

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

**WRIT PETITION NO.1590 OF 2017  
IN  
MISCELLANEOUS CIVIL APPEAL NO.28 OF 2016**

1. Urban Horse Property Developers Pvt.Ltd.,  
(originally known as Tanna Pune Land  
Development Pvt.Ltd.,  
A company registered under the  
Indian Companies Act, 1956  
Tanna House, 11/1, Nathalal Parekh Marg,  
Colaba,Mumbai 400 039.

2. Mr.Dipak Tanna,  
Age-58 years, Occu-Business,  
Flat No.8W, Navroze Apartments,  
Bhulabhai Desai Road,  
Mumbai 400 026

2(a) Dipak Tanna Family Trust,  
Having its office at Flat No.8W  
Navroze Apartments,  
Bhulabhai Desai Road,  
Mumbai 400 026  
Through its Trustees  
(a) Mr.Niranjana K.Tanna,  
Age-Adult, Occu-Business,  
(b) Mr.Dipak Tanna,  
Age-58 years, Occu-Business,

3. Mr.Vinod Purnmal Bansal,  
Age-63 years, Occu-Business,  
Having office at Chandramukhi,  
7th floor, Nariman Point,  
Mumbai - 400 021,

4. Pratibha Vinod Bansal,  
Age-58 years, Occu-Business,

Having office at Chandramukhi, 7th floor,  
Nariman Point, Mumbai-400 021,

5. Kunal Vinod Bansal,  
Age-37 years, Occu-Business,  
Having office at Chandramukhi,  
7th floor, Nariman Point,  
Mumbai 400 021

-- PETITIONERS

**VERSUS**

1. Lt.General Yash Malhotra, AVSM  
(Retired), Age - 70 years, Occu-Retired,  
Residing at Flat No.1, Urban Horse  
Enclave, S.No.66/B-4,  
B.T.Kawade Road,  
Chorpadi, Pune 411 001
2. Capt.Premananda Goswami VM  
(Retired), Age-80 years,  
Occu-Retired,  
Residing at Flat No.5, Urban Horse  
Enclave, S.No.66/B-4,  
B.T.Kawade Road,  
Chorpadi, Pune 411 001
3. Mr.Mehernosh Karkaria,  
Age-53 years, Occu-Business,  
Residing at Flat No.10, Urban Horse  
Enclave, S.No.66/B-4,  
B.T.Kawade Road,  
Chorpadi, Pune 411 001
4. Miss Prudence Salis,  
Age-57 years, Occu-Retired,  
Residing at Flat No.6, Urban Horse  
Enclave, S.No.66/B-4,  
B.T.Kawade Road,  
Chorpadi, Pune 411 001

-- RESPONDENTS

Mr.G.S.Godbole a/w Mr.Sumit S.Kothari, Advocate for the petitioners.  
Mr.Amit Shroff, Advocate for respondent Nos. 1 to 4.

**CORAM : BHARATI H. DANGRE, J.**

**RESERVED ON : 26<sup>th</sup> OCTOBER, 2021**  
**PRONOUNCED ON : 10<sup>th</sup> FEBRUARY, 2022**

**JUDGMENT :**

1. By the present writ petition, the petitioners seek a challenge to the order passed by the Trial Court thereby refusing the temporary injunction in his favour.

The sequence of events would reveal that the plaintiffs instituted RCS No.720/2015 against the respondents for permanent injunction. The plaintiffs, 4 in number, are the residents of flats' scheme named and styled as a 'Urban Horse Enclave' S.No.66-B/4, B.T.Kavde Road, Ghorpadi, Pune. The defendant No.1 to the said suit is a Company registered under the Companies Act, known as 'Urban Horse Property Developers Private Limited' originally known as 'Tanna Pune Land Development Private Limited'. The defendant No.2 is the erstwhile developer Shri Dipak Tanna as well as other private individuals.

2. The plaintiffs filed a civil suit alleging that defendant No.1, a private Limited Company is the owner of all that piece and parcel of

that plot admeasuring 21,200 Sq.Ft. bearing Cadestral Survey No.66-B, hissa No.4/1, situated at village Ghorpadi, Pune, upon which, defendant No.1 constructed buildings consisting of A, B and C blocks known as 'Urban Horse Enclave' which comprised of 15 flats/units in each building. The plaintiffs acquired right, title and interest in their respective flats/units on the basis of respective agreements executed by defendant Nos. 1 and 2 in their favour. Pursuant to a resolution passed in a Extraordinary General Meeting of the Company, for right to possess, use and occupy the respective flats/ units.

