

rrpillai

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

APPEAL NO. 515 OF 2019

IN

NOTICE OF MOTION NO. 1699 OF 2016

IN

SUIT NO. 551 OF 2016

- 1. DHARMSHI D BHANUSHALI**
Aged 69 years, Occ: Business
Devkunj Parimal Cooperative Housing
Society Ltd., R.B. Mehta Road,
Ghatkopar (East), Mumbai-400077
- 2. HARIDAS D BHANUSHALI**
Aged 63 years, Occ: Business
Nos. 1 and 2 Residing at Row House
No. 1, Ghatkopar Parimal Cooperative
Housing Society Ltd., 353/1/, R.B.
Mehta Marg, Ghatkopar (East),
Mumbai 400077
- 3. VASANTLAL D BHANUSHALI**
Aged 61 years, Occ: Business
- 4. ANILKUMAR D BHANUSHALI**
Aged 57 years, Occ: Business
Nos. 3 and 4 Residing at Row House
No. 2, Ghatkopar Parimal Cooperative
Housing Society Ltd., 353/1/, R.B.
Mehta Marg, Ghatkopar (East),
Mumbai 400077

RAJESHWARI
RAMESH
PILLAI

Digitally signed
by RAJESHWARI
RAMESH PILLAI
Date: 2022.07.25
11:09:13 +0530

5. **HASMUKH PROPERTIES AND HOLDING LTD,**
Row House No.3, Being a public limited company having its registered office at 1, Laxmi Nivas, M.G.Road, Ghatkopar (West), Mumbai 400086
6. **NARENDRA R. KAMDAR,**
Aged 74 years, Occ: Business
7. **BHARTI NARENDRA KAMDAR,**
Aged 73 years, Occ: Housewife
Nos. 6 and 7 Residing at Row House No. 4, Ghatkopar Parimal Cooperative Housing Society Ltd., 353/1/, R.B. Mehta Marg, Ghatkopar (East), Mumbai 400077
8. **HEENA HARA KHCHAND RAMBHIA,**
Aged 66 years, Occ: Retired Teacher
9. **HARA KHCHAND NARSHI RAMBHIA,**
Aged 70 years, Occ: Business
10. **HIREN HARA KHCHAND RAMBHIA,**
Aged 38 years, Occ: Business
Nos. 8 to 10 Residing at Row House No. 5, Ghatkopar Parimal Cooperative Housing Society Ltd., 353/1/, R.B. Mehta Marg, Ghatkopar (East), Mumbai 400077
11. **NITIN BHAWANJI SAWLA,**
Aged 52 years, Occ: Business
12. **HARSHITA NITIN SAWLA,**
Aged 51 years, Occ: Business
Nos. 11 and 12 Residing at Row House

... Appellants
(ORIG. PLAINTIFFS)

No. 6, Ghatkopar Parimal Cooperative
Housing Society Ltd., 353/1/, R.B.
Mehta Marg, Ghatkopar
(East), Mumbai 400077

~ VERSUS ~

**1. MUNICIPAL CORPORATION FOR
GREATER BOMBAY**

A body corporate duly constituted
under, the provisions of the Mumbai
Municipal Corporation Act, 1888,
having their head office at Mahapalika
Building, Mahapalika Marg, Mumbai-
400 001

**2. THE EXECUTIVE ENGINEER
BUILDING PROPOSALS,
EASTERN SUBURBS-I**

Near Raj Legacy Residential Complex,
Paper Mills compound, LBS Marg,
Vikhroli (West), Mumbai 400 083

**3. GHATKOPAR PARIMAL
COOPERATIVE HOUSING
SOCIETY LIMITED**

Being a cooperative housing society
having its registered office at 353/1,
R.B. Mehta Marg, Ghatkopar (East),
Mumbai 400 077

**4. ROSEATE REAL ESTATE PRIVATE
LIMITED**

Being a private limited company having
its registered office at 604, 6th Floor,
Siddhi Apartment, Shimpoli Road,
Chikuwadi, Borivali (W), Mumbai 400
092

... Respondents
(ORIG. DEFENDANTS)

APPEARANCES

FOR THE APPELLANTS	MR MAYUR KHANDEPARKAR, ADVOCATE <i>with Amogh Singh, Muttahar Khan, Dharmesh Joshi & Laxminarayan Shukla i/b. Legal Vision.</i>
FOR MCGM	MS POOJA YADAV
FOR RESPONDENT NO.3	MR PRAVIN SAMDANI, SENIOR ADVOCATE <i>i/b. Arun Panickar.</i>
FOR RESPONDENT NO.4	MR ASPI CHINYOY, SENIOR ADVOCATE <i>with Karl Tamboly, Prathamesh Kamat, Nivit Srivastava, Neil Mandevia, Sneha Patil & Saurabh Kshirsagar i/b. Maniar Srivastava Associates</i>

