IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 6014 OF 2022

Shree Mandar Co-op. Housing Society
Ltd. through Secretary Sunil Ganpat Naik … Petitioner
Versus
M/s. V. V. Enterprises and Ors. … Respondents

******

Mr. Mayuresh D. Modgi for the Petitioner.
Mr. R. S. Apte, Senior Advocate i/by Mr. Mandar Limaye for the Respondents.

******

CORAM : ROHIT B. DEO, J.
RESERVED ON : 30th JUNE, 2022
PRONOUNCED ON : 21st JULY, 2022

<u>JUDGMENT</u> :-

. The petitioner is a co-operative housing society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 (for short 'Act').

2. The petitioner instituted Regular Civil Suit 530 of 2021 for declaration and injunction, the prayer clause of which suit reads thus :-

> *"a) It may be declared that the act of Defendants to taking further steps to construct additional flats on 6th, 7th and 8th floor of the suit building on the basis of Re-development Agreement dated 23/06/2017 and Power of Attorney dated 23/06/2017 is per-se illegal.*
>
> *b) The Defendant no.1, 2, 3 and 4 and their agents, servants, legal representative, assigns and/or any other person claiming through Defendants be permanently restrained by*

order of injunction from entering into suit land and to carry out any construction on the suit building and from creating any third party interest in the additional flats on the 6^{th}, 7^{th} and 8^{th} floor of the Plaintiff society.

c) *Interim and ad-interim reliefs in terms of prayer 'b' be granted.*

d) *Cost of the suit be provided for.*

e) *Any other relief which the Hon'ble Court deems just and necessary be granted in consideration of the case."*

3. Respondents 1 to 4 are arrayed as defendants 1 to 4 in the suit.

4. Hereinafter, the parties shall be referred to by their status in the pending suit.

5. It is averred in the suit plaint that the plaintiff is the owner of land bearing Plot 49, Survey 81, new Hissa 27 of revenue village Gajbandhan Patharli, admeasuring 488.25 sq. mtrs., which is situated at Gandhinagar, Manpada Road, Dombivli East, Tal. Kalyan, Dist. Thane, within the limits of Kalyan Dombivli Municipal Corporation (for short 'KDMC'). It is further averred that on the suit land there was old residential building comprising 14 residential apartments which has become dilapidated and in the year 2004 all the members of the plaintiff decided to redevelop the suit land by demolishing the existing building and constructing a new building. The decision culminated in resolution passed in the Special General Body Meeting dated 12^{th}

January, 2014 pursuant to which quotations were invited from various builders and in the process the defendants emerged the successful bidder. It was resolved in the Special General Body Meeting held on 19th April, 2015 to assign the redevelopment work to the defendants.

5(i) The plaintiff and the defendants entered into redevelopment agreement dated 23rd June, 2017 pursuant to which General Power of Attorney of even date was executed by the plaintiff in the favour of the defendants. It is averred that the defendants agreed to utilize available FSI/ premium FSI available on the suit land and obtained commencement certificate dated 26th April, 2017 in the name of the plaintiff in respect of stilt plus 4 upper floors.

5(ii) The plaintiff avers that the defendants demolished the whole building and started the redevelopment work in the year 2018 and obtained revised permission for construction vide communication dated 13th December, 2018 issued by the KDMC in the name of the plaintiff. The KDMC also approved the building plan. The plaintiff avers that the revised construction permission was in respect of constructing a new building stilt on the ground floor, 4 residential flats on first to fifth floor and 1 residential flat on sixth floor, with the result that the revised permission envisaged construction of 21 residential apartments.

5(iii) The plaintiff then avers that the defendants delayed the commencement of the construction and further failed and neglected to pay the promised rent to the members of the society. It is averred that the defendants completed the construction of the new building along with the amenities in the month of November 2020 and obtained completion certificate dated 26th November, 2020.

5(iv) The plaint then refers to Clause 20 of the redevelopment agreement dated 23rd June, 2017 which reads thus :-

"It is further agreed that the Society shall not raise claim, objection or demand any further consideration of any manner whatsoever if there is any change in the Government/ Kalyan Dombivli Municipal Corporation policy whereby additional FSI / premium F.SI. or further loading by way of potential T.D.R. is permissible for the full development potential of the said Plot of land. The Developer shall solely be entitled to develop, utilize it exclusively and receive price consideration thereof. However it should be authorized approved and sanctioned by Kalyan Dombivli Municipal Corporation. The balance FSI, Premium FSI, T.D.R. shall be utilized up to date of Building Completion or Full Occupation Certificate obtained by The Developer from Kalyan Dombivli Municipal Corporation."

