

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 239 OF 2023

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SUBHASH
KULKARNI

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Gera Developments Pvt. Ltd. ...Appellant
Versus
Gera Sky Villas Cooperative Housing
Society Ltd. & ors. ...Respondents

Mr. Pralhad Paranjape, a/w Rahul Punjabi, Pratik Irpatgire,
i/b Manish Kelkar, for the Appellant.

CORAM: N. J. JAMADAR, J.
DATED : 5th APRIL, 2023

ORDER:-

1. This appeal under Order 41 Rule 1(r) of the Code of Civil Procedure, 1908 ("the Code") is directed against an order dated 16th January, 2023 passed by the learned Civil Judge, Senior Division, Pune, on an application for temporary injunction preferred by the appellant – plaintiff whereby the application came to be rejected.

2. The background facts can be stated as under:

(a) The plaintiff is a developer. The plaintiff has developed a project under the name and style, "Gera's Green Ville II (Sky Villas)" on a portion of land bearing Survey No.64 situated at village Kharadi, Pune. The plaintiff has handed over

possession of the flats in the said project to the members of defendant No.1 Society. Defendant Nos.2 to 4 are the flat holders as well as the committee members of defendant No.1 Society.

(b) It is the case of the plaintiff that the plaintiff has maintained all the amenities and services within the premises of defendant No.1 Society till 31st March, 2019. The common areas and facilities outside the building were also maintained and managed by plaintiff till 15th October, 2021. The members of defendant No.1 Society committed default in payment of maintenance charges. Under the terms of the agreement the members are liable to pay the maintenance charges to the plaintiff. Defendant No.1 Society, in turn, is under an obligation to collect the maintenance charges from its constituent members and pay the same to the plaintiff. Defendant No.1 Society has also failed to collect the maintenance charges.

(c) The plaintiff was thus constrained to institute a suit for recovery of a sum of Rs.11,60,87,558/- being the aggregate amount of the maintenance charges due and payable to the plaintiff in accordance with the statement (Annexure-A) appended to the plaint, alongwith interest at the rate of 18% p.a., and declarations that the plaintiff has the proportionate

charge on the respective flats of members of defendant No.1 Society for unpaid maintenance charges, that defendant No.1 is not entitled to issue consent or NOC to any flat holders or members of defendant No.1 Society for sale, transfer or creating any third party interest in respect of their respective flats, that the flat holders – members of defendant No.1 Society are not entitled to transfer, alienate or create third party interest without payment of maintenance charges and to permanently restrain defendant No.1 Society and its members from selling, transferring, assigning or creating third party interest in their respective flats without clearing and discharging proportionate charge on the respective flats for unpaid maintenance charges.

(d) In the said suit, the plaintiff preferred an application for temporary injunction seeking to restrain defendant No.1 and its members from selling, transferring, assigning or creating third party interest in their respective flats without payment of the proportionate maintenance charges, and to restrain defendant No.1 from issuing consent or NOC to any flat holders or its members for selling, transferring or creating any third party interest in their respective flats until the disposal of the suit.

(e) Initially by an order dated 24th February, 2022, the learned Civil Judge had granted an ad-interim injunction restraining defendant No.1 Society and its members from creating any third party interest of whatsoever nature, and defendant No.1 from issuing NOC to its members.

(f) The defendants appeared and resisted the application for temporary injunction. It was, *inter alia*, contended that the suit was essentially for recovery of money. An injunctive relief restraining the members of defendant No.1 Society from transferring their flats cannot be granted in such a suit. The defendants contended that, at best, the claim of the plaintiff was qua each of the flat holders. Defendant No.1 Society was not at all liable to pay any amount to defendant No.1. The liability of defendant No.1 to pay maintenance charges, before it came to be incorporated, was also contested.

(g) The learned Civil Judge after appraising the rival contentions and the material on record was persuaded to reject the application for temporary injunction holding, *inter alia*, that the principal relief was for recovery of money and the rest of the reliefs of declaration and injunction were incidental. The flats of the members of defendant No.1 Society, in respect of which the maintenance was alleged to be due, were held to be not the

property in dispute in the suit. Thus, the plaintiff has neither a *prima facie* case nor the balance of convenience tilted in favour of the plaintiff. Opining that the plaintiff would not suffer irreparable loss in the event of refusal of injunction, the application came to be rejected.

