
(2019) 09 BOM CK 0022

In the Bombay High Court

Case No : Appeal (L) No. 142, 143 Of 2019, Notice Of Motion No. 595 Of 2017, 322, 324, Of 2019, Suit No. 229 Of 2017

Mohinder Rijhwani And Ors

APPELLANT

Vs

Hiranandani Construction Pvt Ltd And Ors

RESPONDENT

Date of Decision : 09-09-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 156(3)
Transfer Of Property Act, 1882 — Section 44
Specific Relief Act, 1963 — Section 41(h), 41(j)

Citation : (2019) 09 BOM CK 0022

Hon'ble Judges : S.C. Dharmadhikari, J;G.S.Patel, J

Bench : Division Bench

Advocate : Arun Panickar, Deepa Pohuja, Sheetal Raghavi, Sushma Singh, Mayur Khandeparkar

Final Decision : Dismissed

Judgement

G.S. Patel, J

1. These two Appeals are by, respectively, original Defendant No. 4 and original Defendant No. 3 to the suit filed by the present 1st Respondent. Both Appeals are directed against an order dated 13th March 2019 of the learned Single Judge. We will refer to the parties as arrayed in the suit for convenience. The sole Plaintiff is one Hiranandani Constructions Private Limited. Defendant No. 3 is shown as two persons, Veena Hinduja and Haresh R Hinduja. Defendant No. 4 is shown as three persons, Mohinder Rijhwani, Prakash H Rijhwani and Prem H Rijhwani. Defendant No. 5 is M/s. Maitri Park Cooperative Housing Society. Veena Hinduja and Haresh R Hinduja are the Appellants in Appeal (L) No. 143 of 2019 and the three Rijhwanis are the Appellants in Appeal (L) No. 142 of 2019.

2. The suit itself was for the following reliefs:

"a) this Hon'ble Court be pleased to order and decree the Defendants by a

mandatory order and direction to forthwith handover or cause to be handed over vacant possession of said premises being old fat Nos. A/35/2 (along with shifting of the said Idol), B/36/1, B/38/1 and B/37/3 of the Defendant Nos. 1 to 4 respectively and shift to the new fat Nos. 1301B/1302B/1303B, 1401B/1402B, 1301A/1401A, and 901A/1001A allotted in the new buildings along with their materials, furniture and all belongings.

b) this Hon'ble Court be pleased to order and decree the Defendant Nos. 1 to 4 by a mandatory order and direction to forthwith make payments of total sum of Rs. 1,03,77,450 (Rupees One Crore Three Lacs Seventy Seven Thousand Four Hundred and ffty only)/- (as per Exhibit Q & R) towards extra area purchased by them over and above their entitlement area along with other charges as per Development Agreement;"

3. Hiranandani Constructions fled Notice of Motion No. 595 of 2017 seeking following reliefs:

"a) That pending the hearing and fnal disposal of the present suit, court Receiver be appointed of the said premises being fat Nos. A/35/2 (along with shifting of the said Idol), B/36/1, B/38/1 and B/373 with direction to take possession thereof including by way of forcible possession from the Defendant Nos. 1 to 4 respectively and hand over the same to the Plaintiffs on such terms as this Hon'ble Court deems ft and proper.

b) That pending the hearing and fnal disposal of the present suit, this Hon'ble Court be pleased to order and decree the Defendants by a mandatory order and direction to forthwith handover or cause to be handed over vacant possession of said premises using old fat Nos. A/35/2 (along with shifting of the said Idol), B/36/1, B/38/1 and B/373 with direction to take possession thereof including by way of forcible possession from the Defendant Nos. 1 to 4 respectively and shift to the new fat Nos. 1301B/1302B/1303B, 1401B/1402B, 1301A/ 1401A, and 901A/1001A allotted in the new buildings.

c) That pending the hearing and fnal disposal of the present suit, this Hon'ble Court be pleased to order and decree the Defendant Nos. 1 to 4 to forthwith deposit the payments of total sum of Rs. 1,03,77,450 (Rupees One Crore Three Lacs Seventy Seven Thousand Four Hundred and ffty only) (as per Exhibit P) with this Hon'ble Court towards extra area purchased by them over and above their entitlement area along with other charges as per Development Agreement;

d) That pending the hearing and fnal disposal of the present suit, this Hon'ble Court be pleased to order and decree the Defendant Nos. 1 to 4 not to create third party rights in respect of the new fats allotted in the new buildings."

