IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 509 OF 2022

M/s. M. P. S. Home & Ors.	...Appellants
V/s.	
Gulshan Co-operative Housing Society Ltd. and Ors.	...Respondents

WITH
APPEAL FROM ORDER NO. 510 OF 2022

Gulshan Co-operative Housing Society Ltd.	...Appellant
V/s.	
M/s. M. P. S. Home and Ors.	...Respondents

Mr. R. S. Apte, Sr. Advocate a/w. Mr. Prasad B. Kulkarni, for the Appellants in AO/509/2022.
Mr. Sharan Jagtiani, Sr. Advocate a/w. Mr. Sharez Mukri & Mr. Girish Piryani i/b. A & G Legal Associates LLP, for the Respondent Nos.2 and 3.
Dr. V. G. Bhartu a/w. Mr. Shahzad M. Panday a/w. Mr. Amit Chavan i/b. Mr. R. B. Kulkarni, for the Appellant in AO/510/2022 and for the Respondent No.1 in AO/509/2022.

CORAM : C.V. BHADANG, J.

RESERVED ON : 12 AUGUST 2022

PRONOUNCED ON : 14 OCTOBER 2022

<u>Judgment:</u>

. Heard finally by consent of parties. Both these appeals arise out of order dated 30 April 2022 below Exh.65 passed by the Joint Civil Judge Senior Division, Panvel in SCS No.90/2022. As such, they are being disposed of by this common judgment.

2. The Respondent Nos.2 and 3 are the original Plaintiffs in Special Civil Suit No.90/2022 in which the Appellant Gulshan Co-operative Housing Society Ltd. ('Gulshan', for short) (Appellant in AO No.510/2022) is the Defendant No.1 while M/s. M. P. S. Home which is a Partnership Firm (Appellant in AO No.509/2022) is the Defendant No.2. For the sake of convenience, the parties are being referred to in their original capacity as Plaintiffs and Defendants.

3. The property bearing Plot No.278/4 admeasuring 946 sq. meters alongwith building by name 'Gulshan' comprising of ground floor with a shop bearing No.7 (admeasuring 526.84 sq. meters), a mezzanine floor (366 sq. meters), office (217.32 sq. meters) and a parking area (182 sq. meters) is the subject matter of dispute. According to the Plaintiffs, shop No.7 is same as old shop No.4A. The existence of shop No.7 is disputed by the Defendants.

4. The case made out in the plaint is that the suit property was originally belonging to their father Saeed Mulla who had developed the property in the year 1990 by construction of a

building with ground plus three floors which was named as 'Gulshan'. The said building had six shops on the ground floor and in all 12 flats together on the second and third floors.

5. The adjoining Plot No.278/5 on the western side of the suit property was developed by Farhana Mulla, the sister-in-law of Saeed Mulla in the year 1990 by raising a building by name 'Gulpham', similarly comprising of ground plus three floors with six shops on the ground floors with 12 flats on the second and third floor.

6. The Gulshan Co-operative Housing Society was formed in the year 2010 but avoided to admit Saeed Mulla as its member on account of the fact that he was not holding any registered document about the additional construction.

7. It is the case made out by the Plaintiffs that Saeed Mulla gifted one of his flat No.309 admeasuring 692 sq. meters on the third floor in 'Gulshan' Building to his nephew Zahid Mohammad Mulla by registered Gift Deed dated 30 March 2007, upon which Zahid Mulla was admitted as a member of the said society.

8. Saeed Mulla gifted the additional 7th shop alongwith mezzanine floor, office and the parking to the Plaintiffs by way of

registered Gift Deed dated 12 April 2017 on the basis of which, the Gulshan Society admitted the Plaintiffs as its members and issued share certificate to them. However, according to the Plaintiffs, the society in collusion with M/s. M. P. S. Home (Builders and Developers) decided to redevelop the suit property for which a special meeting of the society was called on 20 January 2020 for consideration of the proposal. The Plaintiffs claimed that the signature of the Plaintiff No.2 on the intimation of the said meeting has been fraudulently made by the office bearers of the society.

9. It is the material case that on 20 January 2020, behind back of the Plaintiffs, a resolution was shown to be passed by preparing minutes in which the signature of the Plaintiffs and the Zahid Mulla were forged which was reported by Zahid Mulla to the police. The Plaintiffs have also disowned the alleged consent letter dated 23 February 2020 for redevelopment of the suit property. On appointment of the Builders and Developer, the Plaintiff No.1 approached one of the partners on 23 February 2021 informing him about his ownership by showing his property documents. However, no cognizance of the same was taken. The Defendant Nos.1 and 2 in collusion with each other have obtained false and bogus structural audit report showing necessity for redevelopment.