It is the case of the plaintiffs that the defendant Nos. 1 and 2 executed distinct agreements in favour of all the plaintiffs, which was registered with the Office of the Sub Registrar, Haveli under distinct registration numbers.

**3.** The plaintiffs pleaded that the units occupied by them and comprised in a building is constructed at Sr.No.60-B, hissa No.4 and prior to the construction of the said building, the defendant Nos. 1 and 2 had earmarked and demarcated the approach road to the said building by constructing a compound wall about 2 feet in height upto the entrance gate of the building and the defendants had also put chain

link fencing on the 2 ft. wall and trees came to be planted alongside the compound wall and they have now taken shape of grown up trees. The wall came to be decorated by decorative plants and as per the plaintiffs, the demarcated approach road is the only access road for the plaintiffs to their building.

4. Defendant No.2, on 06/01/2015 informed plaintiff No.1 that defendant Nos. 1 and 2 have sold the adjoining property bearing S.No.66-B Hissa No.5 to defendant No.3 and it was informed that originally entrance to Hissa Nos. 4 and 5 was planned through Hissa No.1, but now the entrance is shifted to Hissa No.5. The defendant No.4 informed that defendant No.3 will provide 7.5 mt.wide road for access to the plaintiffs' building and a fencing will be constructed around the property bearing S.No.66-B/5 and the plaintiffs should permit such fencing. The plaintiffs apprehended that by construction of a new boundary of compound wall, the defendants are attempting to reduce their access road by demolishing road by already existing 2 feet wall. The request was therefore made by the plaintiffs to resolve the matter amicably and not to cause inconvenience to the plaintiffs as well as the other flat purchasers and the responsibility of defendant No.2

was not to allow defendant No.3 to enclose the portion viz-a-viz a common road.

Without taking cognizance of the grievance of plaintiff No.1, defendant No.2 and defendant No.2A, with the consent of defendant No.1, illegally and unauthorizedly executed the Agreement of Development dated 31/12/2006 in favour of defendant Nos. 3 to 6 in respect of the land admeasuring 00 Hectre 267.76 R out of land S.No.66-B/5, total admeasuring 00 Hectre 38 R. The arbitrary and unilateral act of defendant Nos. 2 and 2A by executing a Development Agreement in favour of defendant Nos. 3 to 5 do not acquire any right or interest in the said land bearing No.66-B/5 or part thereof, is the case of the plaintiff. The plaintiffs' claim that defendant Nos. 2 to 5 are not entitled in law to carry out development in the said land Survey No.66-B/5 in whatsoever manner. The plaintiffs specifically pleaded that the plan for construction of building on S.No.66/3/4 was sanctioned by the competent authorities in the year 1996 and as per the approved plan, the approach road / access road to building No.A, B and C is clearly reflected, but defendant Nos. 1, 2 and 2A has now attempted to unauthorizedly shift the said road towards Southern side than its original location and said road at present is passing through

land S.No.66/3/5. The plaintiffs claim that the defendants are not entitled to demolish the 2ft compound wall and claimed absolute right over the said open space pertinent to the adjoining access road leading to 'Urban Horse Enclave'.

5. An attempt to demolish the existing 2ft wall at the hands of the labourers appointed by the defendants, the plaintiffs even approached the police station, but their complaint was refused on the ground that the dispute was of civil nature. By alleging that the defendants are in an attempt to reduce the width of their access road, which would pose difficulty for enter and exit of water tankers, fire fighting vehicles or ambulances, causing great loss and hardship to the family of plaintiffs, the suit is filed by the plaintiffs claiming permanent injunction against the defendants from demolishing the existing two feet compound wall adjoining the access road of the plaintiffs' building and also restraining them from constructing a new compound wall.

6. In the said suit, an application for temporary injunction came to be filed claiming that the balance of convenience lies in favour of the plaintiffs as all the flat purchasers in the said building are senior

citizens and are using the said access road to their building since 2004, but if the defendants succeed in demolishing the two feet compound wall alongwith the wire and constructing a new compound wall, there will be reduction in the width in the existing access road and since the defendants have no authority in Law to reduce the access road, a temporary injunction is claimed for.