4. The history of this litigation can be traced to a Development Agreement dated 27th May 2006 between the Maitri Park Cooperative Housing Society and Hiranandani Constructions. This was an agreement by which the Maitri Park Society's property was to be developed. The society had 273 members. At the

time of the Notice of Motion it was said that Hinduja Defendants and Rijhwani Defendants were refusing to vacate their premises despite permanent accommodation being ready and having been offered to them in accordance with the Development Agreement. Both sets of Defendants had opted to take additional area. There was a dispute regarding payment of this additional area. Before the learned Single Judge the society supported Hiranandani Constructions. It agreed that the completion of the development was being obstructed by these Defendants. It is undisputed that the suit was originally brought against four members. After the filing of the suit, Hiranandani Constructions settled their disputes with Defendants Nos. 1 and 2 (although they continued to be shown as parties and have not been deleted). The Suit and the Notice of Motion survived only against these continuing objectors, viz. the Hinduja Defendants and the Rijhwani Defendants.

5. The property in question is at Chembur. It is a very large tract of land of 37,456.2 sq mtrs. The structures on these were, for the most part, ground and one storey constructions with about four flats each. There were a few multi-storey buildings of three and four floors. In addition, there were six commercial shops in building No. 40. There were altogether 42 buildings, all built between 1962 and 1968. Seven of these are dilapidated. Altogether there were 267 residential flats. Original Defendants Nos. 1 to 4 were only the dissenting members, clearly in a minority. After the settlement with original Defendants Nos. 1 and 2, only these two Defendants, namely, Hinduja Defendants and Rijhwani Defendants continued in possession of their original units. This means that 271 out of 273 members supported the development.

6. At its general body meeting on 9th June 2002, the society resolved to redevelop the property. It called for expressions of interest in November 2003 inviting bids. Public notices were issued in newspapers on 1st November 2003. After considering the bids received, the society's members at special general body meetings held on 6th March and 4th April 2004, by an overwhelming majority, chose Hiranandani Constructions as the developer. The society's Managing Committee was authorized to proceed with further negotiations.

7. By its letter dated 1st September 2005 the society agreed to grant development rights relating to the land of the society, as also development of amenity spaces to Hiranandani Constructions. The proposed transaction contemplated that Hiranandani Constructions would be entitled to sell the top four or five floors of the free sale towers. Hiranandani Constructions improved its final offer by a letter of 21st September 2005. It agreed to make a corpus payment of Rs. 15 crores. The society accepted this in a general body meeting of 2nd October 2005 and communicated its acceptance on 4th October 2005 to Hiranandani Constructions. In return, on 10th October 2005 Hiranandani Constructions confirmed its acceptance and also increased the corpus amount to Rs. 16 crores. It was thus approved as a developer.

8. Notably, at this time Veena Hinduja was a member of the managing

committee. In that capacity, she was a signatory to the Development Agreement dated 27th May 2006 that followed after approval of the society's general body. The Development Agreement contemplated phase-wise construction of new towers by consuming the available FSI and TDR that was capable of being used.

9. We come now first to some terms of the development agreement. There is no dispute that between early-2007 and mid-2008 Hiranandani Constructions obtained an NOC from the competent authority for the entire project as also an IOD and a commencement certificate from the Municipal Corporation of Greater Mumbai. Some discussions and meetings took place between the society and the development and these led to the alteration of some terms of the development agreement and then addendum dated 8th November 2006. Relevant for our purposes are the following terms:

(a) Given that the buildings were to be constructed in phases without displacement of existing members, each member was to get a flat double the carpet area of the existing old flat. The carpet area was a term that was defined as 'carpet area including balcony area';

(b) The Plaintiff was to construct a club house, garden, swimming pool and provide all facilities to the society and its members free of cost;

(c) Clause 7.3 said that the agreement could not be terminated. It was also provided that except the balance FSI and TDR available as on 27th May 2006, Hiranandani Constructions could not assign or sell any open spaces (excluding open parking spaces), club house, water bodies and amenities and that all this would belong to and vest in the society;

