

Urmila Ingale

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

**APPEAL FROM ORDER NO. 923 OF 2022
WITH
INTERIM APPLICATION NO. 18397 OF 2022**

Romell Real Estate Private Limited and anr. .. Appellants
vs.
Nityanand Co-operative Housing Society Ltd...Respondent

**ALONG WITH
APPEAL FROM ORDER ST. NO. 23895 OF 2022
WITH
INTERIM APPLICATION ST. NO. 23896 OF 2022**

Nityanand Co-operative Housing Society Ltd. .. Appellant
Vs.
Romell Real Estate Private Limited and anr. .. Respondents

Mr. G. S.Godbole, Senior Advocate i/b Mr. Sumit Kothari & Mr. Shon D. Gadgil, for appellants in AO/923/2022 & for respondents no.1 & 3 in AOST/23895/2022.

Mr. J. S. Kini, Advocate a/w Mr. Aum Kini, Sapna Krishnappa, Mr. Naresh Pai and Ms. Nisha Sharma, for respondents no. 1 to 37 in AO/923/2022 & for appellants in AOST/23895/2022.

Mr. Makarand V. Raut, for respondent No. 38 in AO/923/2022 & for respondent no. 2 in AOST/23895/2022.

**CORAM : M. S. KARNIK, J.
HEARD ON : NOVEMBER 18, 2022
PRONOUNCED ON : APRIL 26, 2023**

P.C. :

1. These two appeals challenge the very same order of the City Civil Court. The appellant in Appeal

from Order ST. No, 23895/2022-Nityanand Co-operative Housing Society Ltd., original plaintiff , makes a grievance that the City Civil Court should have restrained the defendant nos. 1 and 3 from carrying out further construction activity.

2. The appellants-Romell Real Estate Private Limited-original defendant nos, 1 and 3, challenge the impugned order dated 13/09/2022 passed by the City Civil Court thereby granting ad-interim injunction to the extent that the appellants, defendant nos. 1 and 3 are restrained from creating any third party rights, title and interest in the subject property.

3. The appellants in AO NO. 923 of 2022, are original defendants no. 1 and 3. Respondent no. 1 (original plaintiff no.1) is the Co-operative Housing Society. Respondents no. 2 to 37 are (original plaintiffs no. 2 to 37) the members flat purchasers of plaintiff no.1-Society. Respondent no. 38 is original defendant no. 2. The appellant

no. 1-defendant no. 1 is a private limited company holding the title of the suit property. The defendant no. 2 is a partnership firm which constructed the building of the plaintiffs and sold the flats to the members or the predecessors-in-title.

4. In June 1997, an agreement for development was executed between M/s. Parbat Builders Pvt. Ltd. and defendant no. 2-M/s. Chaitanya Enterprises on the basis of which defendant no. 2 constructed the building occupied by the plaintiff-Society. In July 1997, the building plans were approved for construction of the building of the plaintiff-Society. On 30/10/2010, a letter is issued by the plaintiff-Society to the appellant no. 3 thereby acknowledging the rights and ownership of the appellants in respect of the ownership of the plot and to exploit the remaining vacant plot in the subject property for construction. On 05/05/2018, registered deed of

conveyance was executed between Marceline Ferreira and 7 others in favour of the appellant no. 1 where M/s. Parbat Builders LLP joined as a confirming party. A No Objection Certificate ('NOC', for short) was given by the plaintiff-Society to the appellant no. 1 on 20/10/2021 for development work on subject property provided that proportionate conveyance of the land would be given. On 14/03/2022, a legal notice came to be issued by the advocate for the plaintiffs to the defendants calling upon the defendants to stop work of the parking tower and obtain Occupation Certificate of the plaintiffs' building. Defendant no.3 is supposed to have claim i.e. right in the suit property.