5(v) The plaintiff then refers to certain excess construction in the apartments handed over to the members and the extra amount recovered by the defendants from the members towards the excess construction and the development charges. The plaintiff further avers that the defendants failed and neglected to provide borewell water and had breached the terms and conditions of the redevelopment agreement.

5(vi) The averments which are material in the context of the issue arising are found in paragraph 16 onwards. The plaintiff avers that after completing the redevelopment and putting the members in possession of the apartments, the defendants started threatening that additional floors on the building shall be constructed on the premise that the KDMC has approved building plan for additional construction above existing six part floors vide commencement certificate dated 29th July, 2021. The plaintiff responded by pointing out to the defendants that since the possession of the property is handed over to the individual members after obtaining the completion certificate from KDMC, the defendants are not entitled to construct additional floors. The plaintiff addressed communication dated 28th October, 2021 to the Assistant Director of Town Planning, KDMC informing that the defendants have concealed material facts and that the plaintiff's consent for additional construction was not obtained.

On such premise, the plaintiff requested the said authority to revoke the construction permission dated 29th July, 2021.

5(vii) It is on the basis of the case which is noted supra, that the relief of declaration and injunction is sought.

6. Defendants filed their written statement dated 4th December, 2021 denying each and every material allegation in the suit plaint. The defendants alleged that the plaintiff is guilty of gross suppression of material facts and documents. Defendants objected to the tenability of the suit and the jurisdiction of the Civil Court to entertain and try the suit, contending that in view of the provisions of the Real Estate (Regulation and Development) Act, 2016 (for short 'RERA'), particularly Section 79, the jurisdiction of the Civil Court is ousted.

6(i) Defendants contended that the redevelopment was not financially feasible and it was only in view of the assurance of the members of the society that the defendants shall be entitled to utilize any additional fungible or premium FSI, which may be available due to any change in law or policy, that the defendants agreed to undertake the redevelopment project.

6(ii) Defendants then referred to various clauses of the redevelopment agreement dated 23rd June, 2017 *inter-alia* Clauses 18, 19, 20 and 21 to buttress their submission that the redevelopment agreement unequivocally authorizes the defendants to utilize any future or additional FSI, fungible or premium, which may be available due to any change in law or policy.

6(iii) Defendants pointed out that even before the procurement of the building completion certificate dated 26th November, 2020, all the apartment owners executed individual agreements with the defendants, to which the plaintiff is the confirming party. Defendants contended that Clause 20 of the redevelopment agreement will have to be read and understood in the context of Clause 5 of the tripartite agreement, which reads thus :-

> *"5. AND WHEREAS it is further agreed that, the member flat allottee/s shall not raise claim, objection or demand any further consideration of any manner whatsoever if there is any change in the government / Kalyan Dombivli Municipal Corporation DCR rules whereby additional FSI/ premium FSI or further loading by the way of potential additional TR etc. is permissible for the full development potential of the said land whereby raising additional floors/flats in the new building getting the revised approval and sanction from Kalyan Dombivli Municipal Corporation as the developer may deem fit from time to time and the member flat allottee will give his consent in writing if required.* ***The developers shall solely be entitled to develop, utilize it exclusively and receive price consideration thereof***

<u>till two years from the date of Completion Certificate issued by Kalyan Dombivli Municipal Corporation</u>.”(emphasis supplied)

6(iv) Defendants contended that by Clause 5 supra, the apartment owners and the plaintiff society unequivocally agreed that the defendants shall be entitled to utilize the FSI under Development and Control Rules till two years from the date of the issuance of the building completion certificate. Defendants then contended that even after taking possession, most of the members of the society have issued separate confirmatory letters recording their consent for further construction as per the revised sanctioned plan approved by the KDMC.

6(v) Responding to the apprehension expressed in the plaint that the additional construction shall cause inconvenience to the apartment owners and that the uninterrupted supply of water shall be hampered, the defendants assured thus :-

“It appears that the only concern of the plaintiff society is that during the course of construction of additional floors, they will be deprived of water facility, if the water tanks existing on the terrace of the suit building are demolished In order to put the members of the society at rest and peace, the Defendants have already, vide their letter dated 13th April 2021, given various assurances and assured the Plaintiffs that the additional construction would be under the strict supervision of the appointed engineer. These Defendants have also expressed their willingness to offer Rs.5,00,000/- (Rupees five lakhs only) by way of additional consideration in lieu of additional 6th and

