 2019, the plaint came to be amended and defendant No.7 came to be impleaded as a party defendant and the reliefs, which were sought against defendant Nos.1 to 4, are also sought against defendant No.7. In view of the amendment in the plaint, the final reliefs claimed in the plaint read

as under :

“(a) that it be declared that the plaintiffs are the absolute owners of the suit property more particularly described in Exhibit 'B' hereto and shown in red colour boundary line on the plan annexed as Exhibit 'A' hereto qua defendant Nos.1 to 4 and/or defendant No.7.

(a)(i) that it be declared that the plaintiffs having paid the entire consideration and having been placed in possession thereof, the plaintiffs are entitled to remain in possession, among others, of the suit property in part performance of the Agreements dated 5th December 1975, 8th February 1979, 21st September 1980 and 30th June 1982 (Exhibits 'B-3, 'C-1', “c-2' and 'C-4' hereto):

(b) that this Hon'ble Court be pleased to appoint a Commissioner and/or the District Inspector of Land Records and/or City Survey Officer to survey the Plaintiffs' suit property and defendants property and demarcate the boundaries between the plaintiffs' and defendants' property in accordance with their respective title deeds and/or land records and for that purpose all necessary directions and orders be passed including that the Commissioner submit a report and/or plan showing the plaintiffs' property i.e. the suit property and the defendants' property'

(c) that the defendant Nos.1 to 4 and/or defendant No.7 and their assigns, their servants, agents, representatives be restrained by a permanent order and injunction from encroaching upon or trespassing on any part of the suit property by doing any filling work or putting boundary walls or pegs or taking physical possession of the suit property which is more particularly described in Exhibit 'B' hereto and shown in red colour boundary line on the plan annexed as Exhibit 'A' hereto or in any other manner whatsoever;

(d) that the defendant Nos.1 to 4 and/or defendant No.7 and their assigns, their servants, agents and representatives be restrained by a permanent order and injunction from getting layout sanctioned and/or putting any plans or claiming Transfer of Development Rights or other rights in

respect of the suit property which is more particularly described in Exhibit 'B' hereto and shown in red colour boundary line on the plan annexed as Exhibit 'A' hereto or any part thereof.

(e) that defendant Nos.5 be ordered and directed to disclose to this Hon'ble Court the basis upon which the plans are submitted by defendant Nos.1 to 4 as also defendant No.7 their servants and agents for sanction to defendant No.5 and in the event that is found that false representations were made to defendant Nos.5 for getting such plans sanctioned on if defendant No.5 have wrongly sanctioned such plans, the plans be cancelled and IOD and CC granted to defendant Nos.1 and 2 and/or 3 and/or 4, if any, also be cancelled.

(f) that this Hon'ble Court be pleased to issue a mandatory order and direction restraining defendant No.5 their Officers and persons acting through and on behalf of accepting any scheme for Transfer of Development Rights submitted by any or all of Defendant Nos.1 to 4 as also defendant No.7 and/or their assigns in respect of any area or land other than 2 lacs sq.yards of land more particularly described Secondly and Thirdly in the Schedule annexed as Exhibit 'C' hereto and shown in Pink and Blue colour wash on the plan annexed as Exhibit 'A' hereto or in respect of the suit property more particularly described in Exhibit 'B' annexed hereto:

(g) that pending the hearing and final disposal of the suit the Court Receiver, High Court, Bombay or some other fit or proper person be appointed receiver in respect of the said portion of the plaintiffs' admeasuring 10,924/3 Sq.mtrs and shown delineated in red colour boundary on Exhibit 'A' hereto with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908;

(h) that pending the hearing and final disposal of the suit, the defendant Nos.1 to 4 as also defendant No.7 and/or their assigns, their servants, agents and representatives be restrained by an order and injunction of this Hon'ble Court from encroaching upon or trespassing on any part of the suit property by doing any filling up work or putting boundary walls or boundary pegs or taking physical

possession of the suit property more particularly described in the Exhibit 'B' hereto and shown in red colour boundary line on the plan annexed as Exhibit 'A' hereto.

(i) that pending the hearing and final disposal of the suit the defendant Nos.1 to 4 as also defendant No.7 and/or their assigns, their servants, agents and representatives be restrained be restrained by an order and injunction from putting up any plans or claiming Transfer of Development Rights or any other rights in respect of the suit property more particularly described in thte Exhibit B hereto and shown in red colour boundary line on the plan annexed as Exhibit 'A' hereto or from representing to any third party that Defendant Nos.1 to 4 as also Defendant No.7 or any of them have any right in or upon the suit property or any part thereof and/or from in any manner prosecuting C.R. No.331 of 1993 before the Court of the Metropolitan Magistrate, 10th Court, Andheri which proceedings be stayed in view of the interim reliefs claimed therein;

(j) that pending the hearing and final disposal of the suit this Hon'ble Court be pleased to appoint a Commissioner and/or the District Inspector of Land Records and/or City Survey Officer to survey the Plaintiffs' and defendants' property and demarcate the boundaries between the plaintiffs' and defendants' property in accordance with their respective title deeds and/or land records and for that purpose all necessary directions and orders be passed including that the Commissioner submit a report and/or plan showing the plaintiffs' property and the defendants' property.

