
(1997) 11 BOM CK 0060

In the Bombay High Court

Case No : Notice of Motion No. 2677 of 1995 in Suit No. 3513 of 1995

Harsharansingh Pratapsingh Gujral and Others

APPELLANT

Vs

Lokhandwala Builders Ltd. and Others

RESPONDENT

Date of Decision : 27-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 4, 7, 7A
Specific Relief Act, 1963 — Section 20, 38

Citation : (1998) 1 ALLMR 560 : (1998) 1 BomCR 516

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : Zaiwala, Shekhar Naphade and Arun Mehta, for the Appellant; Virag Tulzapurkar, instructed by Madhukar Munim and Co. for the defendant Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Nijjar, J.—The plaintiffs have filed this suit praying for an order of injunction restraining the defendants from constructing any additional building/structure of whatsoever nature on the open space of the suit property described in Ex. A to the plaint as shown in green colour in the plan at Ex. C to the plaint. The plaintiffs also pray for a mandatory decree directing the defendants to provide 11953 sq. ft. = 1110.43 sq. mtrs. recreational ground open space on the suit property. A direction is sought to the defendants to form and register a co-operative society or any other corporate body of all flat purchasers and the purchasers of the row houses constructed on the suit property and to execute a conveyance in favour of the society/corporate body of all the flat purchasers and the purchasers of the row houses transferring the whole of the right, title and interest of the defendants in the suit property including the portion reserved in Bombay's Development Plan for a public purpose of recreational ground. Certain other prayers are also made.

2. This Notice of Motion has been taken out praying that the defendants be restrained from constructing any additional building/structure on the open space of the suit property shown in green colour in the plan at Ex. C to the plaint and for restraining the defendants from interfering with the right of the plaintiffs to use the said open space as recreational space. It is also prayed that the Court Receiver, High Court, Bombay be appointed as Receiver in respect of the open space shown in green colour in the plan annexed to the plaint as Ex. C. Further the defendants be ordered to demolish the newly constructed wall shown in red colour line in plan at Ex. C to the plaint. It is also prayed that the defendants be directed by an interim mandatory order to form and register co-operative society/ corporate body of all the flat purchasers and purchasers of row houses in the suit property.

3. An affidavit in support of this Notice of Motion has been filed. The defendants have filed a detailed reply. The plaintiffs No. 1 to 26 are the flat purchasers under diverse agreement executed between the plaintiffs and the defendant No. 1 between the year 1988 to 1994. The defendant No. 2 are the promoters/ developers within the meaning of Maharashtra Ownership of Flats Act, 1963 (hereinafter referred to as "the MOFA".) The defendant No. 3 are the consultants of the defendants No. 1 and 2. The suit property is described as Plot Nos. 1111-A, 1111-B admeasuring 8156 sq.yds. All the plaintiffs have paid the full consideration for the flats and the row houses which have been purchased by them. These properties are situated in a building known as "Woodstock". The defendant No. 1 submitted a development proposal to the Bombay Municipal Corporation along with the layout plan and the building plan. The Bombay Municipal Corporation approved the plans and issued IOD dated 14th January, 1986. The commencement certificate was issued on 12th June, 1986. The original holding has been divided into plots A and B. The area of the plot B is about 8156.6 sq.mtrs. (hereinafter referred to as "the suit property"). The "Woodstock" building and the row houses are constructed on the suit property. A wall has been constructed between the Plot A and the suit property. The defendants, sometime, in the year 1993 made available to the plaintiffs the location plan, layout plan and the floor plan of the construction raised on the suit property. The plaintiffs discovered that the location plan does not show the parking space requirement correctly, and it also does not show the area of 21 flats correctly. The location plan and the layout plan do not show the actual area of the recreational space as it exists at the site. The actual recreational space is much less than what is shown in the aforesaid plan. It is also stated that the plans show the recreational space only around the swimming pool i.e. at the North West corner of the suit property. The plans shown by the defendant No. 1 to the plaintiffs when they booked the respective flats showed that the main "Woodstock" would have 16 floors and the proposed building on Plot A has 6 floors. The suit property has an access from Jaiprakash Road which is on the Western side of the suit property and an access from a public street on the Eastern side of the suit property. The original holding of the developers consisted