5. It is the contention of the plaintiffs that defendant no. 2 acquired rights from the owners and prepared building plan as per the rules and regulations of the Town Planning authority. Accordingly, MCGM sanctioned the plans with

conditions and issued Intimation of Disapproval (IOD) and Plinth Commencement Certificate to construct 'A' & 'B' wings. It is the contention of the plaintiffs that defendant no. 2 had completed construction work of apartment 'A' and "B" wings on the suit property in the year 2001. The main grievance of the plaintiffs is that the defendant no. 2 failed to secure Occupation Certificate even after receipt of payment of consideration from all the flat purchasers and he also failed to form a co-operative housing society of the flat purchasers though defendant no.2 sold the flats in the year 2000.

- 6.** It is the plaintiff's case that there is violation of the mandatory provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963. In view of failure on the part of the defendants, the flat purchasers are supposed to have come together and formed a registered

association i.e. 'Nityanand Flat Owners Association' and made representations to the MCGM.

- 7.** It is the case of the defendants no. 1 and 3 that development agreement was executed between M/s. Parbat Builders Pvt.Ltd. and defendant no. 2- M/s. Chaitanya Enterprises whereby defendant no. 2 had constructed the building occupied by plaintiff no. 1- Society. There was outstanding tax of the property of plaintiff no. 1 to the tune of Rs.35,33,605/- which MCGM had called upon them to pay, by demand letter dated 28/12/2014. The said amount has been paid by the defendant no.1. Moreover, on 30/10/2010, the plaintiff no. 1 had issued a consent letter in favour of the defendant no. 3. Plaintiff no.1- Society issued NOC on 20/10/2021 which is duly signed by the Secretary of plaintiff no.1-Society. These material facts, according to the defendants, are suppressed by the plaintiffs.

8. It is submitted by learned counsel for the appellants that there are 4 unauthorised flats in stilt area of the plaintiffs building which have been regularized by the defendants for which the defendants incurred huge expenses. The defendant no.1 has already constructed 22 floors which are completed and also created third party rights in favour of several flat purchasers and the plaintiffs are aware of these facts. Moreover, the defendant no. 1 handed over reserved portion of land by constructing school and playground over the area of 1513 sq. meters and handed over the same to the MCGM by obtaining Occupation Certificate. It is the contention of the defendants no. 1 and 3 that the defendants have given assurance to the plaintiffs for obtaining Occupation Certificate of 'A' and 'B' wings subject to certain terms and conditions which are to be abided by the plaintiffs.

9. In the impugned order, the trial Court has noted

that the plaintiff no. 1-Society issued a letter dated 30/10/2010 informing defendant no.3 about the decision taken in their meeting dated 24/10/2010 and thereby given no objection to the defendants for further construction on the vacant portion of the said plot subject to condition that as partner of the developer of existing 'A' and 'B' wings, the defendant no.3 has to bring Occupation Certificate at his own costs and expenses. The trial Court noted that the main grievance of the plaintiffs is that they are suffering on account of non- obtaining Occupation Certificate by the defendants in respect of their building. It is further noted that it is the contention of the defendants no. 1 and 3 that in view of creating hurdles by the plaintiffs, they could not obtain Occupation Certificate.

- 10.** It is the case of the learned counsel for the appellants-defendant nos. 1 and 3 that the construction activity cannot be obstructed by

revoking the consent which is already granted by issuing no objection certification. The trial Court observed that the obligation on the part of the defendants to get NOC pertaining to 'A' and 'B' wings has not been fulfilled. According to trial Court NOC which was given by the plaintiffs Society is subject to the condition that the defendants shall first obtain Occupation Certificate at their own cost and expenses for 'A' and 'B' wings. The trial Court relied upon the case of the **Grand Paradi Co-operative Housing Society Ltd. and ors Vs. Mont Blanc Properties & Industries Pvt. Ltd. & anr. 2011(5) Bom. C.R. 249** wherein it is observed that once consent is given by the flat owners, the builder is always entitled to raise additional structure in the property. It is further observed that it cannot be ignored that apart from the plaintiffs, number of investors have purchased flats in the said project. The trial Court further

observed that if the construction is restrained, those purchasers will unnecessarily suffer irreparable loss without any fault on their part. The trial Court, however, then goes on to restrain the defendants by an ad-interim order, from creating any third party rights, title and interest of whatsoever nature in the suit property till the next date. The Notice of motion is pending.

