

Nikita

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

APPEAL FROM ORDER NO.435 OF 2022

Silver Utopia Premises Co-operative
Society Ltd and Anr. ... Appellants
V/s.
Prestige Properties and Ors. ... Respondents

**WITH
INTERIM APPLICATION NO. 2816 OF 2022
IN
APPEAL FROM ORDER NO.435 OF 2022**

Silver Utopia Premises Co-operative
Society Ltd and Anr. ... Applicants
In the matter between :
Silver Utopia Premises Co-operative
Society Ltd and Anr. ... Appellants
V/s.
Prestige Properties and Ors. ... Respondents

Mr. Rafique Dada, Senior Advocate with Mr. Ashish Kamat, Senior Advocate, Mr. Ashwin Bhadang, Ms. Kajal Punjbabi, Mr. Murtuza Federal, Mr. Mihir M. and Mr. Sudarshan Satalkar i/b Federal & Company for the appellant.

Mr. Ram Apte, Senior Advocate a/w Mr. Mandar Limaye, with Mr. Yadunath Chaudhari a/w Mr. Chinmaya Acharya a/w Mr. Viraj Jadhav i/b Mr. Kevin Pereira for respondent No. 1,2,4, and 6.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 22, 2023

P.C.:

APPEAL FROM ORDER NO.435 OF 2022:

1. Admit.

INTERIM APPLICATION NO. 2816 OF 2022:

2. The appeal arises out of rejection of interim relief restraining the developer from carrying out development contrary to terms of agreement between the parties and contrary to Section 7 of Maharashtra Ownership of Flats Act, 1963.

3. On 8th of April, 2004, the Municipal Corporation granted IOD for construction of lower basement, upper basement, stilt and nine upper floors. From 2011 to 2015, the developer sold 9 units and retained 6 units in the building by disclosing that the suit building consist to level basement, ground floor and 8 upper floors. The said fact was disclosed in agreement to sell. According to appellants, developer failed to take steps to form society and therefore they initiated proceedings against developer for registration of society and for execution of deed of conveyance. The proceedings for execution of Unilateral Deed of Conveyance are pending.

4. According to applicant, in December 2021, it was revealed that the respondent No.1 developer has submitted plans for undergoing additional construction and for alteration of building. According to the plaintiffs the proposal was also filed for amalgamation of suit land with adjacent land without written consent of the plaintiff.

5. The applicants therefore filed SC Suit No. 222 of 2022, before the City Civil Court seeking permanent injunction against respondent from making any change in the original sanctioned lay out and/or putting up any construction of any additional building on the said land or alteration in the existing building without any prior written consent of the applicant. Along with the said suit, the applicants filed notice of motion to restrain respondents from carrying out the construction on the said land without written consent of the applicants. According to the applicants during the pendency of notice of motion, the Municipal Corporation approved amended plans, as submitted by the developer on 5th April 2022. The Trial Court by impugned order rejected the application for temporary injunction.

6. On perusal of the impugned order it appears that the Trial Court has rejected notice of motion mainly on following two grounds.

I. The Trial Court has no territorial jurisdiction to entertain the suit.

II. The construction of the building is yet to be completed.

7. In so far as the reason of territorial jurisdiction is concerned, according to appellants, the case of plaintiff is covered by proviso to Section 16 of the Code of Civil Procedure, 1908. *Per contra*, according to the respondents, the case is covered by Section 16 (d) of the Code of Civil Procedure, 1908 as the immovable property is situated within territorial jurisdiction of the another Court.

8. Generally suit relating to immovable property can be

brought in a place where such property is situated. However, proviso to Section 16 acts as exception to the general principle, dealing with only a specific situation. Thus proviso can be invoked only when enforcement of legal rights relating to immovable property arises, but the relief sought is equitable in nature, and can be obtained purely by personal obedience of the defendant. The obedience should be such that the defendant can comply with it without going outside the jurisdiction of the Court trying the matter. It is possible only if the defendant resides or carries on business or works personally within territorial jurisdiction of such Court.

