

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

WRIT PETITION NO.7161 OF 2021

M/s. Om Vasistha Developers ..Petitioner

Versus

Aum Supreme Co-operative Housing Society ..Respondent

Mr. Simil Purohit a/w Bhushan Deshmukh & Rashmin Jain i/by
Kanga & Co., for the Petitioner.

Mr. A. Y. Sakhare, Senior Advocate i/by Kasim Yusuf Sheikh, for the
Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : 9th MARCH, 2022

PC.

1. This petition is by the defendant to Regular Civil Suit No.357 of 2020 questioning the order dated 15th February, 2021 by the District Judge-4, Kalyan whereby prayer for grant of temporary injunction came to be allowed.

2. The respondent, society registered under the Maharashtra Co-operative Societies Act (Co-operative Housing Society) initiated suit alleging that it consists of in all 66 members. It is claimed that on the suit property, a development was to be carried out by defendant Nos.1 and 2, wherein commercial unit was to be constructed on ground, first and second floor. It is further claimed that third floor meant for parking was kept open to sky and from 4th floor onwards building was to be occupied by the members. It is also claimed that the parking area was also purchased for valid

consideration by each of the members and as such, the agreement for sale of residential, commercial unit was entered into as provided under the provisions of Maharashtra Ownership of Flats Act, 1963 ("MOFA Act" for short). It is claimed that defendant obtained revised building permission and accordingly occupation certificate of commercial unit in 2013.

3. Defendant intentionally avoided obtaining occupation certificate and submitted revised building plan which was processed, revised building permission was granted on 8th September, 2020. As such, intention of the defendant was to carry illegal construction. The same has prompted the respondent/plaintiff to file aforesaid suit in which temporary injunction is claimed thereby restraining the petitioner/defendant from carrying out alternation, additional new construction in parking area of 3rd and 4th floor, the refuge area i.e. Flat Nos.502, 802, 1302, 1802 and also on the ground floor and open marginal areas around the building (Aum Supreme). The temporary injunction is also prayed to the extent of not to create third party interest in the aforesaid property.

4. The Trial Court i.e. Court of Civil Judge Junior Division, Kalyan vide its order dated 22nd December, 2020 rejected the prayer for grant of temporary injunction. However, vide impugned order dated 15th February, 2021, the Lower Appellate Court enjoined the petitioner till the decision of suit from carrying out any additional construction as was brought and also from creating third party

interest.

5. Counsel for the petitioner/original defendant would urge that in absence of final occupancy certificate and in view of recitals of the Conveyance Deed of the members of the plaintiff society, the petitioner has every right to explore and exhaust the available balance FSI. According to him, the members are entitled to enjoy their property as per their agreement and not beyond that. He would claim that in view of change in Development Control Regulation (building bye laws), it is open for the petitioner to revise sanction which it has obtained. It is further claimed that neither the parking area nor the open ground floor area as was promised is reduced and that being so, the injunction granted is not sustainable. The aforesaid submissions are sought to be supported from the recitals of the conveyance, the revised permission and the provisions of Section 7 and 7-A of the MOFA Act.

6. Mr. A. Y. Sakhare, learned senior counsel appearing for the respondent/plaintiff would support the order impugned. However, on instructions, he would claim that such other construction as referred in operative part of paragraph 8 which reads thus :-

“8] The defendants are further restrained from carrying out any construction in the CTS Nos.3361, 3362, 3363 having plot Nos.4, 6 to 9 at Bail Bazar, Ramwadi, Kalyan unless with express permission from the society and its residents.”

can be modified. He would urge that the said modification can be to the extent of permission to carry out construction on CTS Nos.3361 to 3363 having plot Nos.4, 6 to 9 at Bail Bazar, Ramwadi, Kalyn, thereby permitting the construction on ground floor i.e. on the open plot without damaging the existing structure which is occupied by the members of the society. Aforesaid concession is made by him on instructions from the instructing counsel for the plaintiff.

7. As such, clause (8) of impugned order dated 15th February, 2021 is modified and it is clarified that the petitioner shall be entitled to carry out construction in open area in accordance with sanction/permission issued by the respondent/planning authority without disturbing structure and other fasad of the said building.

8. Needless to clarify that such permission to carry out construction has to be adhered to strictly in accordance with the permission granted by the local planning authorities.

9. As far as the other contentions of the counsel for the petitioner are concerned, admittedly, petitioner has not obtained written consent as contemplated under Section 7 of the MOFA Act from the society or its members. Whether the petitioner is entitled to carry out construction in existing building thereby converting open space to that of commercial area and also the refugee area to

that of the marketable residential area can be an issue which can be decided only at the time of final hearing of the suit. However, if not restrained, the petitioner will change entire existing structure which will cause substantial loss to the members of the respondent society as already right are created in their favour by the petitioner.

10. The fact remains that the construction which the petitioner intend to carry out thereby modifying the earlier sanction plan is without consent from the members of the respondent society. The fact remains that such modification claimed to permit the petitioner to carry out additional construction to the existing building. However, what is sought to be developed by carrying out additional construction in existing building was never part and parcel of the sanctioned plan which was shown to the members of the society when 66 flats were transferred to them. As such, claim of the petitioner at this stage is *prima facie* hit by the provisions of Section 7 of the MOFA Act. That being so, in my opinion, the order granting temporary injunction is quite justified but for the concession made by the original plaintiff/respondent to the extent of clause (8) of the impugned order.

11. With above modification, I hardly see any substance in the petition.

12. The petition as such fails, dismissed.

[NITIN W. SAMBRE, J.]