3. Mr. Pralhd Paranjape, the learned Counsel for the appellant, submitted that the learned Civil Judge committed a manifest error in rejecting the application for temporary injunction after initially having granted ad-interim injunction by ascribing justifiable reasons. Mr. Paranjape would urge that that the learned Civil Judge was unjustifiably swayed by the fact that there was no material to show that any of the members of defendant No.1 Society was in the process of alienating the property. Asserting that, in fact, there have been transactions wherein the members of defendant No.1 Society have created third party rights in their respective flats, an endeavour was made to draw home the point that the order passed by the learned Judge deserves to be interfered with.

4. I have carefully considered the submissions of Mr. Paranjape and perused the pleadings and the material on record.

5. The substance of the plaintiff's claim is that the plaintiff had provided and managed the amenities and services within the premises of defendant No.1 Society till 31st May, 2019. On that day the management of the building of defendant No.1 Society was handed over to defendant No.1 by the plaintiff. However, the plaintiff continued to manage the common areas and facilities outside the building of defendant No.1 till 15th October, 2021. Under terms of the agreements, the respective flat purchasers are bound to pay the proportionate maintenance charges. Defendant No.1 Society, according to the plaintiff, is statutorily obligated to collect the maintenance charges and pay the same to the plaintiff.

6. The aforesaid being the nature of the plaintiff's claim, in my view, the learned Civil Judge committed no error in recording a *prima facie* finding that the suit is essentially one for recovery of the amount of maintenance allegedly due and payable as computed in the statement (Annexure-A to the plaint). In the said statement the plaintiff has indicated the principal amount due and payable by each of the unit holders upto 15th October, 2021 and the interest due thereon till 31st January, 2022. There is not much controversy over the fact that under the terms of the agreements executed between the

plaintiff and the flat purchasers the liability to pay maintenance is that of the individual flat purchaser. The suit claim is thus primarily in the nature of a money claim to recover the outstanding maintenance charges and interest thereon.

7. It is true the plaintiff has sought the reliefs of declaration that the plaintiff has the proportionate charge on the respective flats of members of defendant No.1 Society for unpaid maintenance charges and that neither defendant No.1 is entitled to grant NOC for transfer of the flats by its members nor the members are entitled to transfer, alienate or create third party interest in the said flats without payment of the maintenance charges. However, those reliefs do not change the essential nature of the suit.

8. In the aforesaid view of the matter, the trial court committed no error in recording a *prima facie* finding that the suit is primarily for recovery of maintenance charges.

9. In the aforesaid backdrop, the relief of temporary injunction restraining defendant No.1 and especially its members from transferring or otherwise creating third party interest in the respective flats, if granted, would partake the character of an order in the nature of attachment before judgment. The right of the plaintiff to recover the amount qua

each of the members of defendant No.1 Society is a matter for adjudication. The issue as to whether defendant No.1 Society is liable to pay the maintenance charges and, if yes, from what period and at what rate, are all matters which warrant adjudication. An order of injunction restraining the members of defendant No.1 Society from transferring, alienating and/or otherwise creating third party interest in the respective flats has the propensity to cause irretrievable prejudice to the individual members of defendant No.1 Society. In such situation, the balance of convenience clearly tilts in favour of the defendants. Likewise, the individual members of defendant No.1 Society would suffer irreparable loss if the injunction as prayed for by the plaintiff is granted. The possibility of the flat purchasers having already created security interest over the respective flats cannot ruled out.

10. In the circumstances, the learned Civil Judge was within his rights in declining to exercise the discretion in favour of the plaintiff. Thus, I do not find any justifiable reason to interfere with the impugned order.

11. Hence, the following order:

: O R D E R :

(i) Appeal stands dismissed.

- (ii) In view of dismissal of the appeal, the interim application does not survive and stands disposed.

[N. J. JAMADAR, J.]