

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

VAISHALI
ANIL
TIKAM

WRIT PETITION No. 2523 OF 2022

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Goel Ganga Foundation

...Petitioner

Vs.

Federation of Swarganga Co.op.
Society Limited and Ors.

...Respondents

* * * *

Mr. Girish Godbole, Senior Advocate a/w. Mr. Saket Mone a/w.
Mr. Shrey Shah i/b. Vidhii Partners for Petitioner
Mr. Ranjeet Thorat, Senior Advocate i/b. Mr. Prashant Darandale
for Respondent Nos. 1 to 13
Ms. Aksha Hudda i/b. Hudda and Associates for Respondent
No.4

Coram : Sandeep K. Shinde, J.

Reserved on :6th SEPTEMBER, 2022.

Pronounced on: 27th SEPTEMBER,2022.

J U D G M E N T:

1. Maharashtra Ownership of Flats (Regulation of Promotion, Construction Sale, Management and Transfer) Act, 1963 ("MOFA" for short) was enacted by the Maharashtra Legislature, as it was found that builders / developers / promoters were indulging into malpractices in the sale and transfer of flats and flat purchasers who were being exploited.

2. Here, is the case where Developer-defendant no.14, has given complete go-by to the object of the MOFA, by all possible means at his command.

3. Appellants- Plaintiffs run and manages international school. It instituted suit simplicitor for injunction. Pending suit, Trial Court vide order dated 18th July 2019, temporarily restrained defendants 1 to 13, their members, from blocking the entry gate and obstructing Plaintiff School, its employees, and visitors from parking their vehicles in the parking lots and further restrained from disturbing peaceful possession of the plaintiffs over 110 stilt parking spaces, more particularly set-out in Annexure-A to the plaint.

4. In Misc. Civil Appeal No. 327/2019 vide order dated 31st March, 2021, learned District Judge set aside order of temporary injunction and thereby rejected the application, for temporary injunction, moved by the plaintiffs. That order is challenged in this petition. For the sake of brevity, hereinafter the appellants and respondents shall be referred as per their original nomenclature as “plaintiffs” and “defendants”.

5. Facts essential for decision of this petition, are as under :

Plaintiffs, a Company limited by a guarantee, run “Goyal Ganga International School”, upto 12th standard, in the premises consisting of ground plus five floors, area admeasuring 37,711 sq.ft., plus covered parking area 4820 sq.ft, on the land Survey No.174-A (pt), 175-A (pt), 176-A (pt) and 177-A (pt) situated at Pimpri Waghire, within the limits of Municipal Corporation (hereinafter called “the School building” for short).

6. The school building was constructed by, M/s. Goyal Ganga Constructions-defendant no.14, who, vide leave and license agreement dated 30th September, 2014, granted license to Plaintiffs-School, to use the said building, for five years, from April, 2014 to March, 2019 at license fee Rs.45/- per sq.ft, per month.

7. Plaintiffs is Company limited by guarantee; of which Shri. Jayprakash Sitaram Goyal is/was one of the Directors; whereas M/s. Goyal Ganga Constructions-defendant no.14 is a firm of which, Mr. Ameet Jayprakash Goyal is a partner. Thus,

plaintiffs and defendant no.14 are closely held family managed entities.

8. Evidently, M/s. Goyal Ganga Constructions-defendant no.14, is a 'Promoter', within the meaning of Section 2(c) of the Ownership Flats Act, 1962.

9. The Land Survey No.174-A(pt), 175-1 (pt), 176-A (pt), 177-A (pt) at Village-Pimpri, Pune falling under the residential zone under development plan of Pimpri-Chinchwad was owned by Rathi Trust and other co-owners (hereinafter called “the said lands”). These lands were developed by the Promoter-defendant no.14, by implementing two schemes viz; (i) Swar Ganga Complex Scheme and (ii)Ganga Sky Scheme. The Promoter constructed twelve buildings in “Swar Ganga Complex; of following description.

(i) Eight buildings, each seven storied - 'A' Building
(Residential)

(ii) Three buildings, each of seven storied - 'B' Building
(Residential)

(iii) One commercial building consist of nine shops.

- (iv) One bungalow; in a layout- sanctioned by the Planning Authority.

10. The Promoter has also constructed School building on amenity plot, of a layout, which is distinct and stand alone building, in use and occupied by the School.

11. In Buildings "A" and "B" (12 buildings in all) 304 Flats were constructed and sold out to individuals by Promoter-Defendant No.14, by executing individual agreements in the year 2005-06 or around, subject to provisions of Maharashtra Ownership Flats Acts.

12. In 1st January, 2011 flat purchasers formed and registered 12 societies under the Maharashtra Co-operative Societies Act. These Societies are defendants no.2 to13; whereas defendant no.1 is a Federation of these Societies.