7. The application came to be opposed by defendant No.3 by filing his reply and denying the very assertion of the plaintiffs that they are entitled to use the area mentioned in the plaint, as alleged access road to their building and the application for injunction is opposed on the ground that defendant Nos. 1 and 2 have never demarcated or earmarked the road to the said building and the area in which the 2ft compound wall, open space and plantation, etc is alleged to be standing, are actually located in the property bearing S.No.66-B/5 and the said property was earlier owned by defendant No.1 till 19/06/2001. However, as per the order dated 30/08/2001, passed in a Company Petition by the High Court, the same came to be transferred to defendant No.2 and his father, as reduction of capital of defendant no.1 and now upon the death of father of defendant No.2, it is owned by

defendant No.2 and Dipak Tanna Family Trust and the plaintiffs have no concern with the said area bearing S.No.66-B/5 (Part) which is now developed by defendant No.3 under the agreement for development dated 31/12/2006. It is further pleaded that when the proposal for constructing the building on plot S.No.66-B/4 (part) were put up for approval, at that time the said plot had direct access from outside, vide a 7.5 mt. access road and this can be clearly seen in the layout plan of the building, which was approved by the P.M.C. in the year 2000. However, by the time the building was completed, the direct access road from outside had shifted and it became the rear land portion, merging into adjoining open plot and consequently, plot No.66-B/5 became landlocked and for this reason, defendant Nos. 1 and 2 have provided 7.5 mtrs. wide access road from plot No.66-B/5 (part), 66-B/4 (part) and this was also approved by the competent authority.

8. On consideration of the rival claims set up by the plaintiffs and the defendants, the 5th Joint Civil Judge, Jr.Division, Pune on 11/12/2015, granted temporary injunction in favour of the plaintiffs and it was recorded that two feet compound wall was existing beyond the 9mt.wide road, which was shown in the sanction plan and if the

wall is demolished, it will cause irreparable loss to the plaintiffs. When the appeal was carried by the petitioners to the District Court in Misc.Civil Appeal No.28/2016, on 22/09/2016, the learned Judge appointed Richard Pereira and Associates as Court Commissioner to ascertain the factual scenario and a survey came to be conducted in the presence of the plaintiffs and defendants on 12/10/2016 and on 03/11/2016, the Commissioner submitted his report. Recording the findings in the said report, about the scenario prevailing on spot, the learned District Judge dismissed the appeal and concurred with the findings of the First Court, about a prima facie case for injunction being in favour of the plaintiffs.

9. In support of the petitioners, I have heard the learned counsel Shri Godbole and Shri.Shroff appearing for the respondents.

Mr.Godbole would submit that the claim of the petitioners that they have a right of a way through C.T.S.No.66-B/5/1 having width 23.48 Mtr. is a unreasonable claim and the person claiming easement and claiming right having width, orientation and location, which is least onerous to servient heritage and this very principle has been lost sight of by the two Courts below is the submission of the petitioners.

According to Shri Godbole, by placing reliance upon the map, he submits that the plan of 13.09.2000 revealed a 7.5 mt. road and the layout of C.S. No.66-B/5/1 sanctioned on 08.01.2004 provide for 7.5 mt. wide access to C.S.No.66-B/4/1. However, on 29.12.2014, a new layout plan was sanctioned, which provided a 9 mt. road, which sanctioned a 9 mt. road, which has a requisite width prescribed as per the D.C.R. which came into force in the year 2017.

The submission of Shri Godbole is to the effect that the plan of 1996 also showed a 7.5 mt. direct access from the DP road and the occupants purchased the flats after 2004, at a point of time when plot No.66/3/5 was already transferred. The brochure upon which the reliance has been placed has no binding force and the claim of the plaintiffs to the effect that the Company had planned to construct bungalows, cannot survive as no commitment to that effect was made and in fact, the Company always reserve it's right to change it's plans at any time, as there was a covenant to that effect in the agreement. The submission of the respondents (original plaintiffs) is that they will be put to inconvenience if 23 mt. road is not provided, but it is specifically argued by Shri Godbole that from the D.P. road, to have an access to their plot, one has to pass through 3 meter narrow service road to reach

the 7.5 mt. road and width of this nature is sufficient enough to gain ingress/egress of the trucks/ tankers and at a time 2 trucks / tankers can pass comfortably. The P.M.C. following the DC Rules, deemed it expedient to approve 9 mt. common access road and therefore the demand made by the plaintiffs is clamped to be unreasonable and not based on any existing right.

