IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 358 OF 2022
WITH
INTERIM APPLICATION NO. 3694 OF 2022

Strata Co-operative Housing Society Ltd ..Appellant

v/s.

Simplex Realty Limited And Ors. ..Respondents

APPEAL FROM ORDER NO. 37 OF 2022

Simplex Realty Limited ..Appellant

v/s.

Terra Co-operative Housing Society Ltd.
And Ors. ..Respondents

APPEAL FROM ORDER (ST) NO. 12203 OF 2022

Terra Co-operative Housing Society Ltd ..Appellant

v/s.

Simplex Realty Limited And Ors. ..Respondents

Mr. Sham A. Mehta, Sr. Counsel a/w. Mr, Ranbir Singh and Mr. Naser Ali Rizvi i/b. Dua Associates for the Appellant in AO/358/2022.

Mr. Sunil Vyas a/w. Ms. Shruti Dasondi i/b. Foz Mandal & Associates for the Respondent No.2 in AO/358/2022.

Mr. Naser Ali Rizvi i/b. Dua Associates for the Appellant in AO (L)/12203/2022.

Mr.Rafique Dada, Sr. Advocate a/w. Mr. Aditya Thakkar, M.S.Federal, Murtuza Federal, Paulomi Mehta, Sougat Patil i/b. Federal & Company for the Respondent No.1. in AO/358/2022 and IA(st)/10871/2022 and AO/(St)/12203/2022.

CORAM : ANUJA PRABHUDESSAI,J.
DATED : 2nd May, 2023.

P.C.

1. Heard finally with consent of the learned Counsel for the respective parties.

2. The Appellant herein was the Plaintiff No.3, the Respondent Nos.5 and 6 were the Plaintiff Nos.1 and 2, whereas, the Respondent Nos. 1 to 4 were the Defendant Nos.1 to 4 and shall be hereinafter referred to as the Plaintiffs and Defendants respectively.

3. The Defendant No.1, the original owner of the land entered into a Development Agreement with Defendant No.2 to develop the land described in the third schedule of the Development Agreement viz. the leasehold land admeasuring 7836.18 sq. meters and freehold land admeasuring 28717.62 sq. meters excluding an area of 579.71 sq. meters covered by an existing structure. It is the contention of the Plaintiffs that the right of the Defendant Nos.1 and 2 is restricted to refurbish or reconstruct the structure existing in the freehold land within the existing plinth area of 579.71 sq. meters. The grievance of the Plaintiffs is that in violation of the Development Agreement and MOFA Agreement, the Defendant Nos. 1 and 2 are attempting to reconstruct the structure

beyond the plinth area. The Plaintiffs therefore filed a suit for permanent injunction, with a Notice of Motion seeking to restrain the Defendants Nos.1 and 2, from carrying out any development activity or construction beyond the plinth area of structure admeasuring 579.71 sq. meters situated in the free hold land more particularly described in Exhibit A-1.

4. The Defendant Nos.1 and 2 have denied having violated the terms and conditions of the Development Agreement or MOFA Agreement. The Defendants have also denied having infringed the right, title or interest of the Plaintiff Society. It is averred that the Defendant No.1 is constructing a commercial premises in the demarcated portion of land in its possession, in accordance with the sanctioned plans, copies of which are in possession of the Plaintiffs. It is alleged that despite knowledge, the Plaintiffs had not raised any objection to such development.

5. The Defendant claimed that till date no conveyance is executed in favour of the Plaintiff. The Defendant No.1 has stated that the old office building having ground plus two floors with plinth area of 579.71 sq. meters, is on the freehold land, and the built up area of the said building is approximately 1685 sq. meters. It is stated that the land admeasuring 4000 sq. meters abutting this structure is in his exclusive possession of the Defendant No.1. It is stated that two electricity sub stations stand in the said land for supply of electricity to the office building and that the

remaining open area is used by the Defendant No.1, its employees, tenants and visitors as parking place. It is stated that the office premises along with land admeasuring 4000 sq. meters is enclosed by a compound wall.