10. The Plaintiffs approached Mr. Mangesh Parulekar, one of the Partners of Defendant No.2 in May 2021 and tried to convince him about their ownership rights by showing their documents. It was contended that Manan Parulekar, son of Mangesh Parulekar had shared the draft of proposed development agreement on What's App with Saroj Mulla, the cousin of the Plaintiffs.

11. However, on 16 June 2021, the Defendants in collusion started demolition of the Gulshan Building with connivance of Panvel Municipal Corporation and the building was demolished. Panvel Municipal Corporation (PMC) did not take cognizance of the objection taken by the Plaintiffs but issued a certificate dated 16 June 2021 acknowledging the possession of the Plaintiffs of the suit property.

12. The Plaintiffs thereafter approached the Assistant Registrar of Co-operative Housing Society Panvel against the Defendant No.1 – Society and it is in these proceedings that for the first time the Defendant No.1 – Society made false allegations disputing the rights of the Plaintiffs in the suit property.

13. According to the Plaintiffs, the Defendant No.1 – Society alongwith its members have got registered the redevelopment agreement with the Defendant No.2 on 13 August 2021. The

Plaintiffs obtained the certified copy of the agreement and found that there were only 18 members mentioned in Schedule A attached to the redevelopment agreement without mentioning the shop of the Plaintiffs. It is contended that in respect of a similar redevelopment agreement of the adjoining Plot No.278/5, the Defendant No.2 has accepted the existence of the 7th shop on the ground floor with 12 flats in the Gulpham Building. However, the existence of the 7th shop has been denied in so far as 'Gulshan' building is concerned.

14. It is in these circumstances, the Plaintiffs have filed Special Civil Suit No.90/2022 for a declaration of title in respect of the suit property and for cancellation of the redevelopment agreement. The Plaintiffs have also sought an alternate relief of an injunction restraining the Defendants from redevelopment of the property till execution of a registered document in respect of the suit property and for some other consequential reliefs.

15. The Plaintiffs filed application (Exh.65) for temporary injunction for restraining the Defendants from effecting any construction or creating any third party rights or from changing the nature of the suit property and for deposit of Rs.1,50,000/- per month from 16 June 2000 till date.

16. The Defendants have opposed the application. The Defendant No.1 - society contended that the Gulshan Building was demolished by the PMC as it was in dilapidated condition. The contention about nonjoinder / misjoinder of parties was raised as the Chief Promoter of the Defendant No.1 - Society and the Corporation have not been made parties. The material contention is that Saeed Mulla had no documents to show that a consolidated construction permission and sanction plan was obtained for Plot No.278/4 and 278/5 and therefore, the allegations about the additional constructions were denied. It was contended that although Saeed Mulla was the Chief Promoter of the society, he never made himself as a member of the society. The existence of the 7th shop with the mezzanine floor etc. has been denied.

17. Similar contentions have been raised on behalf of the Defendant No.2 including the objection raised on the basis of Section 163 and 164 of the Maharashtra Co-operative Societies Act, 1960.

18. The learned Trial Court framed points for determination and answered them in the affirmative and by the impugned order has temporarily restrained the Defendants or anybody on their behalf from carrying out redevelopment / construction in any form in the suit property bearing Plot No.278/4. Feeling

aggrieved, these appeals are filed.

19. I have heard Mr. R. S. Apte, learned Senior counsel for the Appellants in AO/509/2022 and Dr. B. A. Bhartu, for the Appellant in AO/510/2022 and Mr. Sharan Jagtiani, learned Senior counsel for the Respondent Nos.2 and 3 (Plaintiffs). With the assistance of the learned counsel for the parties, I have gone through the record.

20. It is submitted by Mr. Apte, the learned Senior counsel for the Appellants that the alleged 7th shop with the mezzanine floor was not in existence. It is submitted that the then Panvel Municipal Council had not authorised such construction. There are also no documents to show that a consolidated building permission regarding Plot Nos.278/4 and 278/5 was given. It is submitted that the Gift Deed is in respect of Shop No.4A and not Shop No.7. It is submitted that in the absence of sanctioned plan showing existence of Shop No.7, the said case of the Plaintiffs could not have been accepted. It is submitted that the deemed conveyance has been executed in favour of the Society on 30 December 2016 and thus Saeed Mulla, father of the Plaintiffs ceased to have any right so as to execute the Gift Deed in favour of the Plaintiffs. It is submitted that the Appellants – Developers have obtained a consolidated development permission from the PMC in respect of the three adjoining plots bearing No.278/4,

278/5 and 278/6 and the construction / excavation has already started when the suit came to be filed and the interim injunction is obtained. The learned Senior counsel has pointed out that on account of said injunction, the entire process of redevelopment has come to a stand still affecting the rights of the members of the society. He submits that it is the settled position that the Plaintiffs as minority members cannot resist / oppose the redevelopment.