**CORAM : G.S. Patel &
Gauri Godse, JJ.**

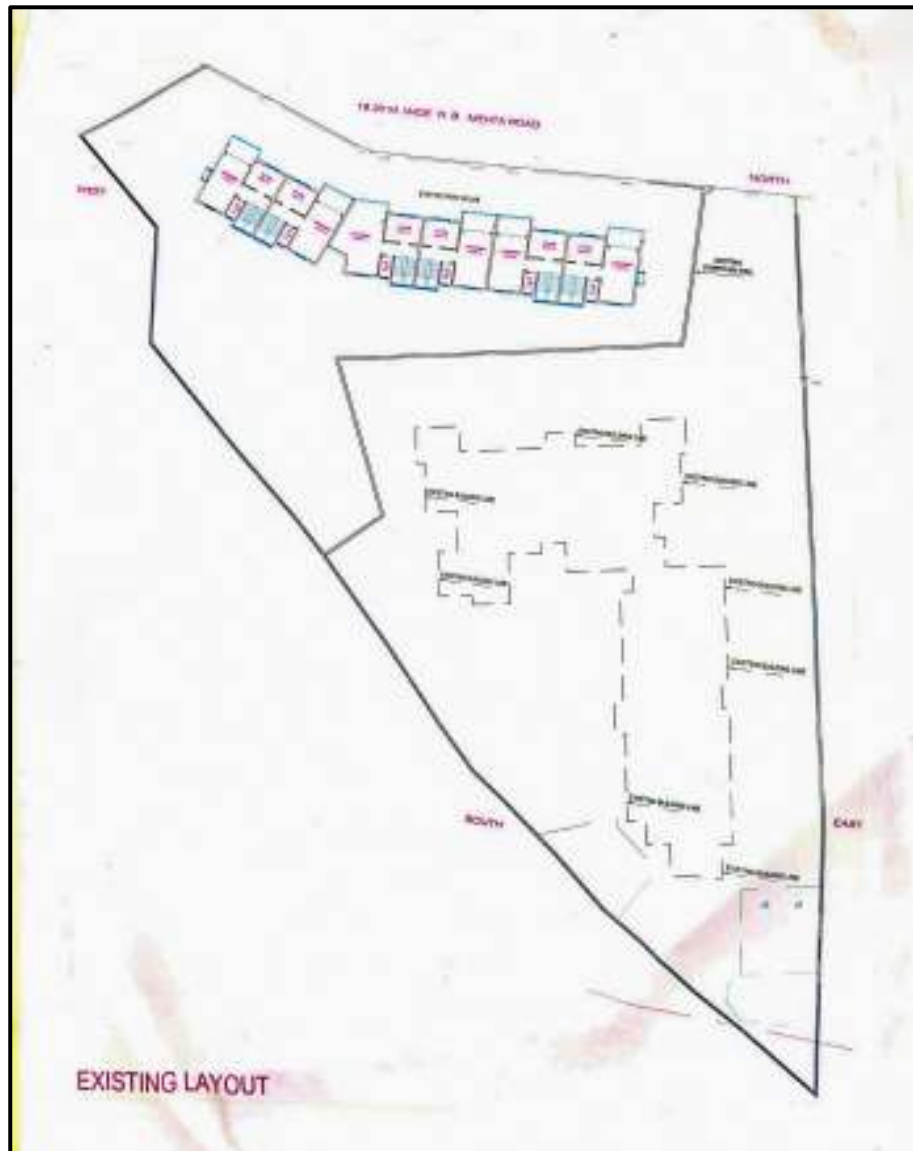
DATED : 20th July 2022

ORAL JUDGMENT (Per GS Patel J):—

1. The original plaintiffs in the suit have come up in appeal against an order of 12th December 2018 passed by the learned Single Judge, RD Dhanuka J. There are 12 Plaintiffs. The first two Respondents and Defendants to the Suit are the MCGM and its

Executive Engineer. The real contest is with the original Defendants Nos. 3 and 4, the Ghatkopar Parimal Co-operative Housing Society Ltd (“**the Society**”) and a developer, Roseate Real Estate Private Limited (“**the Developer**”).

2. The controversy is perhaps best understood from a sketch. Mr Samdani for the Society has given us a clear copy of the existing layout. This is undisputed. It is reproduced below.



3. The Society owns the entire plot. The total plot area is 4187.50 sq mtrs. The northern side of the plot has a frontage on an 18.20 meter wide road known as RB Mehta Road. Along this northern periphery there is what is known as Building No.1. That description is perhaps slightly inaccurate because Building No.1, although this is an expression used throughout, including in title documents, is actually a set of six row houses. Each of these six row houses has a frontage on RB Mehta Road and direct access from that road. They also have a front garden or yard. The Plaintiffs claim that in addition to these features, the Plaintiffs have exclusive rights to a garden at the *rear*, the portion that separates this Building No.1 (and the six row houses) from the larger Building No.2 that occupies a significant portion of the rest of the plot, south/south-east of the row houses. According to the Plaintiffs, there was a somewhat irregular or Z-shaped compound wall between Building No.1 and Building No. 2. That Building No.2 did not and was not permitted to have access “through the row houses” and through Building No.1 is undisputed. Indeed, it is common ground that Building No.2 has access through a gateway in the north-east corner of the plot (at the far eastern end of the RB Mehta road frontage).