9. The Court's decision, which grants an equitable relief can be obtained through the personal actions by simply restraining from doing something for obedience of the Court's decision. In such cases, even though the dispute is regarding immovable property, the relief sought can be awarded to the aggrieved by requesting the defendant not to do something. Thus the defendant can obey Court's decision by staying at a place where he is on the date of filing of suit. It can be said that such relief thus can be obtained by personal obedience of the defendant and hence it is equitable in nature.

10. In the facts of the case the relief in substance sought by the plaintiff is against the developer restraining him from carrying out development without informed consent of the plaintiff. Therefore I am *prima facie* of the opinion that the case is covered by proviso to Section 16 of Code of Civil Procedure, 1908.

11. In so far as the second reason for rejection of notice of motion that the construction is yet to be completed, in my prima facie opinion, is of no relevance for considering the application for temporary injunction filed for enforcement. Reliefs conferred under the provisions of the Act. In my opinion, the issue involved is clearly covered by at least two judgments of this Court. One in the Case of **Maduvihar Co-operative Housing Society Mumbai and Ors. Vs. Jayantilal Investments, Mumbai and Ors.**,¹ wherein the single Judge of this Court in paragraph 40 held as under.

“ 40. It can thus, be seen that it is settled position of law, as laid down by the Apex Court, that a prior consent of the flat owner would not be required if the entire project is placed before the flat taker at the time of agreement and that the builder puts an additional construction in accordance with the layout plan, building rules and Development Control Regulations. It is, thus, manifest that if the promoter wants to make additional construction, which is not a part of layout which was placed before flat taker at the time of agreement, the consent as required under the Section 7 of the Maharashtra Ownership of Flats Act, would be necessary.”

12. The next judgment is by in the case of **Malad Kokil Co-operative Housing Society Ltd. Vs. The Modern Construction Co. Ltd. and Ors.**,² whereas this Court in paragraph 33 has held as under.

“33. It is thus clear that relying on the judgment of the Apex Court in the case of Jayantilal Investment it has been held that at the time of execution of the agreement with the flat takers, promoters are statutorily obliged to place before the flat taker the entire project scheme be it one building scheme or multiple number of building

1 2011 (1) Mh.L.J. 641.

2 (2012) 6 AIR Bom R 257.

scheme. It has been further held by the Apex Court that obligations remains unfettered because the concept of developability has to be harmoniously read with concept of registration of society and conveyance of title. It has been held that once the entire project has been placed before the plaintiff at the time of agreement then the promoter is not required to obtain prior consent of the flat takers as long as builder makes additional construction in accordance with lay out plans, building rules and DC Regulations. Etc. It has been held that if the construction which is sought to be made was not a part of layout which was placed before the flat taker at the time of agreement, the consent as required under Section 7 of the Maharashtra Ownership of Flats Act, would be necessary".

13. On perusal of both the judgments, it is clear that this Court in no uncertain terms has laid down that entire project needs to be placed before the flat takers at the time of agreement. If the promoters wants to make additional construction which is not the part of lay out placed before the flat taker at the time of agreement, the consent under Section 7 of Maharashtra Ownership of Flats Act, 1963 would be necessary. In the facts of the present case, I am satisfied that there is no informed consent of the plaintiffs before the plans which are submitted to the planning authority or before carrying out the construction.

14. Undisputedly, the construction as per amended plans is yet to start.

15 Therefore, applicant has made out a *prima facie* case for grant of interim relief. Balance of convenience is in favour of the applicant. Irreparable loss will be caused to the applicants if the construction as per amended plans without informed consent is

permitted. For the aforesaid reasons, there shall be interim relief in terms of prayer clause (b) during pendency of appeal.

16. Interim Application stands disposed of in the above terms.
No costs.

(AMIT BORKAR, J.)