Per contra, the learned counsel Shri Shroff would urge that the developer cannot change the very basis of understanding upon which the flats were sold to them, so as to take undue advantage of the available FSI. Relying upon the brochure, which depicted a open space in front of the flats A, B, and C, the submission is while buying the flat located in S.No.66-B/4, the space was shown as open space and not as open plot, and the openness of this available space was a positive factor for the flat purchasers to invest in the scheme and it is always agreed that the open space would remain open with 2 ft wall on one side and the tree plantation on it's side way. Accordingly, when this wall is sought to be demarcated, the Lower Court has rightly construed the change by the petitioners/Developers to be a material breach of covenant and according to Mr.Shroff the covenant of open space is not only a term of easement, but it was a condition accompanying to the

scheme of layout of both plots. The contention of petitioner No.2 and 2A that they were separately entitled to ownership of plot No.66/3/5 and open land is part thereof and as such it can be used by them in the way they want, is contrary to the understanding given to the petitioners at the time of selling of the flats, is the submission advanced. The learned counsel would submit that according to the Development Agreement executed with the plaintiffs, the petitioners were not to change the layouts or schemes of plot No.66-B/5/1. The balance of convenience being existing in favour of the plaintiffs, the submission advanced is that the two Courts have rightly granted injunction in favour of the plaintiffs.

**10.** The sequence of events which emerge from the documents placed on record would, reveal that in the year 1996, Tanna land Development Private Limited, jointly owned C.S.No.66-B/4/1 + 66-B/5/1. On 03/09/1996, the PMC sanctioned building on 66-B/4/1 with 7.5 mt. access road and the bone of contention between the parties is whether the said access road is passing through C.S.No.66-B/5/1. In the year 2000, the plan sanctioned by P.M.C. was re-validated. The Company Petition (Scheme of rejection of share capital) was

allowed by the High Court on 20/06/2001 and a road map was carved, allowing the shareholder to be allotted land in lieu of the cancelled shares in favour of Dipak and Kalyanji Tanna i.e. in respect of 66-B/5/1. In the year 2004, a layout was approved comprising of 7.5 mt. access road. The completion certificate was issued in favour of the constructed building in the year 2004 and on 31.12.2006, development agreement registered for C.S.No.66-B/5/1 between petitioner No.2 + petitioner No.2A and petitioner Nos. 3, 4 and 5. The PMC sanctioned plan on S.No.66-B/5/1 with 9 mt.wide access road, on the other hand 7.5 meter road has been sanctioned on 08.01.2004 and this was done on 29.12.2014. In the backdrop of the aforesaid facts, Exh.5 was allowed in favour of the plaintiffs.

In the Appellate Court, the report of the Court Commissioner came to be submitted in respect of the Urban House Property situated at S.No.66-B, hissa Nos. 4 and 5 and a site report was prepared in the presence of the plaintiffs and the representatives of defendants. The report categorically record as under :-

*"1. Access to the property situated on S.No.66/B Hissa No.4 and Hissa No.5 is through a 3 m (effective) wide Service Road parallel to the flyover on B.T.Kavde Road (marked A) having commercial spaces on one side and the side wall of the flyover on the other side.*

*A sharp right angled turn has to be taken to get to the main access way of 7.35 m (avg) width internal concrete road, serving the Silver Dale Apt. Complex comprising of 98 flats (50 flats on the Northern side and 48 flats on the southern side of this concrete internal road.)*

*The effective width of this 7.35 m (avg) concrete internal road is substantially reduced because of flower beds and trees on either side and also the off street parking of vehicles from Silver Dale Apts.*

*To get to the property located on Hissa No.B/4 (existing building), one has to travel approx 90 m of distance from the 3 meter service road upto the gated enclosure of Urban Horse Enclave.*

*2. The internal concrete road (marked B) terminates at the gate of this enclosure in which both S.No.66/B Hissa No.4. and or are situated. This enclosure is demarcated from the surrounding areas by 1.8 m high boundary with part wall and part chain link fencing, alongwith fully grown trees all along its periphery.*

*3. The gate leading to this enclosure is 4.65 m in width with 2.07 m. in length concrete lugs on either side for support.*

*4. On entering this gate, one reaches an open space (marked D). A right angled Right Turn takes you to Hissa No.B/4 on which Urban Horse Enclave (existing building) was constructed in blocks A and B in order to reach to Block B another right angled Left Turn has to be taken from this open space.*

*5. There is no road leading to Hissa No.B/4. The open space (marked D) above is used as the passage way to Urban Horse Enclave (existing building).*

*This space admeasures 21.95 m (East-West), 23.48 m (North-South) and is demarcated by a 1.8 m high boundary comprising of stone masonry and chain link fence which has adjoining to it raised flower beds, trees 20'-30' high and garden lights with a 4.63 m wide opening*