13. To appreciate plaintiff's case, I deem it appropriate to reproduce Clause-3(e) and Clause 12, of the Articles of Agreement executed by Promoter with the flat purchasers.

"3(e) The nature of organisation of persons to be constituted of all purchasers Units in the said

Complex to be known as "SWAR GANGA" and to which title is to be passed being either a Co-operative Housing Society governed by the provisions of the Maharashtra Co-operative Societies Act, 1960 or a Condominium of Apartment Owners under the provisions of the Maharashtra Apartment Ownership Act, 1970 or a Private Limited Company incorporated under the provisions of the Companies Act, 1956.

12. The Promoters shall be entitled to grant the exclusive right to use, occupy and enjoy all or any of the terraces in the buildings of the said Complex to be constructed by the Promoters on the said land to one or more of the purchases of the Units therein. The Promoters shall also be entitled to grant such exclusive use, occupation and enjoyment of any parts of the said land which remain unbuilt upon one or more of the Unit purchasers to be used as a garden or sit-out the exclusive right of use of the parking spaces under

the stilts of the said buildings and other parking spaces proposed to be constructed by it on the said land to the prospective purchasers of Units therein. Such terraces, open spaces or garden areas and parking spaces the exclusive use, occupation and enjoyment of which have been granted by the Promoters as aforesaid shall constitute restricted common areas and facilities, as contemplated under the Maharashtra Ownership Flats Act, 1963. The Promoters shall be entitled to grant such exclusive right of such terraces/open spaces and parking spaces at or for such consideration over and above the sale/purchase price of such Units as the Promoters may deem fit and proper. Before execution hereof the Purchaser/s has /have been provided with details of the exclusive right of user of certain terraces/garden/open space etc. already granted/agreed to be granted by the Promoters in

the said Housing complex prior to the date of execution hereof."

14. It could be seen that Clause-3(e) speaks of Promoter's obligation under MOFA; whereas Clause-12 declares promoter's right to grant use of the parking spaces, under the stilt constructed buildings 'A' and 'B'. The dispute is in respect of 110 stilt parking spaces in the buildings of Defendants 2 to 13, unilaterally allotted by the Promoter-defendant no.14, to the plaintiffs in March, 2010. Out of which, 100 parking spaces (double-plus single) are on podium of building A-7, A-8, A-4 and below podium B-2 and B-3; Whereas, ten double parking spaces were allotted to near Ganesh Mandir.

15. It is thus evident, from the pleadings, that, the Promoter-defendant no.14 allotted stilt parking spaces constructed in the buildings of respondent-Societies, to the plaintiffs, in March, 2010 i.e. after executing agreements with flat purchasers, but before societies came into being

16. Be that as it may, in the year 2013, Federation, of defendant?" societies, sought, deemed conveyance, under Section 11 of the Maharashtra Ownership Flats Act and

accordingly the Competent Authority granted it, vide order dated 17th May, 2014 subject to Clause-5 of the order. Plaintiffs case is, the deemed conveyance then granted was of area admeasuring net of open spaces, parking spaces, internal roads and that the defendants did not dispute the plaintiffs' right to use 110 stilt parking spaces. Therefore, It is plaintiff's case that School, its employees, parents of students and other visitors are using 110 stilt parking spaces, for parking their vehicles since 2010.

17. Plaintiffs' would contend, although the order of Competent Authority was challenged, by the Federation, in Writ Petition No.8588/2015 order granting deemed conveyance has not been stayed. Therefore, according to Plaintiffs the exclusive right of the Promoter-Defendant No.14, over open spaces, parking spaces, acknowledged by the competent authority is subsisting and binding on the Defendants 1 to 13.

18. In the backdrop of aforesaid facts, Mr.Godbole, learned Senior Counsel submitted the impugned order in Misc. Civil Appeal No. 327/2019 was in breach of exclusive right of Defendant 14 over parking spaces, open areas in layout,

acknowledged by the Competent Authority in order of deemed conveyance and, therefore, not sustainable in law. Mr. Godbole submitted that, once a Competent Authority has acknowledged the right of defendant no.14-developer, to grant use of stilt parking spaces, open spaces etc., which was in consonance of Clause-12 of the Articles of Agreement, the defendant no.14, was/is entitled to allot the stilt parking spaces to person/s of his choice. Thus argued, it is exclusive right of defendant no.14, to whom should he allot or grant use of stilt parking spaces and for that Mr. Godbole, Learned Counsel draws support from the observations made by competent authority in deemed conveyance order. According to Mr. Godbole, neither flat purchasers nor federation of the Society, have right over parking spaces allotted to Plaintiffs. Mr. Godbole submitted, Promoter has constructed about 440 stilt parking spaces and after allotting parking spaces to flat purchasers, balance parking spaces were allotted to the plaintiffs. Mr. Godbole, therefore argued that, right of the flat purchasers to park their vehicles in the stilt parking area has not been taken away and therefore no prejudice is caused to the members of the defendants-Societies,