of C.T.S. No. 1111, 1112 and 1113. On an application made by the defendants, the authorities by their order dated 3rd March, 1988 sanctioned the amalgamation proposal and the entire original holding was again sub-divided into C.T.S. Nos. 1111-A, 1111-B and 1111-C. The building has been constructed. In all there are 64 flats. The possession has been given of all the flats to the purchasers. In para 11 of the plaint, it is stated that the defendant No. 1 has constructed one swimming pool on plot B. The area of the swimming pool is about 4433.12 sq.ft. which is + 411.8 sq.mtrs. This includes the actual area of the swimming pool and the paved area surrounding the swimming pool. It is further stated that around the swimming pool, there is the recreational open space in patches and its total area is about 2300 sq.ft. + 214 sq. mtrs. This is the only recreational open space available on the suit property. Thus, it is stated that the actual recreational space available on the suit property is less than what the plans purport to show. It is further stated that the swimming pool and the recreational open space are not at the ground floor level, but are at the height of about 8 ft. Further the defendant No. 1 has developed one Tennis Court on the portion of the suit property. This portion of the suit property is reserved in the Bombay Development Plan for the public purpose of the recreational ground and the same is liable to be acquired for the said public purpose by the concerned authorities. It is further stated that the total FSI to the suit property is 54210.33 sq. ft. and the whole of it has been utilised. It is further stated that 20% of the plot area is required to be kept open as recreational space on the basis of the provisions of the Bombay Development Control Regulations (hereinafter referred to as "the D.C. Regulations"). This 20% of the area comes to 1110.43 sq.mtrs. + 11952.7 sq.ft. This is so because the net area of the suit property is 4441.74 sq.mtrs. If the FSI of the road is included, then the total area comes to 5036.14 sq. mtrs. = 54210.33 sq.ft. It is reiterated in the plaint that the FSI available to the defendants have been completely utilised except about 2700 sq. ft. which is used for the Health Club. It is further stated that in the original sanctioned plan, 39 parking spaces have been provided. The defendants have provided 39 parking spaces, but of those 2 are not according to the regulation. Thus, only 37 parking spaces have been provided. The defendants have failed to make any efforts whatsoever to form a co-operative society as required under the MOFA. They have also failed to execute the necessary conveyance as required under the Act. It is stated that the defendants have deliberately failed to form a co-operative society and to execute the conveyance to take advantage of the extra FSI which will become available on the area required for the recreational ground (2010 sq.mtrs.) being acquired by the authorities. Thus, the prayers have been made for the execution of the necessary conveyance and formation of the society.

4. Mr. Zaiwala appearing for the plaintiffs has submitted that the property which is described as the suit property includes the area of 2010 sq.mtrs. reserved for the recreational ground under the Development Plan of Bombay. It is also submitted that in accordance with the sanctioned plans, the defendants have utilised the entire FSI available to them. Thus, no further construction can be

permitted. The plaintiffs were constrained to file the suit and take out the present Notice of Motion apprehending that the defendants may surrender the recreation area reserved for the recreational ground and utilise the Transferable Development Rights (TDR) and make construction on the open space marked in green on the plan at Ex. C. (hereinafter referred to as "the green open space"). In order to succeed in their design, the defendants have already shifted the parking facilities from the green open space. This has been done by the defendants in violation of the sanctioned plans and the D.C. Regulations. Mr. Zaiwala has very fairly pointed out that when the Notice of Motion came up for hearing at the ad interim stage, no relief was granted to the plaintiffs, by this Court in its order dated 22nd September, 1995. The defendants were, therefore, constrained to carry the matter in appeal being Appeal No. 874 of 1995. On 13th December, 1995, the Division Bench passed an order with the consent of the parties, para 2 of which is as under:

"With consent of the parties, Messrs Nadkarni & Co., Surveyors, are appointed as Commissioners to survey the suit plot i.e. Plot No. B in order to find out how much recreational area is available on the said plot, excluding the green portion area marked on the eastern side in the plan (Exhibit "C" to the Plaint) and the recreational Public Park situated next to it. The Commissioner shall also make a report on the compulsory open spaces and parking spaces as per the sanctioned plan."

5. In pursuance of the aforesaid direction, the Commissioner submitted the report. After considering the report of the Commissioner, the Division Bench passed the following order on 1st February, 1996.

"Considering the report dated 10th January, 1996, submitted by the Commissioner appointed by this Court by order dated 15th December, 1995, this appeal against the ad interim order passed by the learned Judge is dismissed."

