

(2011) 12 BOM CK 0029
In the Bombay High Court
Case No : Appeal From Order No. 357 of 2010

Rachanaa-I Co. Op. Hsg. Society Ltd.	APPELLANT
Vs	
Rachnaa - Engineers and Developers, A Registered Partnership firm and Others	RESPONDENT

Date of Decision : 17-12-2011

Acts Referred:

Development Control Rules for Greater Mumbai, 1967 — Rule 9
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 4(1A), 7, 7A

Citation : (2012) 4 ALLMR 690 : (2012) 2 MhLj 422

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : A.A. Kumbhakoni with A.M. Kumbhakoni instructed by Ramesh Chheda, for the Appellant; P.K. Dhakephalkar with Vijay Nayar instructed by . P.R. Kulkarni for Respondent Nos. 1, 2, 4, 5, 7, 8 and 9 and Ms. K.K. Soran for Respondent Nos. 12 and 13, for the Respondent

Judgement

1. Heard.

Admit.

By consent of parties, appeal is taken up for final disposal.

2. The appellant/ original plaintiff is taking exception to the order passed in Notice of Motion No.2214/2009 in L.C. Suit No. 2635/2009 by the Judge, City Civil Court, Greater Bombay on 17th March 2010. The appellant is the cooperative housing society and its membership consists of the occupiers of the flats in Rachana1 building constructed and developed by the defendants/respondents herein. The defendant Nos.1 to 7 are the partners of the firm and are the builders and developers. Respondent Nos.12 and 13 are the Municipal Corporation and the Executive Engineer of the Corporation. Defendant Nos.1 to 7 developed the plot situated at village Bhandup, taluka Kurla and constructed Rachana1 building which consist of two wings "A Wing" and "B Wing". The

defendants secured proper permission and got the plan sanctioned and sold the flats to the prospective purchasers. The flat purchasers who are the occupants of building Rachana1 have formed the plaintiff Society and the said society is now controlling the affairs of the building.

3. According to the plaintiff, the defendants obtained IOD for the construction of the building on the plot of land and thereafter obtained commencement certificate on 26th July 1991 and they also started construction and, at the same time, opened booking of the flats and executed agreements with various flats purchasers between 1991 to 1993. It is alleged that in the year 1993 the flat purchasers executed an undertaking in favour of the defendants. In the year 1994, amended IOD and amended approved plan were sanctioned whereby earlier approved plan was cancelled. The defendants obtained occupation certificate in respect of A Wing on 11th July 1993 whereas obtained full occupation certificate in respect of B Wing on 27th September 1996. The flat purchasers have formed the cooperative society without cooperation of respondent defendants. It appears that the defendants received approval from the Municipal Corporation for construction of C Wing on the remaining area of the plot in the year 2009. The cooperative society objected to the construction of C Wing by sending letters to the defendants. However, the defendants did not pay any heed to the request of the society and are about to start construction of C Wing. It is the contention of the plaintiff Society that due to proposed construction the amenities provided to the flat owners of the building are likely to be prejudicially affected and, therefore, without seeking prior permission of the flat owners, who are members of the plaintiff society, the builders and developers i.e. the respondents herein are not entitled to commence the construction work of C Wing after lapse of 14 years after securing occupation certificate in respect of other wings. The plaintiff, thus, approached the Court seeking direction to defendant Nos.1 to 11 to convey the title, rights and interest in favour of the plaintiff society in respect of suit plot and also prayed for direction to the defendants to give complete audited accounts of the moneys, which they have received from the flat purchasers from time to time with further direction against the defendants restraining them from submitting any other plan to the Corporation. A relief is also sought against the Corporation and its officers restraining them from issuing any sanction to the plan submitted by the defendants/ respondents herein. The plaintiff also prayed for interim relief restraining the defendants from making construction of C Wing on the compulsory open space existing in the compound of the plaintiff society. Interim relief is also sought against the defendants to direct them to demolish all construction work which has been carried out for the purpose of proposed C Wing.

4. The defendants appeared and resisted the suit by filing their reply. According to the defendants, the construction sought to be raised in respect of C Wing is as per the plan sanctioned by the Corporation. It is the contention of the defendants that while executing the agreement of sale in respect of flats situated in Rachana1 building, all the flat purchasers were made aware in respect of the

proposed construction of C Wing and, accordingly, they had given a specific consent by executing indemnity bond. It is contended that the proposed construction of C Wing is not in violation of the provisions of the sections 7 and 7A of the Maharashtra Ownership of Flats Act, 1963 (MOFA). The defendants contended that the interim relief as prayed for by the plaintiff is not liable to be granted. It is the contention of the defendants that the plaintiff has suppressed certain material facts. They were aware of the fact that the developer has made them known in respect of the construction of C Wing still they approached the Court seeking restraint order which is not worthy to be granted.