*on South Western Corner to enter the enclosed area H.No.B/5.*

*6. The original sanctioned plan (comm.cert.No.4902 dated 13/09/2000) that was requested by me and provided by the party, shows the existing building on S.No.66-B/4/1 with a 7.5 m wide access road coming straight from the B.T.Kavde Road and entering directly in front of the existing building. Whereas, now the same access road has been shifted further South with Silver Dale Apt. Complex on either of its sides and it opens up directly into the said Open Space (marked D). One has to make two right angled turns to reach the existing buildings Urban Horse Enclave."*

**11.** The report also record that there is no proposed road to Hissa No.B/4, but in the latest PMC sanctioned plan, an internal road of 9 meter width is proposed for entry and exit to the proposed building to be constructed on Hissa No.B/5 and the present open space which was marked as "D", can be used as an entry and exit for both the proposed buildings to be constructed on Hissa No.B/5 and the existing Urban Horse Enclave on Hissa No.B/4. The gates will have to be suitably located to facilitate smooth flow of traffic. Alternatively, another suggestion is offered to the following effect :-

*"3. Alternatively an exclusive road Min.9 m width can be provided from the Lugs in order to negotiate a 90 degree turn to the Right and Left and also facilitate easy approach and reversing of water tankers, fire brigade and ambulances and other vehicles, this road could be carved out of the Open Space (marked D) which can also have a Security Cabin with*

*separate Entry and Exit gates for the proposed building on Hissa No.B/5. As there are several fully grown tall trees 20' to 30' tall, these trees should not be disturbed and one should comply with all Green City norms, rules and regulations. Also the proposed road shall conform to PMC Dev. Control Rules and Bye laws as shown by me in Exhibit "C".*

*4. There is also a possibility that a separate entry could be planned from a proposed D.P. road on Western side to the proposed building to be constructed on S.No.66, Hissa No.B/5/1. Refer to DP Draft Development Plan (2007-2027) - Exhibit D.*

*This possibility will have to be verified from the PMC-DP Department."*

**12.** The plan which is submitted at Exhibit B, which depict the existing building of the plaintiffs and plot No.5 indicate the open space. The suggestion given in the said report was referred to by the learned District Judge and by recording that there are trees planted from the side of the compound wall and therefore though the said plot is forming part of Hissa No.5, but by planting trees and constructing the compound wall, the defendants have practically earmarked the plot as an access to the plaintiffs' building and now if the said open space is used by defendant No.3 for construction then automatically, it would amount to providing another approach road to the plaintiffs building, but not to their exclusive use.

The report submitted by Commissioner is well appreciated and accepted by the Appellate Court by recording that the defendant No.3 in noway is prevented from developing the property, in rest of the area of Hissa No.5. Recording that no hardship would be caused to the defendants, but plaintiffs will suffer hardships because of the non availability of the open space, the injunction in favour of the plaintiffs is confirmed.

13. Perusal of the impugned orders clearly reflect the prima facie case in favour of the plaintiffs and it is pertinent to note that the Appellate Court's the order is passed on 07.12.2016 thereby confirming the temporary injunction in favour of plaintiffs granted on 11.12.2016. Since then, the position between the parties remain the same and the plaintiffs are enjoying the open space and the defendants must have find out a via-media for developing the land in Hissa No.5. The Appellate Court had already directed the Trial Court to expedite the hearing of the suit within a period of one year.

While granting the temporary injunction, the scope available to the Court being limited to recording of a prima facie case, balance of convenience and irreparable loss to the parties, the Trial court, on

appreciation of the existing facts brought before it and the Appellate Court on appreciating the report of the Commissioner appointed by it, has recorded the 3 factors in favour of the plaintiffs. I do not think that the findings rendered by the two Courts call for any interference, since it is not demonstrated that the findings rendered is perverse and based on no material before the Courts below. In the wake of the aforesaid, I am not inclined to interfere with the concurrent findings rendered in favour of the respondents (original plaintiffs).

14. In this contingency, upholding the impugned orders and by dismissing the writ petition, interest would be better served to the parties in case RCS No.720/2015 pending before the Trial Court is directed to be expeditiously decided and in any case within a period of 6 (six) months from today. Needless to state that the parties will co-operate in the culmination of the civil suit and would avoid unnecessary adjournments.

**(SMT.BHARATI DANGRE, J.)**