(d) Clause 3.3 of the development agreement required Hiranandani Constructions to provide an aggregate of 3,51,112 sq ft carpet area including balconies as tenements to 274 members. This included the six occupants of the shop and one trust building. This was double the carpet area of old tenements and was to be provided free of charge. The clause also said that in addition to this aggregate area of 3,51,112 sq ft Hiranandani Constructions would also give 12,500 sq ft additional carpet area for distribution amongst ground floor members being the area of their flat on par with the area of their respective upper storey. It was clarified that in addition to doubling the carpet area being offered to the members, the additional area in the form of niche and dry area would not be included in the double carpet area being offered and would be provided free of cost.

(e) The agreement also said that if any area in the form of lower bed was available free of FSI, that would also be given to the members free of cost.

10. At this time, i.e. on the date of the development agreement and addendum, the much later concept of 'fungible FSI' did not exist. Clause 3.5 of the Development Agreement specified the three categories of flats of different sizes. The first is a 1105 sq ft of carpet area flat, a three-BHK unit and the clause says

that these areas are tentative and liable to change on finalization of the development plan, which would be then in consultation with the managing committee. This change, however, would not affect the double-carpet area principle. Another clause of the Development Agreement provided that if a member defaulted in paying the differential amount, i.e. the additional amount for additional area, Hiranandani Constructions would be entitled to deduct this amount from the corpus instalment and deliver possession of the completed flat to the society.

11. A few further clauses may be quickly noted. Clause 3.15 said that Hiranandani Constructions would not be responsible for any disputes between the society. Under Clause 4, the society agreed to deliver vacant possession from members in phases-I and II when required by Hiranandani Constructions without any default and subject only to the accommodation to the members as agreed. Clause 5.2 gave Hiranandani Constructions ownership of the TDR and clarified that the society would have no right above it. Importantly, the addendum increased the corpus contribution or payment by Hiranandani Constructions to Rs. 30 crores from the already enhanced amount of Rs. 16 crores. The addendum also said that should any member not shift to new flat, then such members would be deemed to have agreed to vacate and shift from their own flats at their own costs.

12. The most important clause in the Development Agreement is 3.10 and we reproduce it below:

"Clause 3.10. The members are entitled to double the carpet area as enumerated in clause 3.3 of the said agreement. For the purpose of allotment of flats, the members will be permitted a maximum of plus or minus 10% over and above their entitlement area, which will be permitted at Rs. 4,000/- per sq.ft. of carpet area. If any member requests for a flat wherein the area is over and above the entitlement area plus the 10% as given above, he/she will have to pay for the same at the applicable market rate which will be as per the free sale rates fixed by the Developers at the time of first free sales i.e. rates prevailing at the time of first booking. To illustrate as example: If a member has a carpet area of 650 sq.ft. Presently, he/she is entitled to carpet area of 1,300 sq.ft. In the redevelopment. If the choice is for 1,105 sq.ft there will be a rebate for 105 sq.ft. @ Rs., 4,000/- similarly if the choice is for 1,440 sq.ft. (720+720 = 1,440), then 130 sq.ft will be charged at Rs. 4,000/- per sq.ft and the balance 10 sq.ft will be charged at the market rate prevailing at the time of first Free Sale Booking by the Developers.

After receipt of the Commencement Certificate whenever the market rate for the free sale booking is finalized by the Developer, the Developers will intimate the Society in writing of the market rate for the first free sale booking. Those members who are desirous of opting for an area over and above their entitlement area, plus the permissible 10%, will have to confirm the same in writing to the Developers within 30 days of the receipt of market rate for the first

free sale booking. On receipt of the member's requirement, the Developers will inform the members of the total amount to be paid by the member, and the down payment of 35% will have to be paid within 45 days of receipt of the demand. The payment for the balance amount of 65% for this area over and above the entitlement area, plus the permissible 10% will be at the time of possession. It is expressly clarified that the members can use this facility only for upgrading their entitlement area to that of the next higher areas and not for acquiring additional fats. In case the members desire to purchase additional area or additional fats they will have to purchase the same from the Developers at the free sale market rates on the applicable terms and conditions. If any member fails to make this payment of 35% within the stipulated period of 45 days it will be deemed that the member is not interested in opting for an area over and above his/her entitlement area plus the permissible 10%. In such case the member will forfeit his/her right to demand any higher area than the entitlement area plus the permissible 10% and the Developer will be entitled to allot to such member such fats which are the nearest to his entitlement area plus/minus the permissible 10%."