It is further submitted by Mr. Zaiwala that those orders were passed in an appeal arising out of the refusal of relief at the ad interim stage. Thus, he has invited this Court to re-consider the report of the Commissioner on merits. Mr. Zaiwala has thereafter referred to the agreements executed between the parties. References have been made to a specimen agreement which has been made available to the Court. Reference has been made in particular to Clauses (k), (m), (n), (o), (u) and (1), (29), (2), (16), (17) and (26) of the aforesaid agreement. Relying on the various clauses, it is submitted that the plaintiffs had entered into the agreement on the basis of the sanctioned plan, in view of the restrictions which have been placed on the builder. Thus, in the agreement itself it is mentioned that the agreement has been entered into between the parties relying on the declarations made. On the basis of Clause (1) read with Clause (29), it is submitted that these clauses make it abundantly clear that the suit property included the recreational ground mentioned above. If there is going to be any deviation from the sanctioned plan, then the consent of the flat purchasers is required. All the purchasers have been in possession, but inspite of

that conveyance has not been executed. It is submitted that there is deliberate delay in forming the co-operative society only to take advantage of the release of recreational ground. On the other hand, the plaintiffs are under an obligation to pay all the municipal taxes to the defendants till the conveyance is executed in favour of the co-operative society to be formed. All the moneys have been collected by the defendants and yet no conveyance is forthcoming. Making particular reference to Clause (26) of the agreement, it is submitted that the defendants are taking un-necessary advantage of the provision that the purchasers shall have no claim with regard to the open spaces until the whole property is transferred to the co-operative society. It is the submission of Mr. Zaiwala that the intention is to surrender the area reserved for the recreational ground and to utilise the FSI before the formation of the co-operative society. It is, therefore, necessary to protect the interest of the plaintiffs. It is submitted that this Court, even at this stage, can direct the defendants to execute the necessary conveyance. Mr. Zaiwala in support of this submission relies upon a Single Bench judgment of this Court reported in 1997 (VI) LLJ 159 in the case of Sai Prasad Commercial Premises Co-operative Society Ltd. v. Lal K. Bijalani & others. That was a suit filed by the co-operative society. In spite of the registration of the co-operative society, the conveyance was not executed. In that judgement, Clause (20) of the agreement was similar to clause (26). This, however, will not apply to the facts and circumstances of the present case, as admittedly in this case, the co-operative society has not been formed. Apart from this, there is not even a prayer in the Notice of Motion for a direction to the defendants to execute the conveyance. Even Justice Sakhare, in the judgement noticed above, had given directions for the execution of the conveyance in the facts and circumstances of that case. It has been observed in para 4 of the judgment that the conduct of the defendants therein is deliberate as the defendants want to exploit Clause (20) to maximum extent, so that builder can deal with the property till it is conveyed in favour of the society. In spite of the society being registered in the year 1991, the defendants were successful in avoiding to execute the conveyance. In these circumstances, it was considered to be a fit case for grant of drastic relief. It is, however, not apparent from the Judgement as to whether the agreement contained clauses similar to Clauses (24) and (26) contained in the agreement which is the subject matter of this suit. Clauses (1), (2), (24) and (26) are as under :

(1) The Developers will construct the said buildings/flats/units/garages on the said property forming part of Non-Agricultural Survey No. 110. New C.T.S. Nos. 1111, 1112, 1113 Versova (West), Bombay, according to the plans sanctioned by the concerned authorities as aforesaid. A particular description of the said property (herein referred to as "the said plot") is given in Schedule hereunder written. The said Plot shall be developed by the Developers in a phased manner as hereinafter set out.

(2) The Developers have informed the Flat Purchaser and the Flat Purchaser is aware that the Developers propose to develop the said plot by construction