4. Each of the row houses in Building No.1 are ground and two floor structures. Building No. 2 is a ground and six floor structure. Building No.2 is said to have deteriorated over time. It was constructed in the 1960’s. It is in urgent need of redevelopment.

5. A large part of the suit, when filed, dealt with development rights claimed by the Plaintiffs vis-à-vis the society. For the purposes

of the Interim Application before Dhanuka J, this controversy was considerably narrowed. The Plaintiffs complaint was that the Society and the Developer could not possibly redevelop Building No.2 in such a way that any part of redeveloped Building No.2 crossed the compound wall. The reason, according to the Plaintiffs, was that everything up to the compound wall was a sort of 'Laxman Rekha', the exclusive entitlement — and not merely possession — of the Plaintiffs. They said that it had always been thus for nearly 50 years. Leaving aside longevity, the Plaintiffs said, this rear-garden land was the Plaintiffs by right, and the Plaintiffs were entitled to a legal enforcement of that right. In other words, the Plaintiffs claimed as a matter of right that the rear garden behind the row houses and up to the compound wall was theirs and theirs alone.

6. In the suit, the Society and the Developer have already filed written statements.

7. The prayers in the Notice of Motion before the learned Single Judge are to be found at pages 51 to 53 of the Appeal paper book. Prayers (a) to (g) read thus:

a) That pending the hearing and final disposal of this Suit, the Defendants No. 3 and 4, their agents and servants be restrained by an Order of injunction of this Hon'ble Court from taking any action in furtherance of the Development Agreement which is annexed to the Plaint as **Ex-SS**;

b) That pending the hearing and final disposal of this suit, the Defendants No. 3 and 4, their agents and servants be restrained by an Order of injunction of this Hon'ble court from disturbing the Plaintiffs' exclusive possession and exclusive use of the Building No. 1 Open Space i.e. the open

space which is exclusively in possession of each Plaintiff and which has been in the exclusive possession of the owner of each respective row house from time to time and which has been identified by the numbers 1, 2, 3, 4, 5 and 6 (corresponding to the row house number) and has been marked in red coloured boundary lines, green coloured boundary lines, yellow coloured boundary lines, brown coloured boundary lines, blue boundary line and orange boundary line respectively on the plan annexed to the Plaint as **Ex-S**;

c) That pending the hearing and final disposal of this Suit, the Defendants No. 3 and 4, their agents and servants be restrained by an Order of injunction of this Hon'ble Court from encroaching upon any portion of the Building No. 1 Land in general and on the Plaintiff No. 1 Side Open Space (which is delineated in yellow-coloured hatched lines on the plan annexed to the Plaint as **Ex-S**) in particular.

d) That pending the hearing and final disposal of this suit, the Defendants No. 3 and 4, their agents and servants be restrained by an Order of injunction of the Hon'ble Court from disturbing or demolishing the compound wall which has been marked by a brown bold line on the plan annexed to the Plaint as **Ex-B** or to uproot or remove the trees which are marked as T-1 to T-32 on the plan which is annexed to the Plaint as **Ex-B**;

e) That pending the hearing and final disposal of this Suit, the Defendants No. 3 and 4, their agents and servants be restrained by an Order of injunction of this Hon'ble court from taking any action in implementation of the resolution passed by the Defendant No. 3 Society in the Special General Body Meeting held on 5th July 2013, which are recorded in Ex-LL to the Plaint;

f) That pending the hearing and final disposal of this Suit, the Defendants Nos. 1 and 2, their agents and servants

be restrained by an Order of injunction of this Hon'ble court from taking any further action in the building proposal No. CE/6726/BPES/AN or any other building proposal relating to the said Land;

g) That pending the hearing and final disposal of this suit, the Defendants No. 3 and 4, their agents and servants be restrained by an Order of injunction of this Hon'ble Court from using the entire presently permissible development potential of the Building No. 1 Land as per the Development Control Regulations, 1991, which is 4,340.79 square metres (including the FSI, TDR, compensatory fungible FSI and any other development potential by whatever name called);

8. Dhanuka J dismissed the Plaintiffs' Notice of Motion. He held, in our view correctly, that all three classic requirements for an interlocutory injunction were cumulative. Each had to be shown viz., a prima facie case, balance of convenience and where lay the more irreparable injury. On all three factors he held against the Plaintiffs. Hence the appeal.

9. In Appeal, Mr Khandeparkar for the Plaintiffs argues that the exclusive rights of the Plaintiffs to the rear portion or the rear garden behind the row houses and up to the compound wall is a covenant that runs with the land. It constrains the rights of the Society over this land. Although the Society may own the land, the title that it took was subject to this covenant. This was known to all, including the Society and the transferors.