13. Returning to the factual narrative, on 26th July 2006, Defendant No. 3, the Veena Hinduja Defendants opted for joint fats with an area of 1,105+1,105, i.e. 2,210 sq ft in lieu of their old fat No. B/38/1, ground floor, area 840 sq ft with a 90 sq ft ota. Similarly, by letter dated 25th June 2006 the Rihwani Defendants' predecessor, then in occupation of old fat No. B/37/3, first floor, area 894 sq ft, also chose a fat of 1,105+1,105, i.e. 2,210 sq ft. There followed an Affidavit and Undertaking dated 2nd July 2006 by the predecessor-in-title of the Rihwani Defendants and another of 30th July 2006 by Veena Hinduja and another. These undertakings were in the similar terms. By these documents, the executants agreed to abide by the agreement, to vacate on being allotted new premises and not to delay or obstruct the redevelopment.

14. We come now to the events after April 2012. On 19th April 2012, the society wrote to the predecessors of Defendants Nos. 3 and 4 saying that the allotment of new fats in Towers A and B was to be done at the society's general body meeting dated 22nd April 2012. Since each of these two sets of Defendants had opted for additional area, they were liable to pay Rs. 16,800/- per sq. ft. The addressees counter-signed these letters. The documents in question mentioned that the society itself was contesting the rate of Rs. 16,800/- and seeking a reduction but cautioned the addressees that they should be in preparedness to pay at this rate should the matter be decided against the society. In the aggregate the amount payable by the Hinduja Defendants was Rs. 22,81,830/- after adjusting pro-rata of corpus. The amount similarly due from the Rihwani Defendants was Rs. 35,02,771/-. By this time there were already certain contentious issues including a question of what constituted the balcony area, the rate of the first sale agreement, the correct computation of the carpet area and payment of the fourth instalment of the corpus. The society said that these issues were expected to be resolved shortly and the addressees of this letter

would receive their benefits in monetary terms. It was also pointed out that future phases would have to conform to the new Development Control Rules and that as a result future phase flat sizes or lay outs might differ from those in phase-I. Finally, the society said that by accepting the phase-I allotment, the addressees were deemed to have confirmed that they would not have the benefit of any application of the now introduced fungible FSI of 35% available under the new DC Rules. The society clearly said that an acceptance of this letter was an acceptance of the allotted flats and a confirmation of the addressees' willingness and ability to pay all amounts due to Hiranandani Constructions at the time of possession.

15. There was a special general meeting of the society on 22nd April 2012. There were, as is usual at such society meetings, long discussions and these covered inter alia the question of the 10% area of the enclosed balcony which Hiranandani Constructions was then contesting. The members were told that the 35% fungible FSI would apply to the structures constructed after the new DC Rules came into force. Fungible FSI was to be distinguished from the base FSI. The society took a legal opinion to the effect that the area allotted to the members was to include the area of the balconies duly sanctioned by the competent authority and that members were not entitled to claim a carpet area in the new building exclusive of the area under balconies. The opinion also said that the market rate as per the addendum would be Rs. 18,389/- per sq ft. This opinion was accepted by the society at its annual general meeting of 12th August 2012. The first booking rate of Rs. 18,300/- was accepted but discounted to Rs. 16,800/-. Hiranandani Constructions obtained a part occupation certificate for Towers A and B on 21st April 2012. A full occupation certificate was to be given by the Airports Authority of India after certain further compliances.