thereon of Units and a building together known as "Woodstock". The Developers have commenced construction of the said building/units. The Developers may as required by the concerned authorities and/or in their (i.e., the Developers) absolute discretion from time to time vary, amend and/or alter the building plan amalgamate the said property with any other property and/or sub-divide the same and as part of such variation amendment and/or alteration in the building plans, the Developers may also construct additional independent structures on the said property and/or additional wings and/or additional construction by way of extension of one or more wings to be proposed buildings/units and also to the building/units now under construction. The Flat Purchaser hereby irrevocably agrees and gives his consent to the Developers carrying out amendments, alterations, modifications and/or variations in respect of the said buildings/units and to put up additional structures/construction thereon. It is, however, agreed by the Developers that the Developers shall obtain prior consent in writing of the Flat Purchaser in respect of any variation or modification in the building plans which may adversely affect the premises agreed to be purchased by the Flat Purchaser as hereinafter stated. The Flat Purchaser hereby also gives his/her/its irrevocable consent to the Developers developing the said property in such phased manner as the developers may determine, even after the developers shall have completed the construction of the premises hereby agreed to be sold to the Flat Purchaser. The Flat purchaser hereby agrees to give all the facilities and assistance, that the developers may require from time to time, but at the costs and expenses of the developers so as to enable the developers to complete the development of the said plot in the manner that may be determined by the developers.

(24) It is specifically agreed that the developers shall be entitled at their option, to form one single Co-operative Society/Corporate body of all the premises to be constructed on the said property and to execute and/or cause to be executed the Lease/Conveyance in respect of the said property and the structures thereon in favour of such Co-operative Society/Corporate body. The developers shall also be entitled at their option, to form separate Co-operative Societies/Corporate bodies for different structures to be constructed on the said property and to execute and/or cause to be executed separate leased/conveyances in favour of such Co-operative Societies/Corporate bodies, as the case may be. Such lease/conveyance and/or leases/conveyances shall, however, be executed only after the entire property described in the schedule hereunder written is fully developed (i.e. all the structures as may be permitted by the concerned authorities shall have been fully constructed on the said plot) and the developers shall have sold all the premises in all the structures on the said property and received fully the consideration amounts from the various flat purchasers of all the premises in the said building/units on the said property. The flat purchaser shall not raise any objection and/or claim any compensation, if the area permitted to be leased/conveyed is less than the area shown in the schedule hereunder written.

(26) The flat purchaser shall have no claim whatsoever except in respect of the

particular flat/unit/garage/car parking space hereby agreed to be sold to him/her/it. The open spaces, unsold car parking spaces, flats, units, rooms, garages, etc., shall remain the property of the developers until the whole property is transferred to the Co-operative Society/Corporate body and thereafter such Co-operative Society/Corporate body shall hold the said property subject to the rights of the developers under this Agreement.

It has been stated by the Counsel at the bar that the co-operative society has not been formed due to the mala fide intention of the defendants. The plaintiffs on their part did make an application for forming a co-operative society. But their request was not acceded because all the agreements were not registered. This application has been withdrawn, which the Counsel states will be renewed after all the agreements are registered. It has also been submitted that the present suit has been filed to compel the defendants to comply with the provisions of MOFA. Under the provisions of this Act, it is necessary for the defendants to execute the conveyance in accordance with the agreement executed u/s 4 and if the period for the execution of conveyance is not agreed upon, then the same shall be executed within the prescribed period. The prescribed period according to the Counsel is 4 months from the date when the minimum number of 10 have purchased the flat. The defendants have deliberately avoided to form the co-operative society and are also avoiding to execute the conveyance. With regard to the report of the Commissioner, it is submitted that the report is not in accordance with the sanctioned plan. Thus, it is liable to be ignored. The report of the Commissioner, according to Mr. Zaiwala has used the parking space to release the recreation area. Some of the area used for parking spaces has been shown as the recreation area. After the dismissal of the appeal, the plaintiffs themselves had engaged an Architect who has given his report. According to this report, the report submitted by the Commissioner is not only against the sanctioned plan, but also against the D.C. Regulations. In view of all this, it is submitted that the defendants cannot be permitted to construct and that the other reliefs claimed in the Notice of Motion deserve to be allowed.

6. Mr. Tulzapurkar appearing for the defendants has, however, submitted that the rights of the plaintiffs flow from the agreements which have been executed between the parties. According to Mr. Tulzapurkar, the conveyance is only to be executed on completion of the project. Since initially the project was conceived as a phase programme, unless all the project is completed, the conveyance cannot be executed. Further more referring to the various clauses of the agreement, Mr. Tulzapurkar submits that there is no need of any consent for making any alterations, amendments and modifications in the development of the suit property. Not only under the agreement it is submitted, but also u/s 7-A of the MOFA. The defendants are at liberty to make any additions or modifications or to raise any further construction on the suit property. The plaintiffs will have the right to the open spaces and the recreational ground only on the execution of the conveyance after formation of the co-operative society. It is submitted that the bar which was placed on amendment, modification and