10. In addition, he argues that since the Plaintiffs are also members of the Society, and they have agreements under the Maharashtra

Ownership Flats Act 1963 (“**MOFA**”) with the original developer, this covenant is equivalent to a ‘special right’ under MOFA. Mr Khandeparkar submits that these ‘MOFA rights’ survive and continue beyond a conveyance of the entire property to the Society. One of the reasons, he maintains, is that a holder of a MOFA agreement can continue to ‘transact it’ independently of any rights or obligations relatable to membership of the Society.

11. The Society entirely denies the formulation made by Mr Khandeparkar. There is, Mr Samdani for the Society says, no such covenant at all. There never was. We do not believe there is much controversy that there was a compound wall, parts of which are now broken. But Mr Samdani argues, the existence of a compound wall does not per se give an exclusive legal entitlement or a legally enforceable right to any person on either side of it. If there is to be such a right, he submits, it can emanate only from a primary document of title or a recognition by statute. Parties may agree or contract to confer or recognise such a right, but that is not the case pleaded. If no right to a particular piece of land can be shown in a statute, then one must look at the documents and see whether the right claimed by the Plaintiffs can fairly be said to be found in those documents. It is his submission that the Plaintiffs have never been able to show the existence of any such entitlement or legally enforceable right to exclusivity in the rear-garden lands. Therefore, he submits, the learned single judge quite correctly rejected the Notice of Motion. To do otherwise — as the Plaintiffs seek — would have resulted in a view being taken that was plainly impossible;

12. Mr Khandeparkar's journey is long and tortuous. His first waypoint is the conveyance, which we find in what is increasingly fashionably called a 'convenience compilation'. The conveyance is at page 54 and since much emphasis has been laid on this, we will examine this as closely as time permits. It is dated 13th July 1972. What is annexed is a photocopy. It is between various individuals who are the transferors, one person as the confirming party and the 3rd Defendant Society. From internal page 2 to internal page 8 we find a series of as many as 20 recitals. These trace the history of the plot from its original conveyance of 11th February 1963 onwards. There was another conveyance of 25th March 1965, a third of 6th December 1965, an Agreement for Sale with the confirming parties, then a partnership document and so on. Up to the end of Clause 7 there is no ambiguity whatsoever and we find here a clear statement that on the road frontage, six bungalows of G+2 were to be constructed, and, at the rear, another building of G+6 was to be built. Up to recital 7 there is no mention of any open space behind the bungalows.

13. Then comes recital 8 at page 58 of this compilation. It reads thus:

“(8) According to the Scheme of the Transferors except the said Yogesh C. Parekh and Haresh C. Parekh but including Amratlal G. Mehta and Prataprai G. Mehta and the Confirming Party each of the bungalows on the front or road side would have an independent open space for garden at the rear of the bungalows, that the bungalow would be separated from the building on the rear portion by a compound wall, further that neither the owners nor occupants of the rear building nor the Purchasers or occupants of tenements of building on the rear side have

a right of access through any of the bungalows on the road side and that the road side building will be known as building No. 1 and the rear building as building No. 2.”

(Emphasis added)

14. Three aspects about this must be kept in mind. *First*, this is a recital. It is not part of the operative portion of the conveyance. *Second*, while there is a mention of an independent open space at the rear up to the compound wall, the embedded proscription is against anyone having a ‘right of access through any of the *bungalows*’ — i.e., the Society and Building No.2 at the rear would compulsorily have required a separate access, and could not use the row houses’ road-frontage access. *Third*, that this was a scheme of the transferors, i.e. the recital is a narrative of a historical past. All are hurdles in Mr Khandeparkar’s way. He must show that the scheme continued through and in the conveyance, and became a part of it. He must show that the scheme did in fact operate to grant exclusive user to the Plaintiffs of the rear garden up to the compound wall. And he must also show that this recital was part of the operative portion of the conveyance.

15. Clause 10 is also important. It says that the bungalow purchasers would become ordinary members of the 3rd Defendant society. This is repeated once again in Clause 20.

16. The conveyance’s operative part begins at internal page 8 of the document. It is in the usual densely packed (almost impenetrable form) that these documents take with not a full stop in sight. The *habendum*, also in the usual form, is to be found at page 62. This is

important, because Mr Khandeparkar's argument is centred at least on some part of this. The relevant portion says:

“TO HAVE AND TO HOLD the said premises and all and singular and other the premises hereby granted, assigned, conveyed and assured or intended so to be with their and every of their rights, members and appurtenances UNTO and to the use and benefit of the society **subject to the terms and conditions of the Town Planning Scheme III, Ghatkopar and any variation thereof from time to time in force and the terms and conditions of sub-division of Final Plot No. 353 and also subject to the right of M/s. Parimal Construction Co. of the Transferors and the Confirming Party to sell unsold structures and open parking spaces remaining unsold to Purchasers as hereinbefore mentioned and subject to payment of all taxes, assessments, rates, duties now chargeable upon the same or which may hereafter become payable in respect thereof, to the Government of the State of Maharashtra or the Municipal Corporation of Greater Bombay and the Transferors and the Confirming Party do and each of them for themselves, himself, herself, their, him or her heirs, executors and administrators COVENANT** with the Society that notwithstanding any act, matter or thing whatsoever by them the Transferors and/or the Covenantee Parties or any person or persons lawfully or equitably claiming by, from, through, under or in trust for them or her made, done, committed or omitted or knowingly suffered to the contrary they the Confirming Party now have in themselves, good right, full power and absolute authority to grant, assign, convey, and assure the said premises hereby assigned or assured or intended so to be unto and to the use of the Society **in manner aforesaid.**”