6. The Defendant No.1 stated that it has absolute right and has sole discretion to either retain or demolish or refurnish the existing old structure within the same plinth area or on any other portion of freehold land admeasuring 579.71 sq. mtrs. The Defendant No.1 claimed that it has opted to demolish and redevelop the office building, and accordingly obtained permissions and sanctions from appropriate authorities. The Defendants have denied breach of terms and conditions of Development Agreement or MOFA Agreement.

7. Learned Trial Judge, upon considering the material on record, observed that Defendant No.1 is bound by the terms of the Development Agreement as well as MOFA Agreement. Referring to clause 40 of the MOFA Agreement, learned trial Judge held that Defendant No.1 can carry out construction on the freehold land, and that there is no restriction to construct the commercial premises only in place of existing commercial premises. Learned trial Judge rejected the contention of the Plaintiffs that the Defendant No.1 cannot construct the commercial premises at any place, except on the plinth of the existing building.

8. The trial court observed that the right of the Defendant to construct the commercial premises is restricted to an area of 579.71 sq. meters. The trial Court held that the proposed construction is beyond 579.71 sq meters, which is contrary to the MOFA Agreement and Development Agreement. The learned Judge, therefore, restrained the Defendant No.1 from carrying out the construction pursuant to the IOD issued under No. EB2/2791/E/A dated 4.6.2007 and amended approval issued under letter dated 19.09.2008 and Commencement Certificate issued under No. EB/2791/E/A dated 7.1.2009, revalidated on 7.12.2018.

9. The Plaintiff No.3 has filed this Appeal against Order challenging the findings that there is no restriction to construct the commercial premises admeasuring 579.17 sq. meters, only in place of existing commercial premises, and that the Defendant No.1 can carry out such construction in any other portion of the freehold land.

10. Shri Mehta, Learned Sr. Counsel for the Plaintiff submits that as per the Development Agreement, the Defendant is bound to transfer the land to the Society, except the portion of land admeasuring 579.71 sq. meters occupied by the structure. Learned Sr. Counsel for the Plaintiff submits that a plain perusal of the relevant clauses in the Development Agreement dated 24th September, 2004 and MOFA Agreement entered

with flat purchasers clearly indicate that the right of the Defendant No.1 to refurbish or reconstruct the existing building is restricted to an area of 579.71 sq. meters. The remaining portion of the freehold land is the entitlement of the Societies formed by the flat purchasers. It is submitted that far from restricting itself to the area of 579.71 sq. meters, the Defendant No.1 intends developing the entire vacant portion of the land admeasuring 4000 sq. meters.

11. Mr. Mehta, learned Sr. Counsel submits that the Defendant No.1 had restricted its right to 579.71 sq. meters despite existence of the provisions for setback, open spaces and other planning constrains. Hence, the Defendant No.1 cannot now be permitted to utilize an area in excess of 579.71 sq. meters under the guise of planning constrains. It is contended that permitting the Defendant to utilize any area beyond the existing structure would result in changing the existing status quo and further any construction or encroachment on the freehold land, beyond the plinth area of 579.71 sq. meters, would gravely prejudice the right of the Societies.

12. It is also contended that no informed consent of the flat purchasers or the societies has been obtained with respect to the amended approved plans dated 17.02.2022. These plans are at variance with those disclosed to the flat purchasers at the time of entering into MOFA Agreements.

Reliance has been placed on the decision of this Court in ***White Towers Co-operative Housing Society Ltd. vs. S.K. Buildings and Others (2008) 6 BOM CR 671*** and ***Madhuvihar Co-operative Housing Society vs. Jayantilal Investment & Ors. (2010) 6 BOM CR 517***.

