

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6557 OF 2019

Smt. Fazunissan Sayad

.. Petitioner

Versus

Smt. Saira Qumruddin Khan

(Since deceased)

Ayub Kamruddin Khan

.. Respondent

-
- Mr. Atul Damle, Senior Advocate i/by Mr. Vaibhav Sugdare, Advocate for the Petitioner.
 - Mr. Gaurav Shenoy i/by Amin Solkar, Advocate for Respondent.
 - Mr. Suresh Sabrad, Advocate for Respondent.
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CORAM : MILIND N. JADHAV, J.

DATE : NOVEMBER 22, 2022.

P.C.:

1. By the present Writ Petition filed under Article 227 of the Constitution of India, Petitioner (Proprietress of Mukul Developers) has challenged the legality and validity of two concurrent Orders, viz, Order dated 30.04.2015 passed in RCS No.109 of 2015 by Civil Judge Junior Division, Ulhasnagar and order dated 12.04.2019 passed by the Appellate Court (District Judge Kalyan) in Appeal No.56 of 2015 upholding the Trial Court order.

2. Respondent (original plaintiff) filed RCS No.109 of 2015 in the Trial Court seeking injunction in respect of interference and dispossession from Plot No. 9A admeasuring 380 sq. mtrs. situated at Ambernath, Kalyan. Admittedly, Respondent No.1 is a member of

Jamiyat Co-operative Housing Society Limited (for short “**Society**”). Society carved out 57 plots originally and allotted 55 plots to its members in 2001. Two plots were kept by the society for R. G. in the original layout. Respondent is one such allottee member in respect of Plot No.9A. Allotment letter dated 01.07.2001 is issued to Respondent. Possession of the said plot had been given to Respondent in 2001. Admittedly, Respondent did not develop the said Plot No.9A until 2015. These are undisputed facts.

3. Mr. Damle, learned Senior Advocate for Petitioner submitted that Petitioner as developer has privity of contract with the society. As such due to contractual obligation all plots belong and are owned by the Society. That Development Agreement with society entitles Petitioner to develop Plot No.9A also. He fairly stated that out of the total 55 plots, as on date, only some of the plots have been developed. Obviously this would be the only consent of the allottee/member of that particular plot and society. He submitted that by virtue of the development agreement with the society, Petitioner is entitled to develop Plot No.9A according to sanctioned plan in conjunction with the neighbouring plots. He therefore submitted that grant of relief to the Petitioner in Exh.5 Application by the Trial Court and upholding of the said order by Appellate Court is severely prejudicial to Petitioner's interest as 95% of the development has been completed by Petitioner.

Hence, Respondent No.1 does not have any right in the said Plot No.9A and cannot object to its redevelopment. According to him both the Courts below have erred in granting injunction to the Respondent No.1 and the orders passed/impugned in the present petition are required to be set aside.

4. *PER-CONTRA*, it is the Respondent No.1's case that the impugned orders have been correctly passed in the facts and circumstances of the present case. That there is material suppression of facts by Petitioner which go to the root of the matter. Petitioner has not disclosed to the court that the development agreement dated 27.02.2008 between the society and Petitioner has been terminated / has come to an end in February 2016. Thereafter there have been disputes and correspondence with the society by the Petitioner for seeking extension to complete the construction work. That apart, in so far as Respondent No.1's plot is concerned, the Chief Officer of Ambernath Nagar Parishad has issued a stay order dated 02.08.2014 to the society and the Petitioner due to numerous complaints received by the said planning Authority against the Petitioner. That admittedly Respondent is a member of the society and at no point of time her consent was obtained by the society for any development / redevelopment.

5. Record indicates that Petitioner has proceeded for redevelopment on the premise that society is owner of all plots, without obtaining consent of the allottee / member in the present case. The factum of possession of the said plot with the Respondent since 2001 has not being denied. Admittedly, nothing is placed on record to show any privity to contract with Respondent No.1. Possession receipt dated 01.07.2001 in respect of Plot No. 9A in favour of Respondent No.1 is not disputed at all. The aforementioned issues are serious and disputed questions of fact which cannot be decided in a writ petition filed under Article 227 of the Constitution of India.

6. I have carefully perused both orders passed by the Trial Court and Appellate Court. There are no documents placed on record to indicate complicity / consent of Respondent for development / redevelopment of Plot No.9A. Without consent of Respondent No.1 / member of the society, Petitioner (developer) cannot deal with and construct on the said Plot. Perusal of record indicates that substantive proprietary rights have been created in the immovable property which are not controverted and which may require a trial. Both orders passed by the Trial Court and the Appellate Court in respect of Exh.5 are well reasoned orders passed on the basis of justifying possession of Respondent No.1 in respect of Plot No.9A and do not call for any interference whatsoever at this stage. Petitioner has failed to show

any perversity in the passing of the said orders. Both orders deserves to be upheld

7. In view of the above discussion and findings, Writ Petition stands dismissed. No costs.

[MILIND N. JADHAV, J.]

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AJAY TRAMBAK
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