
(2013) 06 BOM CK 0151

In the Bombay High Court

Case No : Appeal No. 126 of 2012

Phoenix Construction Company and Another

APPELLANT

Vs

Phoenix Tower Co-operative Housing Society Limited and
Others

RESPONDENT

Date of Decision : 24-06-2013

Acts Referred:

Citation : (2013) 5 ABR 745

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : S.U. Kamdar, Chirag Balsara, Parimal K. Shroff, Ms. F. Shroff Garg, D.V. Deokar, Pinakin Modi, Rishita Gandhi instructed by Parimal K. Shroff and Co., Shailesh Shah, Bankim Gangar instructed by Negandhi Shah and Himayatullah, for the Appellant; Pravin Samdani, Ms. Bindi Dave and Pranay Goyal instructed by . Wadia Ghandy and Co., for the Respondent

Judgement

D.Y. Chandrachud, J.—The Appeals arise out of an Order of a learned single Judge by which a motion for interim relief has been made absolute in terms of prayer Clauses a (iii) and a (iv). Prayer Clauses a (iii) and a(iv) read as follows:--

(a) that pending the hearing and final disposal of the suit, Defendant Nos. 1 and 2 by themselves, their servants and agents be restrained by an order and injunction of this Hon"ble Court from:--

iii. Putting up any construction on the portion shown outlined in colour "yellow" and marked as "CMP" in the Plan, Exhibit "B" to the Plaint, save and except constructing a parking lot for the benefit of the members of Plaintiff Nos. 1 and 2, and

iv. Selling, transferring or creating third party rights in respect of any of the car parks whether open or in podium or in basements." The first to sixth Respondents, who are the original Plaintiffs, are two co-operative societies and some of their members who are purchasers of flats in Towers A and B of

buildings called Phoenix Towers at Parel, Mumbai. The first Appellant who is the original first Defendant is the developer and promoter, while the second Appellant was the owner of the property, who brought it into a partnership firm of the First Appellant and became a partner of the firm. The Appellants proposed to carry out the development of a large plot of land admeasuring 15812.95 sq. metres by constructing two residential towers, including a recreation ground and other amenities such as a swimming pool, podium and car park. A right of way was agreed to be granted to the occupants and users of premises adjoining the suit property. Agreements were entered into by the Appellants with flat purchasers in accordance with the Maharashtra Ownership Flats Act, 1963 (MOFA). The Agreements stipulate in their recitals that: (i) The Second Appellant is the owner of property admeasuring 15812.95 sq. metres, more particularly described in the First Schedule; (ii) The Municipal Corporation had on 7 October, 1986 sanctioned and approved plans for the construction of two multi-storeyed buildings including a car parking facility. The Agreements stipulate in Clause 5, read with the Second Schedule, the common areas and limited common areas and facilities appurtenant to the flat. The Second Schedule inter alia includes a reference in Clause a(ii) to the following:

(ii) Compound of the building i.e. open area (out of the said land described in the First Schedule hereunder written) appurtenant to the built up area of the building but excluding the open car parking space in the compound allotted/to be allotted to the respective flat purchaser and garages if permitted.

Clause 7 stipulates that the flat purchaser has agreed to purchase a flat for a stated consideration which includes the proportionate price of the common areas and facilities pertaining to the flat, more particularly described in the Second Schedule. Clause 16 provides that the vendors would be at liberty to sell, transfer and assign their right, title and interest in the property save and except for the flat agreed to be purchased and that the vendors would continue to be the owner of all other unallotted flats, premises and open spaces. Under Clause 21, the Appellants assumed the obligation to execute a conveyance by conveying the property in favour of the co-operative society.

During the course of the hearing of the appeals, the submissions of the Appellants have proceeded on the basis that the Appellants are under an obligation to convey the entire land to the co-operative society. The dispute in the Notice of Motion relates to an area admeasuring 2153.5 sq. metres, comprising of a parking lot and more particularly depicted on a plan annexed at Exhibit B to the Plaint. The Parking lot has also been identified by the acronym CMP since, when the suit was filed, the lot was occupied by a cement mixer plant. At the ad interim stage, when the first motion was moved before the learned single Judge, a statement was made on behalf of the Appellants that the area in dispute shall be used only for the purposes of parking and a statement was made to the effect that the cement mixer plant would be removed. An order was passed by the learned single Judge on 19 October, 2006 at the ad interim

stage. Subsequently, a second motion was taken out on 24 March, 2011 since it was apprehended that the Appellants were likely to start construction on the area earmarked for a parking facility and that they were likely to create third party rights thereon. The motion was heard finally and the impugned order of the learned single Judge dated 15 December, 2011 has been passed therein; allowing the motion in terms of prayers a (iii) and a (iv).

2. The suit has been instituted in order to seek conveyance of the entirety of the suit property and for an injunction restraining the Appellants from carrying on commercial activities on any portion of the property. By the impugned order of the learned single Judge, the Appellants have been restrained pending the suit from putting up any construction on the portion shown in the plan annexed at Exhibit B by a yellow coloured boundary line and more particularly described as CMP save and except for constructing a parking lot for the benefit of members of the Plaintiffs. The Appellants have also been enjoined from selling, transferring or creating third party rights in respect of any of the car parks whether open or in podium or in basements.