7th floors. At this juncture, these Defendants submit that the shall take all measures to safeguard the interest of the society in terms of not harming the structure or not depriving them of any water facility. The Defendants shall commence the construction of 6th, 7th and 8th floors only after making separate and independent water supply provision for the residents of the society and based on this undertaking itself the KDMC has sanctioned the plan. In fact, at the relevant time Defendants had convinced the members of the Plaintiff about the arrangement for uninterrupted and continuous water supply by way of providing a special water pump that can be installed at the underground water tank at the expenses of the Defendants. The said water pump is very expensive and these Defendants have installed one such pump at their Ghatkopar project successfully. The Defendants do hereby undertake to provide continuous and uninterrupted water supply each and every day until they have completed the work as per the revised plan and restored the Overhead water tanks. It was under such circumstances that there was consent for the revised plan from the members of the Society, save and except, Mr. Naik and Badgujar, who were hostile towards these Defendants and are trying to extort money. Thus, there is no need for the society members to panic.

As far as the other apprehension of the Plaintiff regarding stability of the building is concerned, it is axiomatic that while sanctioning the first plan itself the Municipal Corporation had asserted that sufficient foundation was laid and that present structure was sufficiently strong to accommodate the remaining floors. The plans are revised only after obtaining proper affidavits and undertakings from the builder, RCC Consultants and Structural Engineer. Therefore the apprehension on the part of the Plaintiff is quite unnecessary and irrelevant."

6(vi) The other averments in the written statement may not be strictly relevant for the purpose of deciding whether the learned Appellate Judge rightly reversed the injunctive order rendered by the learned Trial Judge.

7. The plaintiff preferred an application under Order XXXIX, Rules

1 and 2 seeking temporary injunction, in the following terms :-

> "*a) For the reasons stated hereinabove in this application, pending the hearing and final disposal of this suit, the Defendant no.1, 2, 3 and 4, their agents, servants, legal representative, assigns and/or any other person claiming through Defendants be restrained from entering into suit land and to carry out any construction on the suit building and from creating any third party interest in whatsoever nature in the additional flats on 6th, 7th and 8th floor of the suit building of the Plaintiff society.*
>
> *b) That the ad-interim and/or interim relief in terms of (a) be provided for.*
>
> *c) That cost of the application be provided for.*
>
> *d) That such other and further relief as the nature & circumstances of this suit may require be provided for.*"
>
> It would not be necessary to reproduce the contents of the application or the rebuttal, since the same are on the lines of the pleadings in the plaint and the written statement, which are noted in the *extenso*.

8. The learned Joint Civil Judge, Junior Division, Kalyan (Trial Judge) allowed the application of the plaintiff (Exhibit 5) and clamped restraint order on the defendants from carrying out any construction on the suit building and from creating third party interest in the suit building or in the additional apartments on the 6th, 7th and 8th floor.

9. The learned Trial Judge recorded a finding that *prima facie* the suit is not barred by the provisions of the RERA. I need not dilate on

the said aspect at this stage since the said objection is not really pressed by the defendants. The learned Trial Judge then referred to clause 20 of the redevelopment agreement which is reproduced supra and noted that pursuant to the completion certificate which was received on 26th November 2020 the defendants delivered possession of the apartments to the respective allottees. Dealing with the submission of the defendants that clause 5 in the tripartite agreement permits the utilisation of the additional FSI within two years of the completion certificate, the learned Trial Judge observes that clause 5 is inconsistent with the redevelopment agreement dated 23rd June 2017 and that clause 20 of the redevelopment agreement shall override the provisions of the individual allotment agreements. This finding is recorded by the learned Trial Judge relying on clause 8 of the individual allotment agreements which reads thus :

> *"8] And whereas the developers, the member flat allottee, and the confirming party hereby agree and reiterate that the redevelopment agreement as described herein before shall be regarded as the principal agreement for the purpose of all the transaction, deals and affairs arising under the redevelopment project and the in the case of any omission, inconsistency and repugnance in this agreement vis-a-vis the re-development agreement, the provision of the redevelopment agreement shall prevail and bind all the parties concerned."*

The learned Trial Judge then observes that whether clause

5 reproduced supra amounts to novation of contract raises a triable issue requiring evidence, and that the plaintiff has made out a *prima facie* case. The learned Trial Judge further observes that the entitlement of the plaintiff to revoke the Power of Attorney dated 3rd June 2017 also raises a triable issue which cannot be decided without rendering a finding on clause 5 of the individual allotment agreements.