though 110 parking spaces are being used by plaintiff school and its staff and/or by the parents of students for parking their vehicles. Mr. Godbole, strenuously submitted that in view of the Deemed Conveyance order, which has not been stayed by this Court, the right of Promoter-Defendant No.14 over the internal roads, amenity plot and the parking spaces being his exclusive rights, the members of the defendant-Society cannot prevent the plaintiff school from using parking spaces, which are in use and in their possession since 2010. Thus, Mr. Godbole, contended, if the impugned order, is not stayed it would seriously violate the rights of the plaintiffs to use the parking spaces, allotted, by Promoter-defendant no.14. Mr. Godbole submitted in the circumstances, Plaintiffs have made out prima facie case; balance of convenience tilts in their favour and no irreparable loss would cause to the Defendants 1 to 14 if the injunction is granted, because flat purchasers have been allotted stilt spaces, for parking their vehicles.

19. Mr. Thorat, learned Senior Counsel appearing for the respondents, on the other hand supported the impugned order and criticised the temporary injunction order dated 18th July,

2019. Mr. Thorat, Learned Senior Counsel submitted that the stilt parking spaces are part of the common areas and the facilities and therefore, Promoter can neither sale it nor could grant right to use it, to person/s other than the flat purchasers. Mr. Thorat submitted that Plaintiffs School is not a member of the Defendant Societies and, therefore, allotment of stilt parking in the building of Defendant Societies and/or in common areas, open spaces is illegal and not referable to legally enforceable right. Mr. Thorat relied on the decision of the Hon'ble Supreme Court in the case of **Nahalchand Laluchand (2010) 9 SC 536**. Mr. Thorat submitted that sanction plan of the School building provided for independent and exclusive covered parking areas which the Plaintiffs School has illegally converted into a hall. Mr. Thorat has invited courts' attention to police complaints lodged by the supervisor of Plaintiffs School against the members of Federation - Defendant Societies. Mr. Thorat contended that illegal allotment of stilt parking spaces to the Plaintiffs by the Defendant No.14 in common spaces, open areas and its use by the persons other than members of the Societies over a period of 10 years is continuous source of nuisance and

interferes with flat owners' right to live peacefully. Mr. Thorat submitted, it is evident from the facts of the case that the Promoter-Defendant No.14 in connivance with the School, deliberately and knowingly breached the terms of agreement entered into with the flat purchasers. Mr. Thorat submitted that Plaintiffs and the Defendant No.14 in planned and systematic manner deprived the defendants and its members to use the open spaces, stilt parking spaces in or around building in breach of statutory obligations. It is, submitted that Plaintiffs have not approached the Court with clean hands and, therefore, not entitled to equitable reliefs. Mr. Thorat, urged that the impugned order calls for no interference and petition be dismissed with costs.

20. In the case of Nahalchand Laluchand (supra), one of the questions before the Hon'ble Apex Court was, whether stilt parking spaces are part of the common areas/facilities. In para-58, the Apex Court has held that, open to sky parking area and stilted portion useable as parking space is not a Garage within the meaning of Section 2(a-1) and therefore not saleable independently as a Flat or alongwith the Flat. The Apex Court

further held that the stilt parking spaces being part of common areas of the building developed by the promoter, the only right the promoter has, is to charge the cost thereof in proportionate to carpet area of the flat from each flat purchasers. Such stilt parking spaces being neither a flat nor a garage within the meaning of that provision it is not saleable at all. In paragraph 55, the Apex Court has held that "looking to the scheme and object of MOFA, and there being no indication contrary to, expression 'common areas and facilities' of Section 3(f) of MAOA, generally understood as, 'common areas', in building regulated by MOFA. Thus held, there is no justifiable reason to exclude parking areas (open to the sky or stilted portion) from the purview of "common areas and facilities" under MOFA". Moreover, the stilt parking spaces being neither flat nor garage, promoter has no right to sell and/or grant, use of it to persons other than the flat purchasers of the given building, because promoter has already recovered cost of common areas ("including stilt parking spaces") from the flat purchasers of that building in proportion to area of their flat. Thus to be understood that, all stilt parking spaces being common areas,

the flat purchasers of respective building have already paid cost thereof to the builder-promoter. Therefore, the Hon'ble Apex Court has held, such stilt parking spaces are not saleable at all. As such, stilt parking spaces being common areas, are to be used and utilized only by the flat purchasers of the buildings, and by none other than flat purchasers. Corollary of which is that Promoter has no right at all to grant use of such stilt parking space to third person, who is not purchaser or occupying flat in the building. In the case at hand, admittedly, the Plaintiffs' School building is stand alone on amenity plot. Plaintiffs are not members of the Defendant-Societies. They do not own flats in the buildings of Defendants 2 to 13. Therefore, at the first place, the Defendant No.14- Promoter had no right to allot stilt parking spaces to the third person who is not a flat purchaser. That being so, the allotment letters basis on which plaintiffs are asserting their claim, do not confer legally enforceable right on them to use the stilt parking spaces made available on the stilt area or around the buildings of the Defendant Societies. The law does not acknowledge such

right sought to be enforced by the Plaintiffs in connivance with the Defendant No.14- Promoter.