5. Heard learned counsel for the respective parties.

6. It is strenuously contended by the learned counsel for the appellant that the construction of proposed C Wing is not as per the plan sanctioned at the time of entering into agreement with the members of the society. There are amendments to the plan. Those are likely to affect the amenities availed of by the flat purchasers adversely. It is contended that the developer did not cooperate in forming the society even after completion of the construction and after securing occupation certificate in the year 1993 and 1996. The developer is not entitled to commence construction activities over the adjoining plot and erect C Wing as part of the building already constructed, that too, after lapse of about 13 years of the registration of the society and 14 to 16 years after issuing of occupation certificate in respect of A and B wings. The appellant has placed reliance on different sanctioned plans according permission to raise construction over the suit plot. It is pointed out that from to time there were different permissions accorded in respect of construction of C Wing and recent permission accorded in the year 2009 is completely different and has an effect of modifying whole plan thereby putting the occupants of A and B wings to the disadvantageous position. It is the contention of the appellant that even in respect of the amendment carried out to the plans if the construction is to be raised after lapse of about 13 years from the date of registration of the society, the permission of the occupants of the flats/ members of the society would be warranted. The builders and developers cannot be permitted to act upon alleged informed consent obtained in the year 1991 or at the time of entering into agreement during the year 1994. According to the counsel appearing for the appellant, the construction activities being carried out by the respondents/ defendants is not in consonance with the law laid down by this court in its judgment in the case of Madhuvihar Cooperative Housing Society and Others Vs. Jayantilal Investments, A Registered partnership firm, The Municipal Corporation of Greater Bombay and The Executive Engineer, Building Proposal (WS), and Ravindra Mutneja, Rajendra Mutneja, Chandraprakash Menda, Kalpesh Patel, Kamal Aggarwal, Divya Sippy, Gurvinder Singh, Monthchand Parul and Vinod Narang Vs. Bhavan Corporation, Wescan Housing (India) Pvt. Ltd., Mrs. Pushpaben Rasiklal Parekh, Mr. Rasiklal Manilal Parekh, Mr. Sanjay Patel, Mohan Vijan and Shri Gupta, .

7. The counsel appearing for the respondents builders and developers has vehemently controverted the contentions raised by the appellant contending that while entering into agreement in respect of purchase of flats, the prospective flat purchasers were made aware of the construction of C Wing and they had given indemnity bond. It is also contended that the plan was sanctioned in respect of building Rachana1 in the year 1991 wherein the proposed C Wing was shown. The flat purchasers did have knowledge in respect of the proposed construction of C Wing and, as such, they cannot now object to the construction to be made by the builders and developers. It is the contention of the respondents that the proposed action of the builders in raising construction is perfectly in consonance with the law laid down by the Apex Court in the case of Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, and Manratna Developers Vs. Megh Ratan Cooperative Housing Society Limited, Rushabh Rikhav Enterprises, Neelkanth Mansions Pvt. Ltd. and Municipal Corporation of Greater Mumbai, .

8. It is true that the flat purchasers, when they entered into an agreement between 1991 to 1993 for purchase of flats in A and B wings of Rachana1 building, were made aware of the fact in respect of proposed construction of C Wing. The brochure also did give the details in respect of C Wing. The construction of C Wing was proposed by the builders and developers in the year 1991 when the plan was prepared in consonance with the sanction accorded by the Municipal Corporation. The counsel appearing for the appellant referred to various sanctioned plans which are made available while arguing the appeal. The plan sanctioned and approved in 1991 indicates three wings. Construction of C Wing consists of ground + 6 upper floors whereas B Wing was of ground + 2 upper floors. The area of plot considered was 4,825.99 sq.meters and total tenements were only 42 and the car parking for 10 vehicles. It appears that during the intervening period, some area forming part of plot on which construction was to be raised came to be acquired. It appears that some portion of the plot and more specifically where C Wing was to be constructed was deleted in the amended IOD of 25th August 1994 and the previous plan bearing No.CE/4921/BPES/AS dated 26th July 1991 stood cancelled. The plan as per the approved IOD amended in 1994 does not show existence of C Wing. As per the approved plan of 1994, the total tenements which were to be constructed were 82 and the building permission was granted for construction of B Wing is of ground + 7 floors. It is to be noted that as per the approved IOD of 1991, B Wing was to be constructed comprising of ground + 2 floors whereas the same appears to have been amended as ground + 7 floors in the amended plan of 1994. It is to be noted that the amendment issued in the year 1994 appears to be after execution of the agreements with the prospective flat purchasers, however, before carrying out construction and securing occupation certificate. The third amendment in respect of plan is issued in the year 1996 which also does not show existence of C Wing whereas B Wing is shown as structure comprising of ground + 7 floors. The amended plan of 1996 shows the area of