(Emphasis added)

17. This shows two distinct things. *One*, the conveyance to the Society is made expressly subject to (i) the conditions of the Town Planning Scheme 3 Ghatkopar; and (ii) the right of the then developer to sell unsold structures. There is no mention of the conveyance being subject to the ‘Scheme’ narrated in recital 8. *Two*, there is indeed a covenant which we find in the emphasised portion above. But this is also not a covenant that reflects recital 8 at all.

18. Mr Khandeparkar submits that the three ending words “in manner aforesaid” are sufficient to ‘incorporate by implicit reference’ recital 8 (and, presumably, every single one of the 20 recitals). The reason Mr Khandeparkar is compelled to labour this is because of the finding returned by the learned Single Judge in the impugned order in paragraphs 58 and 59 and particularly the latter, viz., that it is the operative part of the document and not the recitals that will bind the parties, unless the operative portion is unclear or ambiguous on a plain reading of the document.

19. Mr. Khandeparkar takes exception to this finding. He relies on the judgment of the Supreme Court in *Ram Charan Das v Girja Nandini Devi & Ors*.¹ There, the Supreme Court held in paragraph 9 that recitals may in fact bind the parties. Recitals may be evidence as against the parties to the instrument and therefore the recitals cannot be ignored. He also submits that because they are evidence they would also operate as estoppel, which is a rule of evidence. But this proposition has to be understood in the context in which the judgment was delivered. The document before the Supreme Court

¹ (1965) 3 SCR 841.

marked as Exhibit Y-13 embodied the terms of a compromise in a 1932 suit. The submission was that a particular recital rendered the compromise agreement as tentative and not final. The judgment does not, in our view, lay down a proposition of general applicability that in every single case and in every single document, every single recital will be read as operative. Indeed, the decision seems to us to repel the submission to the contrary, viz., that in *no* case can a recital *ever* be read as binding, *because it is only a recital*. The judgment says that recitals are either narrative or introductory. A narrative recital set out the facts on which the instrument is based. That would be akin to the present case. Introductory recitals explain the motives or intentions of the operative part. Now where the recitals are clear and the operative part is ambiguous then the recitals would govern the construction. But this is precisely what Dhanuka J said in the impugned order whether there was there a reference to *Ram Charan Das (supra)* or not. To illustrate: where a recital records, say, a ‘representation’ made by one of the parties or signatories to it, this would undoubtedly be binding and operate as estoppel, for that party could hardly be heard to say later that representation was not binding because it did not feature in the operative portion.

20. Thus, what we would have expected was for the Plaintiffs to be able to show unambiguously and clearly that Recital 8 was not merely a recital but was somehow clearly brought into the conveyance’s the operative portion and made part of it. This means that the conveyance would have had to say *after* the *habendum* clause that it was subject to what is stated in Recital 8. If we return briefly to Recital 8 this tells us that there was once upon a time a scheme prepared by the transferors and the confirming party (except a few named) that

each of the bungalows on the road-facing side would have an independent open space for garden at the rear, that the bungalow would be separated from the building on the rear portion (Building no. 2) and a compound wall. So far so good. Then Recital 8 says that the scheme further was that neither the owners nor the occupants of the rear Building no. 2 nor the purchasers or occupants of tenements in that building would “have a right of access through any of the bungalows on the road side”. The entire purport of Recital 8 is only to ensure that the bungalow owners had independent access to their bungalows from the road and no member of Building no. 2 could go through the row houses to access Building no.1. In short Building No.1 would have to have its access and Building No.2 would have its own *separate* access. This is in fact what has happened.

21. It is not possible in our view to read the conveyance as Mr Khandeparkar would have us to or to impute into it some sort of a restriction, let alone a covenant that runs with the land. A covenant that runs with the land is an obligation and a restriction on the use or development of that land. In fact, Section 40 of the Transfer of Property Act 1882 has the words “restrictions on use of land”. We quote Section 40 in its entirety:

“40. Burden of obligation imposing restrictions on use of land—Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

Or of obligation to ownership but not amounting to interest or easement—Where a third person is entitled to

the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to interest therein or easement thereon

Such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.”

(Emphasis added)

22. What Section 40 tells us is that these rights or obligations can be enforced against a transferee with notice or a gratuitous transferee of the property but never against a transferee for consideration without notice. Presumably, Mr Khandeparkar places his case in the first portion of Section 40. But for that to even operate, it must be shown that there is vesting in the Plaintiffs the *right to restrain the Society from enjoying what is undoubtedly a part of its property*, viz., the garden area in question. That right has to be shown to exist. At the interim stage, based on the conjectural reading of the conveyance as noted above, this could not have been established, and Dhanuka J rightly held so.