21. In fact, the Plaintiffs and the Defendant No.14 are closely held family entities, who in connivance encroach over the common areas of the Defendant Societies in defiance of the object of the MOFA and thereby for years together deprived the flat purchasers from enjoying and utilizing their rights over the open space, stilt parking areas. To put up differently, Defendant No.14 systematically, defrauded the flat purchasers from using the common stilt parking spaces contrary to object of MOFA. Therefore, the alleged allotment of parking spaces by the promoter to the Plaintiffs, are not referable to legally enforceable rights. As such, the Plaintiffs cannot seek enforcement of their rights over these parking spaces, allotted to them by the Defendant No.14. It is interesting to note that the Plaintiffs were well aware that the allotment letters ipso-facto do not create legally enforceable rights, and, therefore, discreetly, they did not seek declaration of their character of possession over the parking spaces, in the suit instituted by them. For all these reasons, it is to be held, mere possession

over the parking spaces since 2010 as claimed, being not referable to legally enforceable rights, the Plaintiffs were not entitled to relief of injunction, sought by them. Even otherwise, it is mentionable that School building plan was sanctioned by the Corporation and commencement certificate was granted in 2010. However, Promoter - Defendant No.14 allotted 110 parking spaces to the Plaintiffs in the year 2010 when the school was not functional. This itself shows that the Plaintiffs in connivance with Defendant No.14, deprived the defendants from enjoying the legitimate rights to use the common areas of the building. Therefore, the Plaintiffs have not made out a prima facie case.

22. The main contention of the plaintiffs is that the competent authority in its' deemed conveyance order acknowledged the exclusive rights of Defendant-Promoter over stilt parking spaces and common areas. In my view, the observation in clause No. 5 of the deemed conveyance, order shall not invest the Defendant -Promoter to allot the stilt parking spaces to Plaintiffs in defiance of rights of flat purchaser. As stated above, since cost of the common areas, has been recovered by the

promoter from the each flat purchaser in proportion to the area of their respective flats, only the flat purchasers have right to use and utilize the common areas. It is evident from the material on record, that the use of 110 stilt parking spaces by the Plaintiffs or by their staff for parking their vehicles causes immense inconvenience to the flat purchasers. Material on record shows the school has been sanctioned covered parking areas in its' building. Yet instead of using the area earmarked for covered parking spaces, sanctioned by the Corporation, the Plaintiffs ventured to encroach over the common areas of the flat purchasers. Therefore, balance of convenience does not tilts in favour of plaintiffs. So far as irreparable loss is concerned, it may be stated that since Plaintiffs Society has been permitted to use the covered parking spaces of its' building, the same can be utilized by them or by its staff for parking their vehicles. Thus, refusal of injunction would not cause irreparable loss to plaintiffs.

23. The number of police complaints filed by the management of the Plaintiffs, clearly indicate that the acts of the plaintiffs are continuous source of nuisance to the members of the

Defendant Societies. One of the complaints suggest that management of the School, resorted to the provision of the Atrocities Act against the office bearers and/or members of the Defendant Societies. Thus, plaintiff-school, by all possible means, at their command caused inconvenience to the members of defendant societies. It is curious, to note that the Promoter-Defendant No.14 allotted stilt parking spaces to the Plaintiffs in 2010 although school building plan itself was sanctioned and commencement certificate was granted on 30th March, 2010. This fact clearly indicates that Defendant No.14 and Plaintiffs manufactured the allotment letters to deprive the Defendants from exercising their rights over the common spaces, in and around the buildings in respect of which conveyance has been granted in their favour. It is nothing but abuse of process of law. The acts and the omissions on the part of the Plaintiffs, deprived the members of the Defendant Societies from enjoying their flats peacefully over a period of 10 years and more. They were subjected to police complaints, disputes and the litigation. The Defendants have been dragged into the legal battle, for no fault on their part. For all these reasons, the writ petition is

dismissed with exemplary cost of Rs.5,00,000/- which the Petitioner shall pay to the Respondent - Federation of Swarganga Co.op. Society Limited, within two weeks from today.

24. Request of the learned counsel for the Petitioner to continue interim relief for a period of four weeks, is rejected.

25. In consideration of the facts of the case, I am not inclined to continue ad-interim relief. Request is accordingly, rejected.

(Sandeep K. Shinde, J.)