16. It is after this, i.e. from 2012-2014 onwards that Defendants Nos. 1 to 4 began to complain to various authorities alleging irregularities in the construction of Towers A and B. The Rihwani occupants filed a criminal complaint before the Metropolitan Magistrate in Kurla which resulted in an investigation being ordered under Section 156(3) of the Criminal Procedure Code, and the registration of MACR/2/2015 by the Gowandi Police Station. It was alleged that Hiranandani Constructions did not have a NOC from the Airports Authority of India and that 39 flat holders had illegally taken possession. On 21st July 2015 the Sessions Court granted bail to some managing committee members in an Anticipatory Bail Application. The Airports Authority of India gave its NOC and height clearance on 19th November 2015. Three years later, on 5th July 2016 the MCGM sent a notice to the society to expedite demolition of buildings Nos. 1 to 34, 35 to 40, 45 (part) and 46(part) in accordance with the approved lay out. On 8th November 2016 the MCGM granted a full occupation certificate for Towers A and B. On 9th November 2016 Hiranandani Constructions informed the society that it now had the occupation certificate and, therefore, the new flats allotted to the remaining members in phase-I, (previously occupying buildings 35 to 38), were ready for possession. Those members were thus to deliver possession of their old

units and shift to the new fats after paying the agreed differentials. Hiranandani Constructions issued demand notices on 21st December 2016 for the differential amount. What it called for from the Hinduja Defendants was an amount of Rs. 29,95,200/- and from the Rijhwani Defendants, Rs. 42,84,400/-. The society wrote back on 5th January 2017 saying it was unable to pay these amounts and that the Hinduja and Rijhwanis were not prepared to vacate. At that time, original Defendants Nos. 1 and 2 were also refusing to vacate. On 31st January 2017, Hiranandani Constructions fled this suit and the present Notice of Motion.

17. A few further facts after the filing of the suit must be noted. By this time Defendants Nos. 1 to 4 were opposed by the society itself. There were proceedings in the Cooperative Court which rejected these Defendants' application for interim relief. An appeal also failed. A writ petition was fled but the obstructing Defendants obtained no relief. Since these Defendants continued to obstruct, at a special general body meeting on 14th January 2018 the society cancelled the allotment of new fats to Defendants Nos. 1 to 4 and forfeited the membership of Defendant No. 1 who was at that time 'operating a Saibaba Mandir/Temple', said to be an encroachment in the society's open area. The agenda notice was the subject matter of a challenge by the Defendants in the Cooperative Court. That challenge failed again.

18. In the meantime, pleadings were being fled and exchanged in the present suit and the notice of motion. Defendants Nos. 1 and 2 settled their disputes and they fled consent terms. In March 2018, the society withdrew the forfeiture of their membership and revoked the cancellation of allotment. Importantly, the society then obtained an opinion of an architect on 26th March 2018 saying that the fungible FSI was not available for Towers A and B since they have already been constructed and completed, and had received occupation certificate.

19. As the Hinduja and Rijhwanis continued to obstruct the development, the society said that it would revoke its cancellation of the new fats to be allotted to these two contesting sets of Defendants only if they vacated their old fats and shifted to the new fats.

20. Before the learned Single Judge all this was argued at some length and it was pointed out by Hiranandani Constructions that further development was being held up only because of Defendants Nos. 3 and 4, the Hinduja and the Rijhwanis. The society throughout supported Hiranandani Constructions and pointed out that all proceedings before the Cooperative Court had resulted in no order in favour of the contesting Defendants.

21. We will, for the present, leave aside the consideration of the position where a few members hold up the development that is in the benefit of the society and other members. We will return to that shortly. In assailing the decision before us, the Appellants would have to show that Hiranandani Constructions had failed to make out any sort of a prima facie case, and did not satisfy the defined parameters for the grant of such an interim mandatory injunction.

22. We turn first to the settled law regarding interim mandatory injunctions. Our starting point is the celebrated decision of the Supreme Court in *Dorab Cawasji Warden v. Coomi Warden*. (1990) 2 SCC 117. That was a suit between joint owners of an undivided family. One joint owner sought to restrain the other joint owners or their heirs from transferring their share of the house and from parting with possession to a third party purchaser. The plaintiff also sought to restrain the purchaser from entering into and or remaining into possession of the suit property. This was predicated on Section 44 of the Transfer of Property Act and its proviso. The question before the Court was this: can an interlocutory or interim mandatory injunction (as opposed to a prohibitory one) be granted by a civil court? The Court accepted the test propounded by the respondents before the Supreme Court, viz., that mandatory injunctions were nothing new, and were often granted to avoid a greater risk of injustice. The respondents drew support from *Films Rover International Ltd. v. Cannon Film Sales Ltd.* (1987) 1 WLR 670 : (1986) 3 All ER 772. While the Warden court accepted that test, it set out the law thus:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

23. In *Metro Marins v Bonus Watch Co. (P) Ltd*, (2004) 7 SCC 478. while allowing an appeal, a three-Judge bench of the Supreme Court explained the Warden principle. It held that an interim mandatory injunction can be granted, but only

in the exceptions noticed in Warden.