21. On behalf of the Appellants, reliance is placed on the following decisions.

(i) Cotton Corporation of India Ltd. Vs. United Industrial Bank Limited and Ors.[1]

(ii) Prahlad Pradhan and Ors. Vs. Sonu Kumhar and Ors. [2]

(iii) Choice Developers Vs. Pantanagar Pearl CHS Ltd & Ors. [3]

(iv) Nahalchand Laloochand Private Limited Vs. Panchali Co. Operative Housing Society Limited. [4]

(v) Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vs. Chandran and Ors. [5]

22. Mr. Jagtiani, the learned Senior counsel for the Plaintiffs submits that membership of the Plaintiffs of the Defendant -

1 *(1983) 4 SCC 625*

2 *(2019) 10 SCC 259*

3 *Judgment in Arbitration Petition (L) No.7966/2022.*

4 *(2010) 9 SCC 536*

5 *2017(4) Mh.L.J. 809*

Society is not disputed. It is submitted that Shop No.7 is same as Shop No.4A as referred to in the Gift Deed. He submits that at any rate, this issue needs to be gone into at the trial. He has referred to various documents to show the existence of Shop No.7 (old Shop No.4A). It is submitted that the objection raised by the Plaintiffs to the decision of the society to go for redevelopment is an independent matter which can be separately pursued including about the case of the Plaintiffs of forgery of the signatures of the Plaintiffs and Zahid Mulla. It is submitted that there is total exclusion of the Plaintiffs from the process of redevelopment and the redevelopment agreements. He therefore submitted that the legal position about the minority not being able to oppose the redevelopment cannot be applied in this case. It is submitted that the Plaintiffs being admittedly members of the society cannot be excluded from the process of redevelopment.

23. The learned Senior counsel has submitted that the consent for redevelopment records consent by one of the members who has passed away one year prior to the meeting. The society had refused to permit the Plaintiffs to inspect the documents which makes the entire process by the society suspect. It is submitted that at no point of time the PMC had issued any notice to the Plaintiffs of the alleged illegal construction and even this aspect needs to be gone into at the stage of trial. Lastly, it is submitted

that the present appeal being under Order XLIII of the Code of Civil Procedure, is an appeal on principle, as held by the Supreme Court in *Wander Ltd and Anr. Vs. Antox India P. Ltd.* [6]. It is submitted that the view taken by the Trial Court being a possible view requires no interference for which reliance is placed on the decision of the Supreme Court in *Mohd. Mehtab Khan and Ors. Vs. Khushnuma Ibrahim Khan and Ors.* [7]. It is submitted that the society is refusing to treat the Plaintiffs at par with the other members and has even refused to pay the rent from the date of demolition.

24. I have considered the submissions made.

25. Certain aspects are not in dispute. That the suit property belonged to Saeed Mulla, father of the Plaintiffs. In the year 1990, Saeed Mulla had developed the property by construction of 'Gulshan' Building comprising of ground floor (six shops) and three floors comprising of 12 flats. In the same year the adjoining plot bearing No.278/5 was developed by his sister-in-law Farhana Mulla by construction of similar building by name Gulpham Building.

26. In the year 1997, both the plots were amalgamated with the permission of the then Panvel Municipal Council and according

6 *1990 (Supp) SCC 727.*

7 *(2013) 9 SCC 221*

to the Plaintiffs, the 7th shop was constructed in each of the two buildings for which permissions including the sanctioned plan for construction of these additional shops are produced on record.

27. On 30 March 2007, Saeed Mulla gifted Flat No.309 to his nephew Zahid Mulla vide registered Gift Deed after which Zahid Mulla was admitted as a member of the society. The Plaintiffs have also produced the permissions including the sanctioned plan for construction of a mezzanine floor in the suit shop after obtaining requisite permission.

28. It appears to be undisputed that Saeed Mulla was the Chief Promoter of the society. However, he did not become member of the same. On 30 December 2016, the Competent Authority has issued a unilateral deemed conveyance certificate in favour of the society, upon which, the society would become the owner of the plot. On 12 April 2017, Saeed Mulla gifted the suit shop (shown as Shop No.4A) which according to the Plaintiffs is same as Shop No.7, vide registered Gift Deed. It is also not in dispute that the society has issued a share certificate to the Plaintiffs on 22 December 2017 in respect of Shop No.4A.