10. It would be relevant to reproduce paragraph 31 of the order rendered by the learned Trial Judge which summarises the findings on the basis of which the interim relief is granted, which reads as under:

> "31. Thus prima facie it is clear that it is dispute between promoter and developers, based on contractual terms i.e. clause no. 20 of the re-development agreement and clause no. 5 and 8 as well as other terms of allotment agreement with individual allottee. The documents prima facie shows that there are triable issues between the parties in respect of "Novation". Hence, I am of the opinion that plaintiffs have prima facie case. Therefore, I proceed to record finding as to point No. 1 in the affirmative."

11. The defendants challenged the injunctive order in Miscellaneous Civil Appeal 22/2022 which is allowed by the District Judge -2, Kalyan (the learned Appellate Judge) vide judgment dated 8.4.2022, which is impugned herein.

12. The learned Appellate Judge recorded a finding that by virtue of

clause 5 of the individual allotment agreements supra, the plaintiff clearly agreed that the developer shall be solely entitled to utilise the FSI made available by KDMC under the Development Control Rules till two years from the date of issuance of the building completion certificate. The learned Appellate Judge emphasises that the individual agreement for allotment of apartment is a tripartite agreement to which the plaintiff society is a confirming party.

12(i) The learned Appellate Judge then notes that the plaintiff suppressed the correspondence exchanged between the plaintiff and the developer and the factum of revised sanctioned plan dated 13th December 2018. The learned Appellate Judge observes that the plaintiff did not approach the court with clean hands and in view of the suppression of material facts, the plaintiff is not entitled to discretionary relief. The significance of the plaintiff having suppressed, the execution of the tripartite agreement is considered by the learned Appellate Judge in paragraph 11 of the order, which reads thus :

"11] The learned advocate of plaintiff society has not made any submission as to why plaintiff society has suppressed the tripartite agreement under which Clause 20 of redevelopment agreement has been novated. Prime submission of the learned advocate of plaintiff society is

that in terms of Clause 20 of redevelopment agreement defendant firm is not entitle to carry out further construction of upper floors in terms of revised sanction plan dated 29/07/2021 as defendant firm has obtained occupation certificate on 26/11/2020. As I mentioned above Clause 20 of redevelopment agreement has been novated as per Clause 5 of tripartite agreement. So far as regards to tripartite agreement there is absolutely no pleading of plaintiff society. Plaintiff society has not explained the circumstances under which it had executed tripartite agreement in favour of defendant firm alongwith new members of plaintiff society. In absence of pleading to that effect only on the basis of submission of learned advocate of plaintiff society it can not be held that Clause 5 of tripartite agreement is inconsistent with the terms of redevelopment agreement, therefore, it can not be held in case of inconsistency clauses of redevelopment would prevail. If plaintiff society would not have executed tripartite agreement alongwith new members of plaintiff society in favour of defendant firm, defendant firm would not have applied for revised construction plan and obtained revised sanction plan by spending substantial amount. Therefore, there appears no merit in the submission of the learned advocate of plaintiff society that the clauses of tripartite agreement are inconsistent with the clauses of redevelopment agreement and therefore clauses of redevelopment agreement would prevail.

The learned advocate of plaintiff society further submitted that the members of plaintiff society has already occupied their respective flats and started residing there. If defendant firm allowed to carry out construction of upper floors certainly it will cause inconvenience to the members of the plaintiff society. Besides this, defendant firm will have to remove four overhead water tanks and machine lift room constructed on 6th floor. Thus, the members of the plaintiff society will face scarcity of the water, use of lift and inconvenience, therefore, defendant firm is not entitle to carry out further *construction of upper floors as per revised sanction plan. The inconvenience put-forth by plaintiff society was within its knowledge when it had executed tripartite agreement in favour of defendant firm. Defendant firm has already given letter to the plaintiff society dated 13/04/2021 and made it clear that defendant firm will make available water supply to each member of the plaintiff society during the period of construction by making an alternate arrangement, the project will remain under strict supervision of the Engineer and defendant firm will take every precaution that the members of plaintiff society would face minimum inconvenience. Even undertaking given by the defendant firm has been reiterated in the written statement."*

12(ii) Having recorded the findings supra, the learned Appellate Judge was pleased to reverse the injunction order.