24. The Supreme Court reiterated these principles in *Kishore Kumar Khaitan v Praveen Kumar Singh*, (2006) 3 SCC 312. saying that a mandatory injunction, being possible only in exceptional circumstances, required the demonstration of prima facie materials justifying a finding that one of the parties to the litigation had altered the status quo; and that justice demanded that the status quo ante be restored.

25. These decisions were reviewed and followed in the later Supreme Court decision in *Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja*. (2011) 6 SCC 73.

26. We have noted this at the forefront because it is the principal plank of the contesting Defendants' case both before the learned single Judge and before us. Could *Hiranandani Constructions'* case be fairly, reasonably and plausibly be said to fall within the Warden principle? If not, i.e., if it could by no means fall within that principle, then the appeals must succeed. In assessing this, we must bear in mind the next principle, one applied to appellate courts - the principle in *Wander Ltd v Antox India (P) Ltd*, 1990 (Supp) SCC 727. consistently followed to this day. That was a trade mark dispute. A learned single Judge of the Madras High Court declined an interim injunction to the plaintiff against the registered proprietor of the mark and its nominee from manufacturing the products in question. The plaintiff had an agreement with the registered proprietor defendant for manufacturing certain pharmaceuticals. Claiming continued user, the plaintiff sought this injunction. Having failed before the learned single Judge, the plaintiff went in appeal. The appeal court granted the injunction sought. The Supreme Court reversed and observed, inter alia, that the appeal court had misdirected itself in regard to its appellate powers (and also on facts). The *Wander v Antox* court held:

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles, Gajendragadkar,

J. in Printers (Mysore) (P) Ltd. v Pothan Joseph [AIR 1960 SC 1156 : (1960) 3 SCR 713] held: (AIR p. 1159, para 9)

'9. ... These principles are well established;

but, as has been observed by Viscount Simon in *Osenton (Charles) & Co. v. Johnston* [1942 AC 130 : (1941) 2 All ER 245 (HL)] : (AC p. 138)

"... The law as to the reversal by a Court of Appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case."

The appellate judgment does not seem to defer to this principle."

(Emphasis added)

27. Hence, our approach in first assessing whether any part of Hiranandani Constructions' case fell into the Warden framework, and, second, whether these Appellants before us today can satisfy the *Wander v Antox* test. To put it differently, if the Plaintiffs' case can reasonably be said to fall within the Warden principle, and unless there is arbitrariness, perversity or caprice demonstrated, we cannot and will not interfere.

28. One area of disagreement between Hiranandani Constructions and the Society on the one hand and the contesting Defendants on the other is the rate they are to pay for the extra area they have sought to purchase. The contesting Defendants claim that the rate of Rs.16,800, though already discounted, is too high. They also say it does not accord with the Development Agreement. Then these Defendants claim that there is a dispute about the 10% balcony area, and whether or not it should be included in the computation of the carpet area. They also contend that Hiranandani Constructions owes these Defendants some amounts and therefore they are entitled to an adjustment; but this argument seems to be predicated on an assumption that the Defendants' contentions regarding the 10% balcony area is true and is accepted. Finally, it is submitted that the benefit of the newly introduced fungible FSI concept is not available to these appellants.

29. We find that the learned single Judge has carefully and in elaborate detail considered all these submissions. He held against these Defendants. It is not pointed out to us, as indeed we imagine it cannot be, that the view the learned single Judge took was in any way perverse or contrary to law. As regards the fungible FSI, for instance, the learned single Judge correctly found that the Development Agreement, as amended, fully provided for that situation. It did not benefit those in the already completed constructions. There was legal opinion to this effect. The society accepted it. The contesting Defendants would be bound by this. There is no reason why these appellants should be treated differently. The same is equally true of the balcony/carpet area argument, and the rate per sq ft for the additional area being purchased.