(k) that pending the hearing and final disposal of the suit this Hon'ble Court be pleased to issue an order and injunction restraining defendant No.5 their officers and persons acting through and on behalf of them from sanctioning any plans or accepting any scheme for Transfer of Development Rights submitted by any or all of defendant Nos.1 to 4 as also defendant No.7 and/or their assigns in respect of any area or land other than 2 lacs sq.yds of land more particularly described Secondly and Thirdly in the Schedule annexed as Exhibit 'C' hereto and shown in Pink and Blue colour wash on the plan annexed as Exhibit 'A' hereto or in respect of the suit property more particularly

described in Exhibit 'B' annexed hereto.”

10. The position which, thus, emerges is that the suit as against defendant No.6 stands decreed, by an order passed by this Court on 31-07-2018, in terms of prayer clauses (a) and (a1), extracted above. The defendant No.4 has supported the claim of the plaintiffs. It has been recorded by this Court that the plaintiffs do not seek substantive reliefs against defendant No.5. There is no contest on behalf of defendant Nos.1 to 3. Moreover, the defendant No.7 claimed that there is devolution of interest of defendant Nos.1 to 3, in its favour. Thus, for all intent and purpose, the defendant No.7 assumes the character of a party who is interested in contesting the claim of the plaintiffs.

11. The defendant No.7 has filed written statement on 6-08-2019. The defendant No.7 has contended *inter-alia* as under :-

“3 The Plaintiffs have in paragraph 36C averred that the suit property formerly bearing C.T.S. No.1/205 and C.T.S. No.1/202 (part) and now bearing C.T.S. No.1/190E of village Oshiwara, Taluka Andheri, District Mumbai Suburban admeasuring 10,924.3 square metres, is required to be kept vacant and un-built in terms of the conditions of the Swami Samartha Lay-out bearing CE/649/BS-II/LOKWN.

4 As the southern boundary of lands of

Yamuna Nagar Layout about the suit property, the Plaintiffs claim relief in terms of prayer clauses of the plaint, not only against Defendant Nos.1 to 4 but against this Defendant, as this Defendant holds rights in respect of the Yamuna Nagar Lay-out.

5 The Defendant had vide letter dated 11th April 2019 (Exhibit 'X' to the plaint) made its stand clear by stating that except Nalla portion, entire Yamuna Nagar Layout is the property of this Defendant and this fact had been also confirmed by the Plaintiffs in Consent Terms dated 27th March 2008 in Suit No.3100 of 1996 filed in this Hon'ble Court and this Defendant had vide letter dated 11th April 2019 (Exhibit 'X' to the plaint) assured the Plaintiffs that this Defendant does not claim any right, title or interest in the suit property.”

12. Evidently, the defendant No.7 admits the proprietary title of the plaintiffs over the suit property. In the letter dated 11-04-2019 (Exh.'X' to the plaint, referred to above), the defendant No.7 has made a categorical statement that the defendant No.7 assures and confirms that defendant No.7 has no right, title and interest in the suit property. In view of the aforesaid admission of defendant No.7 in the pleadings, which stands on a higher pedestal, there is no impediment in passing the decree. However, the reliefs sought against the defendant No.5-Municipal Corporation are in the nature of reliefs consequent to the declaration that the defendant Nos.1 to 4 and 7 have no proprietary title over the suit property. This Court, in the

orders dated 24-08-2018 and 24-09-2018, recorded that no substantial reliefs are sought against defendant Nos.5-Municipal Corporation. Once the declaration in favour of the plaintiffs and against the defendant Nos.1 to 4 and 7 is made, there does not seem to be any propriety in granting a specific relief against defendant No.5, a Planning Authority.

13. Hence, I am persuaded to pass a decree against the defendant Nos.1 to 4 and 7, and dismiss the suit against defendant No.5-Municipal Corporation. Accordingly, I pass the following order :

O R D E R

- (i) The suit stands decreed against defendant Nos. 1 to 4 and 7 in terms of prayer clauses (a), (a-i), (c) and (d).
- (ii) The suit stands dismissed against defendant No.5.
- (iii) The parties shall bear their respective costs.
- (iv) The decree be drawn up and sealed expeditiously.

[N.J. JAMADAR, J.]