11. I have heard learned counsel Shri Godbole appearing for the appellants and Shri Kini, learned counsel appearing for the respondents extensively. Shri Kini was at pains to point out that the defendants no. 1 and 3 have committed breach of their obligation and have taken no steps whatsoever to fulfill their obligation of getting NOC despite granting time to do so which was the condition of grant of NOC. It is submitted that serious prejudice would be caused to the plaintiffs if the defendants are allowed to create third party rights in the suit

property.

12. In my opinion, it would have been in the fitness of the things in the facts of the present case when the construction has proceeded to such an extent that it is almost complete and third party rights are already created to a large extent, the trial Court could have decided the notice of motion itself finally instead of passing an ad-interim order restraining the respondents from creating further third party interest.

13. The observations of the trial Court in the impugned order are in favour of the defendants. The appellants have completed the construction of the entire building i.e. 22 floors on the date of the filing of the suit. On record is a demand letter dated 28/12/2014 issued by MCGM demanding outstanding property tax from the plaintiff no.1-Society. I have perused the consent letter dated 30/10/2010 issued by the plaintiff no. 1 in favour of the defendant no. 3

where there is reference of the decision of Managing Committee of plaintiff no. 1- Society in its meeting held on 24/10/2010. There also is NOC dated 20/10/2021. On record is a letter dated 30/10/2010 addressed by the plaintiff no.1-Society issuing NOC for additional construction on the remaining vacant plot in addition to the existing 'A' and 'B' wings. The plaintiff no. 1 issued NOC for proposed ongoing development on the condition that the defendant no.3 shall obtain full Occupation Certificate for 'A' and 'B' wings and that provisional conveyance of the land for the property shall be given to the Society. Pursuant to the NOC, the work proceeded and the entire building is constructed. Third party rights are already created. The same has been observed by the trial Court.

- 14.** The concern of the plaintiffs mainly is that the defendants no.1 and 3 have failed to fulfill its obligation of providing Occupation Certificate in

respect of 'A' and 'B' wings. The construction having been completed upto 22 floors, at this belated stage, it would not be just to injunct the defendants no. 1 and 3 from creating any third party rights in respect of rest of the flats by way of an ad-interim order. In fact, all the observations of the trial Court are in favour of the defendants and rightly so. The trial Court has specifically observed that as the consent has been given by flat owners, the builder is always entitled to raise additional structure in the property. The defendants proceeded with the construction in terms of the NOC. The defendants say that the plaintiffs have some outstanding dues payable to MCGM and also that the defendants have undertaken to regularize certain portion of the construction of 'A' and 'B' wings which is unauthorized, as per the request of the Society. Having issued NOC and proceeded with the construction which

progressed till construction of 22 floors i.e. the entire building, breach of condition of NOC could not have been a reason to injunct defendants no. 1 and 3 at such a belated stage and that too by an ad-interim order. The trial Court could have decided notice of motion itself finally.

15. For the above reasons, Appeal From Order No. 923/2022 is allowed. The impugned order is set aside. Appeal From Order ST. No.23895/2022 is dismissed.

16. The trial court is requested to hear and decide the notice of motion expeditiously and preferably within a period of 16 weeks from 02.05.2023 on its own merits and in accordance with law without being influenced by the observations made in this order.

17. The parties to appear before the trial Court on 02.05.2023 along with copy of this order.

18. In view of the disposal of the Appeals from Order, all pending interim applications stand

disposed of. No costs.

19. Shri Kini requested for stay of this order for a period of eight weeks. The request is rejected.

20. Shri Godbole makes a statement that an area of 2000 square feet in the present building in respect of which the injunction was sought shall be kept vacant till the disposal of the notice of motion. Statement is accepted.

(M. S. KARNIK, J.)