23. The Section also plainly says that such a restriction on the use of the land may indeed exist. It may be enforced against the transferee. But it can only happen where the transferee has notice or is a gratuitous transferee. But for such a restriction to in fact be enforced against a transferee (which is clearly not the case here), that restriction must have clearly defined limits and contours. It must be expressly found in some grant or document of title or in some

statutory form. Short of an easement (and that is not anyone's case), it is almost impossible to infer a covenant running with the land and restricts the beneficial use of another person's land. Covenants running with the land are not unknown to our jurisprudence, occurring frequently in matters involving leases, tenancies or grants. But the weight of decided authority seems to deal with whether such covenants bind a particular transferee or not. That is not the case here. There is at least some learning that distinguishes between a restrictive covenant and one that runs with the land.²

24. No argument is taken before us (or was taken before Dhanuka J) that the restriction, whether as a covenant running with the land or a restrictive covenant, is noted in the land registry records.

25. The ambit of the Section 40 is not, we believe, so much as to confer any special right of a covenant of any stripe, but is whether or not a transferee can be held to have (constructive) notice of the restriction, and when he may be held to have such notice. Section 40 does not seem to us to advance the Plaintiffs' case.

² See, for instance, *Gordhandas Vithaldas v Mohanlal Maneklal Doshi & Anr*, 1920 SCC OnLine Bom 76 : ILR (1921) 45 Bom 170. Macleod CJ & Heaton J had before them a case where the plaintiff had entered into an agreement with the defendant's vendor by which the latter agreed to a restriction of ordinary user of his property. The plaintiff sued for injunctive relief against the defendant. The question was whether the defendant had notice of the registered agreement. The Division Bench held this was *not* a covenant that ran with the land but was 'merely a restrictive covenant' by which the defendant's vendor restricted the ordinary user of his property, and therefore the defendant could not be said to have had constructive notice unless the document was indexed in the register in relation to the defendant's property.

26. Indeed, the whole of the case is not directed against any transferee at all. It is directed against the owner of the entire plot, including the land on which the Plaintiffs' property stands. Necessarily, this means that the Society, which owns the plot, must be shown to have obtained an explicitly restricted or limited right, and that its ownership of the whole plot was constrained or limited by the rights to which the Plaintiffs lay claim. This is not demonstrated before us and was not demonstrated before Dhanuka J.

27. The next argument is that the Plaintiffs have rights under their MOFA agreements and that these have remained unaffected by the conveyance of the entire plot i.e., land and buildings to the society. Here again, Dhanuka J took the view that a MOFA agreement was transitory. Once there is a conveyance to the society, he held, there is no question of MOFA rights being invoked. Indeed, Mr Samdani points out that it is a startling submission that MOFA rights, far from being invoked against a *promoter*, are now sought to be invoked against the very Society of which the Plaintiffs are members. The Society's conveyance conflates all the rights under the MOFA agreement into a single transfer of title to the society. To be sure, the MOFA Act has provisions under Section 3 and 4 and there is no doubt that a MOFA agreement is a special right reflecting statutory protections. But as Section 11 of the MOFA itself says, a promoter is required to convey title and execute documents in terms of the MOFA agreement title to an association of flat takers or apartment owners. The transfer must be of the promoter's interest in the land and the building. This is what the 1972 conveyance has actually done. It has done it in terms of the MOFA agreement and it has done this without there being a clearly spelt out 'covenant that runs with the land'.

28. The learned Single Judge held in paragraph 57 that the MOFA agreements between original owners and purchasers of the row houses or purchasers of flats in either of two buildings merged with the deed of conveyance and no reliance could be placed by the Plaintiffs on the recitals in the MOFA agreement. In addition, the learned Single Judge held in paragraph 52 that all the rights, obligations and entitlements of the parties are governed under the deed of conveyance. The MOFA agreement is thus a transitory document.

29. Mr Khandeparkar's submission that the MOFA agreement can continue to be transacted *independently* of membership of the Society only needs to be stated to be rejected. The MOFA agreement may be recited in any agreement that a flat owner has with a new buyer. But it cannot buy and of itself transfer title. To accept Mr Khandeparkar's argument would be to hold that every flat owner with a MOFA agreement has an absolute title independent of the Society's title, which is the land *and* the buildings. No flat in the Society will transfer out to a third party *only* on the basis of the old MOFA agreement. All that can be transacted are shares in the Society, subject to Society permission, and with the share transfer, attendant rights such as the right to occupy a specified flat.