29. The dispute has essentially cropped up when the society decided to go for redevelopment calling a special meeting on 20 January 2020. The parties have made allegations and counter

allegations about the said proposal. While according to the society, the PMC had sought for demolition of the building on the ground that it is dilapidated, the Plaintiffs are opposing redevelopment including appointment of the Appellants M.P.S. Home as Builders and Developers. There are also allegations made about the minutes of the meeting shown to be signed by a member who was already dead and forged signatures of Plaintiff No.2 and Zahid Mulla being made for which a criminal complaint is filed. It is necessary to note that the said dispute about the objection taken by the Plaintiffs to the redevelopment is an independent dispute. I am presently concerned with the order granting injunction restraining the Defendants from carrying out any construction / redevelopment on Plot No.278/4. A perusal of the impugned order would show that what has weighed with the learned Trial Court is the total exclusion of the Plaintiffs from the process of redevelopment / redevelopment agreement although they are admittedly the members of the society. Mr. Apte, the learned Senior counsel for the Appellants, in all fairness, did not dispute that Plaintiffs are the members and holding share certificate of the society. However, they are not part of the development agreements. He has however, pointed out the recitals in para 37 of the plaint in which the Plaintiffs have stated that they have no objection for the redevelopment. However, a perusal of para 37 shows that the case made out by the Plaintiffs is that, although they have no objection for redevelopment, it is the responsibility of the society as per law to include the Plaintiffs in the process of redevelopment. The fact that the Plaintiffs are not part of the redevelopment agreement and have been simply excluded is clearly borne out of the record. In my view, the learned Senior counsel for the Respondents (Plaintiffs) is right that this is not a case where the society has proceeded with the redevelopment overruling the opinion of the minority. Even where the minority members oppose the redevelopment, if ultimately a decision is taken for redevelopment, on the strength of the opinion of the majority members, the minority members need to be included in the process of redevelopment. Quite to the contrary, this is a case of total exclusion of the Plaintiffs from the process of redevelopment.

30. Considering the settled principle and the facts as obtaining in the present case, I do not find it necessary to dwell in details on the decisions cited by the parties.

31. Considering the fact that the Plaintiffs are admittedly the members of the society and have been excluded from the redevelopment, an attempt was made to explore the possibility of amicable settlement as it is in everybody's interest that the redevelopment takes place. The parties exchanged the draft proposals.

32. The learned Senior counsel for the Appellant submitted that for the present even, the Defendants can acknowledged the existence of Shop No.7 with a mezzanine floor and the loft (which other members are getting free and the office premises) and a necessary addendum acknowledging the rights of the Plaintiffs be executed to the development agreement. It is submitted that the Plaintiffs be also paid rent as paid to other members from the date of demolition of the building. In short, it was contended that the society needs to acknowledge the Plaintiffs as members with the benefits at par with the other members. However, unfortunately the parties were unable to agree to the terms of an amicable settlement. In such circumstances, the law has to take its own course. In my considered view, the impugned order is a possible view of the matter.

33. Prima facie, it appears that there are documents such as (i) certificate issued by the PMC certifying the possession of the Plaintiffs at the time of demolition, the tax receipts, share certificates in respect of Shop No.4A, permissions including sanction plan of the year 2008 showing existence of the 7^{th} shop in Gulshan Building, registered Gift Deed in respect of Shop No.4A, Architect's report of structural audit showing 7^{th} shop in Gulshan and Gulpham Building and a draft of proposed redevelopment agreement shared by the son of one of the

partners of the Appellant - Builders and Developers with Saroj Mulla, the cousin of the Plaintiffs which indeed would establish the prima facie case in favour of the Plaintiffs.

34. The Architect's report regarding Gulshan and Gulpham Building also shows in all 24 flats and 14 shops. The learned Trial Court has relied upon the same to hold that there were 12 flats and 7 shops in each of the two buildings. Moreover, the redevelopment agreement of 'Gulpham' building, still shows 7 shops. However, significantly, the development agreement of 'Gulshan' Building shows only 12 flats and 6 shops for which no explanation is forthcoming.

35. The Supreme Court in *Mohd. Mehtab Khan (supra)* after placing reliance on its earlier decision in Wander Ltd. has interalia held that interference by the Appellate Court is not permissible in the exercise of discretion by the Trial Court unless and until such exercise of discretion is palpably incorrect and untenable. It has been held that if the view taken by the Trial Court is a possible view, the same is not liable to be interfered with.

36. Considering the over all circumstances no case for interference is made out. In the result, the appeals are hereby dismissed. However, the parties will have liberty to apply for

modification / variation of the order of injunction in terms of the second proviso to Rule 4 of Order XXXIX of CPC, if the same is necessitated by change in circumstances and in the event, the parties arrive at an amicable settlement. If any such settlement is arrived at and if the parties apply before the trial Court, for variation of the order, the trial Court shall decide the same on its own merits and in accordance with law.

37. At this stage, the learned counsel for the contesting Respondents has made a prayer for expediting the suit.

38. The trial Court shall proceed to hear the suit as expeditiously as possible and an endeavour shall be made to decide the same on or before 30 June 2023. The parties to cooperate for the time bound disposal of the suit.

In the circumstances, there shall be no order as to costs.

C.V. BHADANG, J.