further development u/s 7 of the Act has been wiped out by the amended section 7-A of the Act. He relies on a Single Bench judgement of this Court reported in The Mohatta Nagar Co-operative Hsg. Soc. Ltd. Vs. Vishram Khimji and Sons and Others, . Therefore, it is submitted that no relief whatsoever can be granted to the plaintiffs. The report submitted by the Commissioner viz. Nadkarni & Co. the Architect has been accepted by the Court whilst hearing the appeal. The very same objections raised now by the plaintiffs were also raised before the Division Bench. In spite of the aforesaid objections, the Division Bench has accepted the report. Merely because the plaintiffs have obtained another report from another Architect would not detract from the authenticity of the report submitted by the Commissioner. So far as the parking spaces are concerned, it is submitted that under the D.C. Regulations, only the minimum space is provided. The Regulations nowhere provide the exact location of the parking space. Further more it is submitted that even according to the plaintiffs, there are 39 parking spaces provided. According to the sanctioned plan, only 26 parking spaces were necessary, but in fact, 39 have been provided. Even the report submitted by the Architect of the plaintiffs says that 27 parking spaces are required. Thus, the plaintiffs could hardly make any grievance of this. With regard to the elevation of the swimming pool, it is stated that the building is constructed on an area the level of which is lower than the road. In order to bring the level of the swimming pool to the level of the road, it has been built on an area which was naturally elevated. So far as the complaint with regard to the shortage of open space is concerned, it is submitted by Mr. Tulzapurkar that the open space is in conformity with the Regulation 23 of the D.C. Regulations. In fact, what has been provided is in excess of what was required. Under the said Regulation, 20% of the area was required to be kept as open space. Even from the report submitted by the Architect of the plaintiffs, it is obvious that the area kept as open space is more than what is required. The plaintiffs have sought to build up a case on the ground that the area occupied by the swimming pool is not to be included in the recreation area. The plaintiffs have also said that the area required for providing access to the swimming pool ought also not to be included in the recreation area. referring again to Regulation 23(a), (g)(ii)(d), it has been stated that the recreation area includes the structures such as swimming pool and allied structures. In any event, it is submitted that the plaintiffs can hardly complain at this stage. They have been in possession of the premises since a year 1989. They have filed the present suit merely to take a gamble that they may gain monetarily in the event the recreational ground admeasuring 2010 sq.mtrs. is acquired by the appropriate authority.

7. I am inclined to agree with the submissions made by the Counsel for the defendants. A perusal of the agreement itself would show that the plaintiffs were aware that the plot had to be developed in a phased manner. This is so stated in Clause (1) of the agreement. In Clause (2), the plaintiffs had agreed that the developers shall have absolute discretion from time to time to amend or alter the building plan and to amalgamate the property with any other property and to

sub-divide the same. The plaintiffs also irrevocably agreed and gave their consent to the developers carrying out amendments, alterations, modifications in respect of the building, and to put up additional structure/construction thereon. The only eventuality, the defendants have to obtain consent in writing of the flat purchasers was in respect of any variation or modification in the building plans which may adversely affect the premises agreed to be purchased by the flat purchasers. Thus, the restriction on the defendants was only if any alteration was made with regard to any particular flat purchased by a particular person. A perusal of Clause (24) and (26) also shows that the conveyance is not to be executed till the whole property is transferred to the co-operative society. Clause (24) gives option to the defendants to form one single co-operative society or to have a number of co-operative societies. It is also provided that the conveyance shall be executed only after the entire property described in the schedule is fully developed. I do not find merit in the submissions of Mr. Zaiwala that since all the FSI has been utilised, the suit property has to be treated as fully developed. If that is so, there was no question of having any apprehension that the defendants would be able to build on the open green space. It is well-known to all the parties that extra FSI will become available in the event the area which has been reserved as recreational ground is acquired by the BMC. Unless and until the conveyance is executed in favour of the plaintiffs, they have no right, title or interest in any open space. In accordance with the agreement, ownership continues to vest in the developers. It is the admitted case of the parties that all the agreements are not registered. Even the plaintiffs themselves have not been able to register themselves as a co-operative society.

8. In my view, the plaintiffs have failed to make out a prima facie case. I, therefore, find no merit in the Notice of Motion. The same is hereby dismissed with no order as to costs.