30. The real argument before us, based on clause 4.4 at page 137 is that there is no warrant for any mandatory order. If the appellants do not vacate, then Hiranandani Constructions has its own contractual remedies, including selling of the flats in the newly constructed building. But this clause cannot be read in isolation. It goes with the preceding clauses, which are not highlighted before us, and these make it the Society's obligation to deliver vacant possession. This argument is evidently premised on Sections 41(h) and (j) of the Specific Relief Act:

41. Injunction when refused.-An injunction cannot be granted-

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not sub-ordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.

(Emphasis added)

Just because these Defendants have some dispute with their own Society, this clause does not stand effaced. Further, the Defendants have obtained no relief in any one of their repeated applications to the cooperative courts. The submission is also without logical foundation, for we do not have an unequivocal statement from the Defendants that they are prepared to forgo their flats in the new building. This clause 4.4 cannot be used to stymie the whole re-development,

which is in phases, or to refuse to vacate. In fact, correctly read, this clause is against the appellants, because they will have to suffer both a vacating of their existing homes and a loss of the replacement flats in the new building. It is not an either/or situation.

31. These were the only points canvassed before us. We note that Mr Khandeparkar for the Rihwani appellants attempted to frame a submission based on the written submissions or notes of arguments said to have been tendered to the learned single Judge. We make it clear that we did not permit him to open up this line of attack. That point finds no place in the learned single Judge's judgment. We pause here for a moment to unequivocally deprecate this practice of filing written notes of arguments willy-nilly. To file written submissions in addition to making extensive oral arguments is not the right of any party or advocate. No party or advocate has the right to argue *ad infinitum* and then also to file tedious written submissions. Too often, these written submissions do not correctly reflect what was argued. Such written submissions must be filed when the court calls for them, or may be filed when the court permits them. Too often we find that the written submissions either contain material never argued, or even seek to withdraw a concession made by counsel. They are also often unsigned, or signed only by the advocate-on-record. That is also impermissible, when counsel has been engaged. We make it clear that any written submissions must be only when called for or permitted and must be, and must be only, a concise summary of what was actually argued. They must, as an invariable rule, be signed by the arguing advocate or counsel, and must contain a statement that they are a concise summary as an *aide-memoire* of oral arguments. It is not acceptable to have one advocate argue and another to sign and file written submissions. In this case, we find that though the matter was argued by counsel, the written submissions are signed only by the advocate on record. Further, if indeed a point was canvassed and was not considered, the advocate or party in question must first approach the learned single Judge or lower court and seek a clarification or make an appropriate application. In appeal, we flatly refuse to interfere with an order on the basis of a submission not reflected in the impugned order, and when nothing is shown to us to indicate that the point was ever taken in oral arguments before the learned single Judge. Merely slipping in this or that point in written submissions is unacceptable. It would be totally unfair and unjust to upset an order on the basis of a point never urged in arguments before the learned single Judge. In this behalf, we believe we can find support in the trenchant observations of the Supreme Court in paragraph 13 of its decision in *Daman Singh v State of Punjab*: (1985) 2 SCC 670 : AIR 1985 SC 973.

13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and Counsel to raise innumerable grounds in the petitions and memoranda of appeal etc. but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the

grounds are considered even by them to be untenable. No party or Counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not.

In *R v Aaron Mellor*, 1858 Dears & Bell 468 : 169 ER 1084 : 7 Cox CC 454. the Court said: See also: *State of Maharashtra v Ramdas Srinivas Nayak*, (1982) 2 SCC 463, and *Urviben Chiragbhai Shah v Vijaybhai Shambubhai Joranputra*, (2011) 12 SCC 582, where the Daman Singh principle, though distinguished in cases involving tribunals, was said to fully apply to courts of record.

"We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of court which of itself implies an absolute verity."