30. It is also pointed out that from the beginning of the plaint, the Plaintiffs have admitted that the Society is the owner of the entire land and all structures on it. Thus, even at this point, it is still unclear to us what right exactly is being canvassed. If the owners of the row houses are claiming that they have exclusive rights as owners to the

rear gardens behind the row houses, then that is in the teeth of the conveyance. It must be so because the plaint also claims FSI and development benefits from that portion of the rear garden space. We are told that FSI is already been consumed in constructing Building No.2 but we have nothing further to say on that aspect of the matter at this stage. That may well be an issue at trial. On the other hand, it is equally unclear if the Plaintiffs are claiming only some sort of a possessory right or right of user, in which case it must fall outside the conveyance, and must be found in some other document or writing or enactment. This is also not shown to us. It was also not shown to the learned Single Judge.

31. We are unable to accept Mr Khandeparkar's formulation that the MOFA agreement survives the execution of a conveyance in favour of the society. The emphasis on the recitals in the MOFA Agreements will thus carry the case no further.

32. There is some emphasis placed before us, as it was before Dhanuka J, on the decision of the Supreme Court in *Nahalchand Laloochand Pvt Ltd v Panchali Co-operative Housing Society Ltd*³ and in particular paragraph 53, 54 and 58. This is in the context of common areas. There the Supreme Court was concerned with garages and parking spaces. In *Nahalchand* the Supreme Court said:

“56. It was argued that under MOFA it is for the promoter to prescribe and define at the outset the “common areas” and unless it is so done by the promoter, the parking area cannot be termed as part of “common areas”. We are quite unable to accept this submission. Can a promoter take

3 (2010) 9 SCC 536.

common passage/lobbies or say staircase or RG area out of purview of “common areas and facilities” by not prescribing or defining the same in the “common areas”? If the answer to this question is in the negative, which it has to be, this argument must fail.”

33. This only adds another layer of ambiguity because it is unclear to us now whether the rear garden is being said to be a common area or an exclusive area. It is difficult to see how the Plaintiffs can continuously change position like this.

34. Mr Samdani points out that effectively the Plaintiffs as members of the Society are seeking an injunction against the true owner, the Society itself. He bases his submission of the Supreme Court in *Sopan Sukhdeo Sable & Ors v Assistant Charity Commissioner & Ors*.⁴ In paragraphs 25 and 26 the Supreme Court said this:

“25. Now the other aspect of the matter needs to be noted. Assuming a trespasser ousted can seek restoration of possession under Section 6 of the Specific Relief Act, 1963, can the trespasser seek injunction against the true owner? This question does not entirely depend upon Section 6 of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunction. In *Mahadeo Savlaram Shelke v. Pune Municipal Corpn.*⁵ it was held, after referring to Woodroffe : Law Relating to Injunctions; Goyle, L.C.: Law of Injunctions; Bean David: Injunctions; Jouce: Injunctions and other leading articles on the subject, that the appellant who was a trespasser in

4 2004(3)SCC 137

5 (1995) 3 SCC 33

possession could not seek injunction against the true owner. In that context this Court quoted *Shiv Kumar Chadha v. Municipal Corpn. of Delhi*⁶ wherein it was observed that injunction is discretionary and that (SCC p.175, para 31)

“Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court”

26. Reference was also made to *Dalpat Kumar v. Prahlad Singh*⁷ in regard to the meaning of the words “prima facie case” and “balance of convenience” and observed in *Mahadeo* case that (SCC p.39, para 9).

“9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession”

35. This is not a case of a trespasser seeking an injunction, so we will take Mr Samdani’s submission to mean only this: that a member of a Society cannot seek an injunction in respect of land owned by the Society itself. We leave aside this question of law for a fuller consideration at a later stage, viz., whether the Plaintiffs as members of the 3rd Defendant society can ever assert an independent title contrary to that of the society itself.

36. Mr Khandeparkar’s last submission need not detain us. It is that the wall has continued for several decades and no one has interfered with the Plaintiffs’ use of the rear garden spaces. But that is not an argument based on a covenant of any kind. On its own, it does not establish a contrary title, nor does it operate to limit the

6 (1993) 3 SCC 161

7 (1992) 1 SCC 719

Society's title. We do not know if this is being set up as some sort of adverse possession claim, because that does not appear to ever have been part of the suit. The Plaintiffs' claim is, explicitly, that from the time of the conveyance of the land and buildings to the Society (including Building No.1, the one with row houses), they, the Plaintiffs, had a legal title to the rear garden spaces up to the compound wall. If that was not shown, then the application for an injunction had to fail.

37. Mr Chinoy for the developer draws attention to an affidavit which points out that the development of the entire land was done in a composite fashion with an aggregate FSI of 4187 sq. mtrs. FSI of 621 sq mtrs was used for the row houses. The remainder of the entire plot (including what is presumably covered by the rear garden to which the Plaintiffs claim exclusivity), an area of 3566 sq mtrs, was consumed in the construction of Building No.2 There is therefore no balance available FSI that attaches to the rear garden space as wrongly claimed by the Plaintiffs. There is no denial of these assertions in affidavit in rejoinder.

