

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION NO. 744 OF 2021
IN
COMMERCIAL SUIT NO. 803 OF 2017**

Sandip C Shah ...Plaintiff
Versus
Pratibha S Shah & Ors ...Defendants

Mr Firoz Bharucha, *with Levi Rubens, Sushant Arora, & Rucho Magoo, i/b LR & Associates, for the Plaintiffs.*
Mr Anoshak Davar, *with Anisha Nair, i/b Vis Legis Law Practice, for Defendants Nos. 1 to 4.*
Mr Shailesh Poria, *i/b Economic Laws Practice, for Defendants Nos. 5 to 9.*

**CORAM: G.S. PATEL, J
DATED: 4th October 2021**

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1. The approach of Defendants Nos. 11 and 12 is astonishing. Both are described in the title as the same society but are sued separately through the Chairman and Secretary.

2. They continued to make additional demands, but they have adopted no proceedings of their own in any forum to establish their rights to any additional facilities.

3. The Plaintiffs/Applicants are the purchasers of free sale flats on the same development site separated from the society by an RG.

4. The development was the subject matter of Consent Terms dated 6th February 2018, a copy of which is at Exhibit 'C' to the IA and which was made an order of the Court (the Hon'ble Mr Justice SJ Kathawalla) on 6th and 14th February 2018 (Exhibit 'B'). Now, the Consent Terms require an officer of the Court to be appointed for the purposes set out in the Consent Terms. That was done. During the course of this development, it was found that part of the frontage of the site that had a 5.03 meter wide access road to the north of the property had to be set back for a public utility project, namely, a replacement of a drainage line from another plot elsewhere. This necessarily required a reconfiguration of some of the facilities.

5. Mr Davar appears for the developers, Defendants Nos. 1 to 4. He draws my attention to the Affidavit dated 26th July 2021 and its annexures. From this, he shows that not only has the society been provided basement parking but it has also received the facility of something called cantilever parking, where one vehicle is stacked on top of another. Part of the separate stack parking allotted to the free sale building has also been renegotiated and made available to the society. No other amenity has been reduced or taken away.

6. The society continues to be too clever by half. Having received the cantilever parking and stack parking advantage, it now contends that the marginal open space is insufficient and does not comply with MCGM norms. In short, at every stage the society only wants to be obstructive and create more and more demands. The society and its Architects do not seem to understand, or perhaps refuse to understand, that the entire development is physically and geographically constrained. It is not possible for the developer to conjure up additional open space to meet the society's demands. The society is perfectly at liberty to dismantle the cantilever parking if it is so worried about the marginal open space and fire safety and make do with less parking or to park outside. This change in the plot dimensions has been forced not by the developer seeking to make additional profits by constructing additional area or by anything the free sale flat purchasers have done but only because of a demand from the planning authority. I do not see how the society can be so unreasonable in its approach.

The facilities that are provided by the developer are set out in its Affidavit at length. In the Affidavit filed by Defendants Nos. 11 and 12 and affirmed on 17th September 2021, there is no specific traverse of the developer's contentions in paragraph 10 at page 46 that the old pipeline on the north from the Parijat society site had to be replaced. resulting in a shifting of the building line, or that because of the new DCPR 2034 plans had to be revalidated and adjusted.

7. Instead in its Affidavit, the society has not only confirmed its agreeability to the Consent Terms but has raised grievances in

regard to other amenities such as the society office, proposed meter, car parking spaces and so on. As I have noted, these have been taken care of. In any case, in paragraph 20 the society has reserved its rights to take appropriate steps for recovery of damages or loss. That is precisely what I mean when I said that the society must now put its hand in its cooperative pocket and bring forth court fees.

8. Although the Consent Terms do not explicitly require the written consent of the society, it is stated before me that the MCGM will require the no objection from the society on the final plan before an occupation certificate can be issued to the free sale building.

9. Prayer (c) of the IA at page 15 reads thus:

“C. In the event Defendant No. 11 and 12 [Society] do not cooperate for revalidating the Commencement Certificate / approving the revised Building Plans, the requirement of their signatures for the same be dispensed with.”

10. Even now the society insists that while it is not “opposing” either the developer or the free sale flat purchasers, it still wants to make additional submissions for what it believes is its “right”. Yet the society will not institute any proceedings of its own to establish even in a prima facie case that it has such rights. If the society wants to assert ‘rights’, it must adopt proceedings of its own; and that includes paying court fees. If the society believes it has any other remedies, it is welcome to pursue those. However, it cannot obtain a stay against MCGM from operating contrary to this order.

11. There will be an order on the IA in terms of prayer clause (c).
There will be no order as to costs.
12. The IA is disposed of accordingly.
13. Previous order, if any, to continue until next date.
14. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)