13. Per contra, Shri Rafique Dada, learned Sr. Counsel submits that there is no restriction to construct a new structure on the plinth of the existing structure. The Recitals XIV, XV, XXV, and Clause 40 of the Agreement unambiguously envisage that the Defendant No.1 has an option to construct a structure admeasuring 579.71 sq. mts. at the same plinth area or on any portion of freehold land. Shri Dada, learned Sr. Counsel submits that pursuant to the impugned order, the Defendant No.1 modified the plans. The construction as per the modified plan, which has been sanctioned by the M.C.G.M., does not exceed the plinth area of 579 .71 sq. meters and the same is in conformity with the MOFA Agreement.

14. Ld. Sr. Counsel further submits, that the new commercial building can be constructed only in accordance with the planning regulations, which mandate amenities such as underground water tank, underground pump room, drive ways, visitors parking, green zone etc. He submits that compelling the Defendant No.1 to construct the building and provide all the amenities within the area of 579.71 sq. meters would

negate a contractual right and bargain. He submits that the contract must be interpreted to give effect to all its clauses, to give business efficacy to the contract.

15. It is submitted that the amenities which are proposed to be provided are essential requirements of any building, and most of these amenities are for the benefit of all the Societies. He submits that the provisions of Section 7 and 7A of MOFA Act would be applicable only if there was no disclosure of the construction of a new building or that the construction was beyond the contractual MOFA agreement. He submits that the development was undertaken in a phase wise manner and the construction of proposed commercial building was disclosed in MOFA agreement. Hence, the judgments relied upon by the Plaintiffs are distinguishable and not applicable to the facts of the case.

16. I have perused the records and considered the submissions advanced by learned Counsel for the respective parties.

17. It is not in dispute that the Defendant No.1 was the owner of freehold land admeasuring 28717.62 sq. meters and possessed lease hold land of 7836.18 sq. meters, situated at St. Clarke Road, now known as Keshavrao Khade Marg, at Byculla. There is an existing commercial building admeasuring 579.71 sq. mt. in the freehold land. The

Defendant No.1 and Defendant No.2-Developer entered into a Development Agreement dated 24.09.2004 to develop the said entire property, described in the schedule as firstly and secondly, excluding the land admeasuring 579.71 sq. meters occupied by the existing structure in the freehold land.

18. Accordingly, the Defendant No.2 commenced development on portion of freehold land by constructing four towers and subsequently completed construction of 5th tower partly on the portion of the free hold land and partly on the leasehold land. The flats/premises in the said towers have been sold to various flat purchasers. Upon completion of all five towers, the Defendant Nos.1 and 2 formed five separate Societies under the provisions of Maharashtra Societies Act, viz. Plaintiff Nos.1 to 3 and Defendant Nos.3, and 4 Societes.

19. The Defendant No.1 thereafter proceeded with phase III development i.e. proposed demolition of the existing structure with plinth area of 579.71 sq mts., and construction of a new commercial building consisting of ground and upper floors, with approval, permission and consent of local Government Authorities, as per the terms and conditions agreed between the owner and the developer. The Plaintiffs raised objection to Phase III development mainly on the ground that the Defendant No.1 has no right to do any development

beyond the plinth area of 579.71 sq. mts. The Plaintiffs claimed that the proposed construction undertaken by the Defendant Nos.1 and 2 is in breach of the provisions of MOFA Act and MOFA Agreement.

20. The only question for consideration is whether the Defendant No.1 has breached the terms and conditions of the MOFA Agreement.

21. It is to be noted that the MOFA Agreement refers to -

(i) '*the said entire land*' which is described in the First Schedule. The said entire land as described in the First Schedule, includes firstly the freehold land admeasuring 28717.62 sq.mts and secondly the leasehold land admeasuring 7836.18 sq. mts.,

(ii) '*the land on which the commercial building stands'*, described in the Second Schedule. The land described in the Second Schedule is the portion admeasuring 579.71 sq. mts. of the freehold land, comprising of the Commercial building consisting of ground plus two upper floors.