38. The task before Mr Khandeparkar is made more formidable by the line of authority regarding appeals from interlocutory injunctions. somewhat different. It is not enough for him in appeal to show that he has an arguable case or that another view is possible. We have been saying repeatedly that we have to be mindful of the Supreme Court's formulation in *Wander Ltd v Antox India Pvt Ltd*,⁸ which was reaffirmed by the Supreme Court in *Mohd Mehtab Khan v Khushnuma*

8 1990 Supp (1) SCC 727.

*Ibrahim Khan*⁹ and recently in *Shyam Sel & Power Ltd & Anr v Shyam Steel Industries Ltd.*¹⁰ Paragraph 14 of *Wander vs Antox* says this:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion.”

(Emphasis added)

39. A more trenchant commentary is to be found in *Shyam Sel*, where the Supreme Court said that if the Appellate Court is not to

9 (2013) 9 SCC 221.

10 2022 SCC OnLine SC 313.

see whether the impugned order is or is not within the frame of *Wander v Antox* then it is unclear what else is it supposed to do.

40. In *World Crest Advisors LLP vs. Catalyst Trusteeship Ltd & Ors*,¹¹ we have also held that this is of course a constraint on what an Appellate Court can permissibly do when it is considering an order on an interlocutory application. If the view of the learned Single Judge is not shown to be perverse, capricious or arbitrary, then a Court will not interfere. If the view in the impugned order is reasonably possible, it cannot be upset in appeal just because another view is also possible. Mr Khandeparkar must, therefore, show that the view of Dhanuka J was not even reasonably possible, or that it was arbitrary, capricious or perverse.

41. We take the opportunity to define each of these terms because we find that they are used indiscriminately (including in Memoranda of Appeal). ‘Perversity’ in the context of a legal decision, especially at the level of the High Courts, has to be understood with a certain amount of circumspection. It means that the order below must be clearly demonstrated to have been arrived at *although the learned Judge knew it could not have been done*. That is the level of perversity that must be shown. ‘Capricious’ in this context means utterly whimsical or fanciful, unmoored to either facts or law. Arbitrary would mean entirely random and without a studied or reflective application of mind.

¹¹ Interim Application (L) No. 19253 of 2022 in Commercial Appeal (L) No.19252 of 2022, decided on 23rd June 2022.

42. But the *Wander v Antox* principal has its counterpart or flip side and this is the obligation it firmly puts on the appellant. It is clearly not enough for an appellant to show in appeal that the appellant has some prima facie case. What must be shown that appellant has such a prima facie, one so overwhelming, that relief could never have been refused by the trial court. In other words, that the impugned order was not even reasonably a possible view. Thus, when a defendant comes up in appeal against an order made against him, the defendant must show that the plaintiff had not a vestige of a prima facie case. And when a plaintiff comes up against an order refusing an injunction, the plaintiff must show that the prima facie case is so firmly established that there was no reasonable possibility of refusing the injunction.

43. We are not, in this decision, making any reference at all to the fact that the vast bulk of the members of the Society have voted in favour of the development, even though this was noted by Dhanuka J. What we do bear in mind is this: the Plaintiffs all have their separate row houses, structures of G+2. At the rear stands Building No.2, one that has become dilapidated over time. The fight is over the 'gardens' behind the row houses. While Mr Khandeparkar says the Plaintiffs are not 'opposing' the re-development of Building No.2, because they have no difficulty with or opposition to that redevelopment *so long as it does not affect the gardens behind the row houses*, in fact the opposition is to the re-development. For under the present regulations, re-development will necessarily affect those open spaces. The fight is therefore between the narrower and very private claims of the Plaintiffs and the housing conditions of considerably more members in Building No.2. This becomes a question of a decision in equity, and

it is very difficult to see how bungalow owners can get an order that effectively compels fellow members of the same Society to live in increasingly degraded conditions.

44. We see no merit in the Appeal at all. It is dismissed.

45. In the facts and circumstances of the case, there will be no order as to costs.

46. Mr Khandeparkar seeks continuation of an ad-interim order, one was continued by the Appellate Court on 2nd March 2020. Mr Khandeparkar says that this order has held the field for five years and should continue for another four weeks. We are unable to accept this. The interim order may have protected the parties, but surely in anticipation that the appeal would be heard at the earliest. This continuation for five years has undoubtedly affected the rights of the occupants for Building No. 2, now in a dilapidated condition. The bungalow/row house owners offer no security for the occupants of Building No. 2; they are simply supposed to manage. That is hardly equitable. If an order has continued for five years, that is hardly reason to let it continue once it is shown that it prejudices the other side. We understand this submission if there was at least some vestige of a case. If anything, the order has been allowed to continue for far too long. It is time for it to go. We also note that there is no permission and there is no mention of any prospective construction activity starting without sanctioned plan. The anxiety Mr Khandeparkar expresses is about the wall. We have no particular fondness for the wall. Walls can come down and walls can be rebuilt. The question is

whether the Plaintiffs have been able to show a right to exclusivity. The fact that the wall existed, or exists, or can be rebuilt does not mean that the Society should be stopped from proceeding to obtaining the necessary permission. The application for continuance is rejected.

(Gauri Godse, J)

(G. S. Patel, J)