32. The final dimension to the matter is the detailed discussion in the impugned order in regard to the principles underlying cooperative societies and the rationale of the governing Maharashtra Cooperative Societies Act. We need not repeat the various authorities cited and considered by the learned single Judge. We are in the fullest agreement with his views and his appreciation of the law. Before us, the appellants' counsel were at some pains to contend that they accepted that view and that they were not, in fact, 'opposing' the society or re-development. The facts are to the contrary. They are indeed holding up the entire re-development, and they have indeed moved the cooperative courts repeatedly, and repeatedly without success, to agitate a minority view against the decision of the majority. That majority decision binds them. There is no separate privilege or benefit that can be made available to these members just because they believe they have some other idea or interpretation. They are bound to subject themselves to the discipline of the majority decision. In case after case, we see a handful of members holding up the betterment of the society, and this comes at the very real cost of their fellow society members. Of all the 273 society members, only the Rijhwani and the Hinduja continue to hold out. They continue to delay and obstruct the re-development. They cannot. They have no such right.

33. It is no use arguing that the 'time for handing over possession' has not yet come. The development is in phases, and the time for delivery of possession is not contingent on some permission or certificate being obtained.

34. But beyond all this, we have to see what it is that the learned single Judge ordered. In his final order, he struck a careful and delicate balance between the competing claims, parsing the claim for possession from the money dispute. He said:

39. In the circumstances, I pass the following order :-

(i) Defendant No.3 is directed to handover possession of Flat No.B/38/1 and Defendant No.4 is directed to handover possession of Flat No.B/37/3 which are in their respective possession to the Plaintiff on or before 27th March, 2019.

(ii) In the event of Defendant No.3 and/or Defendant No.4 failing to comply with the the directions given in Clause (i) above, the Court Receiver, High Court, Bombay shall forthwith stand appointed as Receiver in respect of the said fats and shall take physical possession of the said fat/s from Defendant Nos.3 and/or 4 and/or any other person found therein, if necessary with the help of Police and shall handover possession of the said fat/s to the Plaintiff.

(iii) The Plaintiff and Defendant No.5 are directed to simultaneously allot and handover possession of new fats as per the letters of allotment dated 21st April, 2012 to the Defendant Nos.3 and/or 4 upon the amounts demanded by the Plaintiff towards extra area being deposited with the Prothonotary and Senior Master of this Court.

(iv) It is clarified that non-compliance of clause (iii) above by Defendant Nos.3 and/or 4 shall not deter the Court Receiver from complying with the directions given in clause (ii) above.

(v) The above Notice of Motion is accordingly disposed of with no order as to costs.

(Emphasis added)

In other words: (i) re-development proceeds, and thus the interests of the society and the majority members are addressed; (ii) the opposing Defendants' rights to new fats are protected; and (iii) the opposing Defendants'/Appellants' contentions as to the monetary aspect are entirely safeguarded and ring-fenced and remain unaffected.

35. Most importantly, this is in full comport with the settled law from *Warden v Warden* onwards. In our view, this is not just faultless. The *Kumar Khaitan* test is fully met: "one set of parties to the litigation had altered the status quo, and justice demanded that the status quo ante be restored." In our view, the learned single Judge's decision suffers from no infirmity, let alone perversity or being contrary to law. To the contrary, it is exactly in conformity with settled law. To our mind, the decision is faultless; and for more reasons than one is admirable, and possibly an object lesson in how an interim order in such case ought to be fashioned: balancing rival claims, and yet ensuring that the interests of the majority do not suffer.

36. The appeals are entirely without merit. They are dismissed.

37. Ordinarily, we might have been inclined to accompany our order of dismissal with one of costs. But we believe we must, with all humility and respect, learn from the approach of the learned single Judge. Hence, we make no order of costs.

38. At this stage, after judgment is pronounced, the Appellants' Advocate says that there was an oral understanding not to move the Court Receiver to take possession from the Appellants/Applicants, and that this should be continued for a period of four weeks so that the Appellants can challenge this order in a higher court.

39. It is conceded that there was such an understanding, but there is an opposition to its continuance once these appeals are dismissed.

40. Having heard both sides on this limited point, we are of the firm opinion that having found no merit at all in the appeals and having found no prejudice being caused to the Appellants either, such an arrangement cannot continue.

41. The request in that behalf is refused.