(iii) *'the portion of the said land'* which is described in the Third Schedule is the freehold land admeasuring 28137.91 sq. mtrs., excluding the commercial building admeasuring 579.71 sq. mts. The land described in the Third Schedule consists of four towers, podium consisting of amenities and Club House.

(iv) The Fourth Schedule refers to the individual residential flat and car parking space sold to the purchasers.

22. It would also be apposite to refer to some of the relevant Recitals and Clauses of the MOFA Agreement which read thus:-

> **Recital XIV** stipulates that 'there exists an old structure (for commercial use) on a portion of the said entire land admeasuring 579.71 sq.mts approximately on which portion is demarcated on the said land No.1 in green colour boundary line and more particularly described in the Second Schedule hereto which is occupied by the owner, its associates and tenants. The owner may decide to refurbish or demolish the said old office structure and construct a new commercial building consisting of ground and upper floors on the said land described hereinafter.'

Recital XV – Pursuant to a Development Agreement dated 24th September, 2004, made between the Owner and the Developer, the Developer has commenced development of a portion of the freehold land, more particularly described in the Third Schedule hereto and delineated on the said plan no.1 in pink coloured boundary line on the terms, conditions, stipulations and provisions therein contained. …

Recital XXV provides that 'the Developer shall put up additional constructions on the said land in a phased manner including residential towers/commercial building and other infrastructure/facilities'.

Clause 40 stipulates that 'there exists an old office structure (for commercial use referred to recital XIV hereinabove on a portion admeasuring 579.71 sq. mtrs approximately of the freehold land , which portion is demarcated on the said plan No.1 in green colour boundary line and described in the Second Schedule hereto) which is occupied by the Owner, its associates and tenants. The Owner may decide to demolish and/or refurbish the said old office structure and construct in its place or any portion (admeasuring 579.71 sq. mts approx.) of the freehold land a new commercial building (consisting of ground and upper floors) with the approval permission and consent of all local government bodies and authorities concerned and on such terms and conditions as may be mutually agreed upon between the Owner and the Developer. Alternatively, if the Owner decides not to demolish the said old office structure, then the same may be refurbished. The said portion of land admeasuring 579.71 sq. mts. approximately described in the Second Schedule hereto and the old office structure and or refurbished structure and/or new office structure shall absolutely belong to the Owner.'

Clause 41 (d) states that 'In case the Owner decides to form separate society of the refurbished or reconstructed non-residential commercial building standing on the land, (described in the Second Schedule hereto), and also decides to merge all its rights in respect of the land and commercial building retained by the Owner and described in the Second Schedule hereto with the said land described in the Third Schedule hereto then five co-operative societies will be formed of four residential towers constructed on the said land, (described in the Third Schedule hereto), and of the non-residential commercial building constructed on the land (described in the Second Schedule hereto). It is only after completion of development of the said lands, (described in the Second and Third Schedule hereto and after all available FSI in relation to the said lands are fully consumed, and all residential buildings (towers) and non residential commercial buildings and the structures in the Planet Godrej have been completed (but not otherwise) that a federal society of which the co-operative societies not less than five in number or such number as may be prescribed by law of purchasers, of flat units and premises in the buildings and structures in Planet Godrej shall be formed and registered in whom the said lands described in the Second and Third Schedule hereto and the buildings and structures in Planet Godrej shall be legally vested as the owner or lessee (as the case may be). If the owner decides to execute in favour of the federal society a Deed of Conveyance of the said lands, (described in the second and Third Schedule hereto) then the Developer shall join in and execute such deed and transfer the buildings and structures constructed thereon to the federal society'

Clause 41(e) provides that 'If the Owner decides not to form a separate society of the refurbished or reconstructed non residential commercial building and not to merge all its right, title and interest in respect of the land and commercial building retained by it and described in the second Schedule hereto then the owner may execute in favour of the four societies jointly (formed by the four residential towers) a lease in perpetuity and the Developer shall join in and execute the assigned buildings and structures constructed thereon to the four societies jointly ...'