3. Senior Counsel appearing on behalf of the Appellants submits, in assailing the order of the learned single Judge, that;

(i) The Appellants by virtue of the Agreements which were entered into under the MOFA retained the right to construct a building using a parking facility and to sell parking spaces;

(ii) In exercise of their rights, the Appellants propose to construct a parking lot on the area, more particularly described as cement mixer plant on the plan at Exhibit B, comprising of a ground floor and four upper floors; and to allow it to be used as a parking facility for the users of an adjoining shopping mall;

(iii) The co-operative society has already been allotted 386 parking spaces;

(iv) The parking lot which is sought to be constructed upon is not appurtenant to the buildings of the co-operative societies and is excluded from the areas described as the common areas in the agreements with flat purchasers;

(v) By permitting the Appellants to construct a parking facility for the members of the cooperative societies, the learned single Judge has implicitly recognised the rights of the Appellants to carry out such a construction and the Court was in error in injuncting the Appellants from alienating the parking spaces to third party purchasers;

(vi) The judgment of the Supreme Court in Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd., has no application since it applies exclusively to stilt parking spaces which are a part of a constructed building;

4. On the other hand, it has been urged on behalf of the Respondents - Plaintiffs by Senior Counsel that;

(i) The Agreements under the MOFA that were entered into by the Appellants

contain the disclosure of the fact that plans had been sanctioned for the construction of two multi-storeyed buildings including the car parking facility and it was always within the contemplation of the parties that the car parking spaces would be an amenity available to the existing flat purchasers. Hence, it was never within the contemplation of the parties that the car parking spaces would be sold to independent third party purchasers;

(ii) The Appellants as developers and promoters are under an obligation to convey the entirety of the property to the co-operative society in discharge of their obligation under the MOFA;

(iii) The common areas and facilities which have been included in the Second Schedule include the compound of the building i.e. the open area appurtenant to the built up area of the building But excluding the open car parking space in the compound allotted/to be allotted to the respective flat purchasers and garages, if permitted. The objective in doing so was to clearly enable the flat purchasers to avail of the open car parking spaces and it was never the intention of the parties to allow the developer to alienate the parking spaces to third party purchasers as independent units.

These submissions have been adopted by the Appellants in the companion Appeal.

5. The ambit of the controversy in these Appeals is substantially governed by the law which has been laid by the Supreme Court in *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd.*, . The judgment of the Supreme Court considered the following issues;

(i) whether stand alone "garage" or in other words "garage" as an independent unit by itself is a "flat" within the meaning of Section 2(a-1) of MOFA;

(ii) whether stilt parking space/open parking space of a building regulated by MOFA is a "garage";

(iii) if the answer to the aforesaid questions is in the negative, whether stilt parking space/open parking space in such building is part of "common areas and facilities"; and

(iv) what are the rights of the promoter vis-?-vis the society (of flat purchasers) in respect of open parking spaces(s)/stilt parking space(s)?

These issues arose for consideration in the context of the provisions contained in Section 2(a-1) of the MOFA which defines the expression "flat" as follows;

2. (a-1) "flat" means a separate and self-contained set of premises used or intended to be used for residence, or office, or showroom or shop or godown or for carrying on any industry or business (and include a garage), the premises forming part of a building and includes an apartment.

Explanation.-- Notwithstanding that provision is made for sanitary, washing,

bathing or other conveniences as common to two or more sets of premises, the premises shall be deemed to be separate and self-contained;

6. The principles have been laid down by the Supreme Court can be summarised thus:

(i) The legislature in enacting Section 2(a-1) has indicated an intent to include a garage as appurtenant or attaching to a flat which satisfies the ingredients of Section 2(a-1);

(ii) A stand alone "garage" or, in other words a "garage" as an independent unit by itself is not a "flat" within the meaning of Section 2(a-1);

(iii) An open parking space does not constitute a "garage" within the meaning of Section 2(a-1);

(iv) For the purposes of the MOFA, and particularly Section 2(a-1), the term "garage" must be considered as would be understood by a flat purchaser and such person would contemplate a garage as one which has a roof and walls on three sides;

(v) Having regard to the object and purpose of the MOFA, there is no justifiable reason to exclude car parking areas whether open to the sky or falling within stilts from the purview of "common areas and facilities";

(vi) A promoter cannot exclude certain "common areas" from the purview of what the statute regards as "common areas and facilities" by not defining that expression in the agreement with a flat purchaser to include what are in substance, common areas and facilities. Consequently parking spaces including those in stilts do not cease to be part of the "common areas and facilities" merely because the promoter has not described them as such in the agreement with the flat purchaser;

(vii) Stilt parking spaces being part of the common areas of a building developed by the promoter, the only right which the promoter has, is to charge the cost thereof in proportion to the carpet area of the flat to each flat purchaser. Such a parking space which is neither a "flat" u/s 2(a-1) nor a "garage" within the meaning of that provision is not saleable;

(viii) The promoter has no right to sell any portion of the building which is not a flat within the meaning of Section 2(a-1) and the entire land and building has to be conveyed to the co-operative society. The only right which remains with the promoter is to sell the unsold flats.