13. The learned Counsel for the plaintiff, Mr.Mayuresh Modgi, has reiterated the submissions canvassed in the courts below. Additionally, Mr. Mayuresh Modgi vehemently argued that the learned Appellate Judge failed to record a finding on the breach of the provisions of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (MOFA). Mr. Mayuresh Modgi would argue that the consent was not an informed consent within the meaning of Section 7 of the MOFA and the additional construction is, therefore, violative of the provisions of Section 7 read with Section 7A of the MOFA. Mr. Mayuresh Modgi has

invited my attention to certain decisions to buttress the submission that the consent envisaged under Sections 7 and 7A of the MOFA must be an informed consent. Heavy reliance is placed on the order dated 22.1.2015 in Notice of Motion 62/2014 in Suit 54/2014 (**Eternia Co-operative Housing Society Ltd. & Ors. vs. Lakeview Developers & Ors.**).

In rebuttal, the learned Senior Counsel for the defendants, Mr.Ram Apte, would submit that in the context of the pleadings, the issue of informed consent under the provisions of Sections 7 and 7A does not arise. Mr.Ram Apte would submit that the edifice of the plaint is the premise that clause 20 of the agreement of redevelopment dated 23rd June, 2017 overrides clause 5 of the individual allotment agreements. The extension of the submission is that the entire plaint is founded on the assumption of the plaintiff that the right and authority of the defendants to utilise further or future fungible or premium FSI stood extinguished on receiving the completion certificate, and that clause 5 of the individual allotment agreements that extends the said period by two years is inconsistent with clause 20. Mr.Ram Apte would submit that since the plaintiff society is the confirming party to individual allotment agreements, it does not lie in its mouth to contend that there is inconsistency between clause 20 of the agreement of redevelopment and clause 5 of individual allotment agreements and that clause 20 shall override clause 5 to the extent the period within which the additional construction and utilisation of FSI can be done is extended by two years. Mr.Ram Apte would submit, that at the most clause 5 is a novation and since the said clause is incorporated in the tripartite agreement, the question of there being any inconsistency as such does not arise. Mr.Ram Apte would further submit, that it is well settled, that a litigant who seeks relief in equity must approach the court with clean hands and the fact that the plaintiff suppressed from the court several material facts *inter alia* the execution of the individual allotment agreements to which the plaintiff was the confirming party, *ipso facto* disentitles the plaintiff the relief in equity.

14. While I have heard the learned Counsel for the Plaintiff, Mr. Mayuresh Modgi, at length, on the import and implication of the provisions of Sections 7 and 7A of the MOFA, I am inclined to agree with the submission canvassed by Mr.Ram Apte that the plaint is not

founded on the breach of provisions of the MOFA. The case of the plaintiff is that in view of the clause 20 of the agreement of redevelopment, the defendants were not entitled or authorised to consume the additional fungible or premium FSI and to seek and obtain revision of the building plan without the consent of the plaintiff society. I have not come across a single averment in the suit plaint as would indicate that the issue of informed consent as envisaged under Sections 7 and 7A was raised or fell for consideration. I may note that neither the Trial Judge nor the Appellate Judge was invited to render a finding on the said aspect, and obviously so, since it is not the case of the plaintiff that the revision of the building plan falls foul of the provisions of the MOFA.

15. The reference to the absence of consent in the suit plaint is only in the context of the pleading that in view of clause 20 of the agreement of redevelopment dated 23rd June, 2017 the defendants were disentitled to carry out additional construction by using the additional fungible or premium FSI, after receiving the building completion certificate. In my considered view, the submission canvassed by Mr.Mayuresh Modgi for the first time in this court have no factual foundation in the plaint.

16. It is further difficult to agree that the view of the learned Trial Judge that clause 5 of the individual allotment agreements is inconsistent with clause 20 of the redevelopment agreement dated 23rd June 2017. The question of inconsistency would have arisen only were the society not to be a party to the individual allotment agreement. However, since the plaintiff society is the confirming party to the individual allotment agreement, clause 5 is only a novation to clause 20 of the agreement of redevelopment. No other view is reasonably possible.

17. The learned Trial Judge has committed no error in reversing the injunctive order.

18. While I am not inclined to interfere with the judgment impugned, the apprehension of the plaintiff that the members may be deprived of water supply or that its members may suffer inconvenience or their apartments may suffer structural damage, shall have to be allayed.

19. While I am confirming the judgment impugned, I hold and direct that the assurances extended by the defendants in paragraphs 10 and 11 of the written statement, which are reproduced *supra* shall be treated as

an undertaking to this Court.

20. I further hold and direct that if the defendants commit any breach of the assurances which are treated as undertaking to this court, in addition to any other remedy in law, the plaintiff shall be entitled to seek appropriate relief from the Trial Court, including injunctive relief and if such occasion arises the entitlement to relief shall be considered on its own merits, uninfluenced by any observations in this order.

21. Subject to the observations and directions supra, the petition is dismissed.

(ROHIT B. DEO, J.)