Clause 41(f) stipulates that 'The Federal Society' formed to be known as 'Planet Co-operative Housing Society Ltd.' in respect of the said land described in the Second and Third Schedules hereto and the building and the structures in Planet Godrej of four separate societies for each tower (in respect of the said land described in the Third Schedule hereto and the building and structure in Planet Godrej) as the Owner or the lessee as the case may be shall be entrusted with the administration, management and maintenance of all the common services that are common to all the buildings and structures in Planet Godrej and particularly the common internal roadways, street lightening water or severage treatment plants, rain water harvesting system, tubewells, gardens recreations or playground, clubhouse, swimming pool, watch and ward department or any other community servicing facility. The right of each co-operative society (referred to in sub clause b) shall be recognized and regulated by the provisions, rules and bye laws that shall be adopted by the federal society. The purchaser hereby irrevocably grants his /her /its /their consent to the co-operative society relating to the said tower being admitted to the said federal society and for that purpose to sign the requisite papers applications and other documents as may be required for the formation of such federal society.'

23. It is to be noted that the subject development as per the Development Agreement was a phase-wise redevelopment of Cotton Textile Mill Land, under DCR Regulation 58, undertaken on a single layout (CS No.19605/ part of the Mazgaon Division. The relevant clauses in the Development Agreement and MOFA Agreement clearly indicate that the development in Phase I and Phase II was to be undertaken in the freehold land and the leasehold land, excluding the portion admeasuring 579.71 sq. mtrs. covered by the existing structure in the freehold land. Recital XIV of the MOFA Agreement clearly stipulates that the Defendant No.1 has an option to develop the land described in the Second Schedule of MOFA Agreement i.e. '*the land on which the commercial buildings stands*' either to refurbish or demolish

the old structure admesaruing 579.71 sq. mtrs. and reconstruct a new structure of ground plus upper floors on '*the portion of the said land*', which as described in the Third Schedule is the freehold land excluding the land covered by the existing building. Similarly, Clause 40 unambiguously stipulates that the Owner has an option to demolish the structure and construct new commercial building in its place or on any portion (admeasuring 579.71 sq. mts. approximately) of the freehold land.

24. A plain reading of recital XIV and Clause 40 of the MOFA Agreement prima facie indicates that there is no restriction on the Owner to reconstruct the commercial premises over the same plinth. The Owner has a choice either to construct the structure in its place or on any portion admeasuring 579.71 sq. mtrs of the freehold land. To construe that the Defendant No.1 has to necessarily construct the new building on the existing plinth, would render the words 'on any portion admeasuring 579.71 sq mtrs. of the freehold land' surplus and otiose. This interpretation is harmonious with Clauses 41 (d), (e) and (f) of the MOFA Agreement which gives an option to the Owner to form a separate society of the refurbished or reconstructed commercial building and to merge all its rights in respect of the land and the commercial building retained by the Owner and described in Second Schedule, with the said land described in the Third Schedule, and to form five co-

operative societies i.e. four of residential towers and one of the commercial building. -The Agreement also provides for formation of a federal society on completion of construction of all residential towers and commercial building, and full consumption of FSI in relation to the said land. The land described in the Second and Third Schedule thereafter would vest in the said federal society, which would be entrusted with the administration, management and maintenance of all the common services which are common to all the buildings and structures in Planet Godrej, particularly internal roadways, street lighting, rain water harvesting, gardens, playgrounds etc. The purchasers had granted irrevocable consent to the co-operative society to be admitted to the Federal Society.