7. These principles which emerge from the judgment of the Supreme Court indicate the approach which must be adopted in resolving the controversy in the appeals. The agreements with the flat purchasers in the present case clearly show that the Municipal Corporation had sanctioned an approved plan in respect of the property more particularly described in the First Schedule which admeasures 15812.95 sq. metres. The area delineated in the plan at Exhibit B to

the Plaintiff as "CMP" is an integral part of the said property. A right of way had been recognised as an easementary amenity by the owner in favour of the occupants who are in occupation of the premises adjoining the road and the conferring of ownership rights on the co-operative society was, hence, subject to the right of way thus created. But, what is of significance is that the Appellants are obliged under the terms of the agreements with the flat purchasers which in turn were based on the provisions of the MOFA, to convey the entirety of the property to the Co-operative Societies formed by the flat purchasers. As a matter of fact, the hearing of the Appeals proceeded on that basis as counsel for the Appellants concedes to that position. Once that be the position, there can be no manner of doubt, following the law laid down by the Supreme Court in *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd.*, that the area of the parking lot more particularly described in the plan at Exhibit B constitutes a part of the common area which enures to the benefit of the flat purchasers. It would not be open to the promoter by a self serving definition of what constitutes the common area to reduce and circumscribe the ambit of what truly constitutes common areas for the purposes of the MOFA. For convenience of reference, it would be appropriate to extract from the judgment of the Supreme Court in *Nahalchand Laloochand* (supra) where this principle of law finds expression:

55. ...Looking to the scheme and object of MOFA, and there being no indication to the contrary, we find no justifiable reason to exclude parking areas (open to the sky or stilted portion) from the purview of "common areas and facilities" under MOFA.

56. It was argued that under MOFA it is for the promoter to prescribe and define at the outset the "common areas" and unless it is done by the promoter, the parking area cannot be termed as part of "common areas". We are quite unable to accept this submission. Can a promoter take common passage/lobbies or say staircase or RG area out of purview of "common areas and facilities" by not prescribing or defining the same in the "common areas"? If the answer to this question is in the negative, which it has to be, this argument must fail.

8. In the affidavit-in-reply which is filed to I the Notice of Motion by a Director of the second Defendant, who was also a partner of the first Defendant, it was stated that the portion admeasuring 2153.5 sq. metres (the CMP area) is for car parking which is yet to be developed by the first Defendant. Moreover, it was stated that the second Defendant is also a member of the Plaintiff society to whom the first Defendant had sold some of the car parking spaces in the CMP area. Three agreements were entered into on 6 August, 2005 between the first and second Defendants. Under the three agreements, forty-one car parking spaces, forty-two spaces and forty-two spaces, respectively, were sold for consideration making a total of one hundred and twenty-five car parking spaces. The agreements between the Appellants, the original first and second Defendants, stipulate that the First Appellant had decided to construct open car

parking spaces/garage/parking under stilts which would be sold first to the flat purchasers and which thereafter the vendor would sell to the third party as permissible only after refusal by the flat purchasers to purchase the same. Clause 15 of the Agreement states that the purchaser shall not be entitled to transfer, in any manner, his right of parking cars without the prior consent in writing from the vendor or society, as the case may be. Clause 18 specifies that the Agreement is executed in favour of the purchaser having purchased a flat in Phoenix Towers which was subject to the provisions of the MOFA. This Agreement is clearly indicative of the fact that the car parking spaces were sought to be alienated by the first Appellant in favour of the second Appellant as an incident of the membership of the second Appellant of the co-operative society which negates the attempt to treat the car parking spaces as independent units which were capable of being sold as separate units distinct from a flat in the Phoenix Towers.

9. For all these reasons, we have come to the conclusion that the Learned Single Judge was correct in his evaluation, prima facie of the merits of the rival contentions. The view which has been, taken by the learned single Judge is consistent with the law laid down by the Supreme Court. The balance of convenience must weigh in favour of the grant of an injunction since what the Appellants have attempted to do is prima facie in breach of their statutory obligations contained in the MOFA. Irreparable injury is liable to be caused if the Appellants are permitted to alienate the car parking spaces, in the meantime during the pendency of the suit. The order of the learned Single Judge granting relief in the Notice of Motion in terms of prayer Clauses a(iii) and a(iv) does not require the Appellants by way of a mandatory injunction to carry out or put up any construction. The order has restrained the Appellants from putting up any construction save and except in the form of a parking lot for the benefit of the members of the two co-operative societies and from selling, transferring or creating third party rights in respect of the car parks.

10. For these reasons, no case for interference is made out in the Appeals. The Appeals shall accordingly stand dismissed. There shall be no order as to costs. In view of the dismissal of the Appeals, the Notice of Motion in the appeal shall not survive and shall stand disposed of.