25. The relevant recitals and clauses of the Development Agreement as well as MOFA Agreement thus prima facie indicate that the land was to be developed in phase-wise manner. The development in first two phases was in respect of the portion of the said land, as described in the Third Schedule, and the Owner had right to develop the land described in the Second Schedule in the third phase and had option to form a federal society which would administer and maintain all the common services. The entire project scheme was placed before the flat purchasers at the time of execution of MOFA Agreement. In view of the disclosure of phase-wise construction as per disclosed layout and the

right of the Defendant No.1 to demolish the existing structure and reconstruct a building admeasuring 579.17 sq. mtrs on the same plinth or any portion of the freehold land, the provisions of Section 7 and 7A of the MOFA are not applicable. Hence the decision in Madhuvihar Co-operative Housing as well as White Towers Co-op. Hsg. Soc (supra) are distinguishable on the facts.

26. The Defendant No.1 owner has exercised the option to demolish and reconstruct the office building. The learned Judge acknowledged the right of the defendant to reconstruct the building at the same place or any other portion admeasuring 579.71 sq. mtrs of the free hold land. The ld. Judge however observed that the proposed construction which was impugned in the Notice of Motion exceeded the plinth of 579.71 sq. mtrs and hence restrained the Defendant No.1 to carry out the construction pursuant to the IOD issued under EB/2791/E-A dated 04.06.2007, amended approval under letter dated 19.09.2008 and Commencement Certificate dt. 7.01.2009 which was revalidated on 07.12.2018. Subsequent to the said order, the Defendant No.1 has modified the plans to bring them in conformity with the MOFA Agreement. The amended plans are approved/ sanctioned by the MCGM. The structure which is proposed to be constructed does not exceed the plinth area of 579.71 sq. mts., and this puts a quietus to the grievance raised by the Plaintiff.

27. The Plaintiffs have objected to utilizing portion of the freehold for parking area, underground tank, underground pump room, green zone, security cabin etc. It may be mentioned that when the Defendant has right to construct or reconstruct the existing building, it has to be in accordance with the rules and planning regulations, which mandate amenities such as drive ways, green zone, visitors parking, underground water tank, underground water pump room, fire safety requirement etc. Restraining the Defendant No.1 from complying with these mandatory requirements would negate the contractual right to construct.

28. It is also pertinent to note that though the Defendant No.1 has right to construct the building admeasuring 579.71 sq. mts in any portion of the freehold land, it has maintained the proposed construction substantially at the same place, except for marginal shifting of 9.0 meters space around the building to meet the fire safety norms which requires space around the building for fire fighting and maneuvering. The existing building is touching the road and has no open space around the building and literally it would be impermissible to construct at the same spot without violating the fire safety norms.

29. The Defendant No.1 has also stated in the affidavit in reply that forty car parking for visitors service and transport vehicles, as per DCPR

2034, shall also be available for use of the societies. Similarly, the other amenities like water tank and pump room are primarily for fire fighting requirements of the new office building as per BMC norms and fire NOC for the new office building and fire hydrants for the UG Tank would be available for use by the fire department for any emergency within the Planet Godrej compound. It is stated that the DG set is the existing DG set and that as far as the drive way is concerned, the same is necessitated for fire tender and vehicles to pass. It is stated the green zones are not exclusive to the new office buildings, but are common to the lay out plan and are areas earmarked for peripherial tree plantation and landscaping provided common to the area accessible to all within the Planet Godrej Compound. These amenities which are proposed to be put up beyond the plinth area will be beneficial to the society and or federal society and the same are otherwise in the portion of the land which is in possession of the Defendant No.1.

30. Having considered the material on record, in my considered view, the Plaintiff has prima facie failed to prove that the Defendant has violated the terms of the Development Agreement or MOFA Agreement. Hence, the decisions relied upon by the Plaintiffs are not applicable to the facts of the case. The balance of convenience is in favour of the Defendant and no irreparable loss will be caused to the Plaintiff as the construction will be subject to the final outcome of the suit and the

Defendant will not claim any equity in this regard.

31. Under the circumstances, the Appeal filed by the Plaintiff is dismissed. The other appeals stand disposed of in above terms.

32. Interim Application stands disposed of in view of disposal of the appeal.

(ANUJA PRABHUDESSAI, J.)