plot considered as 5,286.67 sq.meters and total tenements which were to be constructed were 96. The construction C Wing which is proposed by the respondents/ defendants is in accordance with the amended plan issued in the year 2009. The amended plan of 2009 shows proposed additions and alterations of residential building C Wing and the area of plot considered is 5,266.10 sq.meters and the tenements are shown as 97. Permission is granted in respect of construction of C Wing with an area of 74.90 sq.meters. Thus, there appears that the demarcated open space of C Wing appears to have been reduced from earlier plan of 1991 from 7.33 to 3.60 meters on eastern side. Thus, it is the contention of the appellant that the different plans got approved from time to time show lot of variances in plans which cannot be permitted without consent of the occupants of the building. It is to be noted that occupation certificate granted in respect of A Wing is in respect of ground + 7 upper floors whereas the occupation certificate of B Wing appears to have been granted on 25th September 1996 during the period when the plan as sanctioned by the Corporation stood amended and did not show existence of C Wing. Thus, the contention of the appellant is that there was an amendment proposed to the plan which was sanctioned in view of deletion of certain area from the plot in the year 1994 where the C Wing was supposed to be raised as per the plan of 1991. The same situation continued so far as amendment to the plan carried out in the year 1996. It appears that amendment to the original plan necessitated existed because of deletion of certain area from the plot and acquisition of the area out of the plot, abutting the area where C Wing was proposed to be constructed, for road widening purposes. On perusal of the plan prepared in the year 2009, it appears that C Wing is readjusted in the remaining portion of available plot after acquisition. There appears to be increase in number of tenements comprising C Wing. Thus, the amendment to the plan in the year 2009 results in adding to congestion thereby rendering lesser area available towards the open space for the occupants of the existing flats of the building. The argument advanced by learned counsel appearing for the appellant that the amendments to the plan which are disadvantageous to the occupants at the instance of the builder are not permissible unless there is consent by the flat owners/ members of the society. The informed consent, which is stated to have been obtained in the year 1993/94 while the flat purchasers booked their flats, was on the basis of the approved plan of the year 1991. The B Wing, which was initially proposed to be comprising ground + 2 floors, was converted into ground + 7 floors and, at the same time, the proposed C Wing was also deleted in the plan of 1994. While the occupation certificate was issued the same situation continued and the deletion of C Wing from the plan remained till the fresh plan was got approved by the builder in the year 2009. Thus there is some substance in the contention of the appellant that the changes effected by the builders and developers at the subsequent stage are disadvantageous to the occupiers of the flats and, as such, need their consent.

9. At the same time, it is to be noted that the plans on which reliance is sought

to be placed while arguing the matter were not forming part of the record before the trial Court. In order to substantiate his contentions, the appellant has placed reliance on various plans approved by the Municipal Corporation in respect of the building from time to time. Since the respondents did not have an opportunity to meet the case of the appellant, in my opinion, the matter requires reconsideration at the hands of the trial Court.

10. The counsel appearing for the respondents contended that there was informed consent by the members/flat purchasers and they were made aware in respect of the proposed construction of C Wing. It is contended that it is immaterial if the developer changes the plan at any subsequent point of time and the change which is proposed is also approved by the planning authority i.e. the Municipal Corporation. It is contended that the land where C Wing was proposed to be constructed still remains the property of the builders and developers and, in any case, cannot be handed over to the society. It is contended that there shall be balancing of rights of promoter to make alterations or additions in the structure of the building in accordance with the layout plan on the one hand visavis his obligations to form the society and convey the right, title and interest in the property to the society. Reliance is placed on the judgment of the Apex Court in the case of *M/s. Jayantilal Investments v. Madhuvihar Coop. Housing Society* (supra) and more specifically paragraph 17 thereof which reads thus:

17. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the lay out plan on the one hand visavis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure of the flat takers remains unfettered even after the inclusion of Section 7A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of Sub section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 are quoted herein below:

3. The Promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions if any, which may have been imposed by the concerned local authority at the time sanctioning the said plans

or thereafter and shall, before handing over possession of the Flat to the Flat Purchaser, obtain from the concerned local authority occupation and/or completion certificates in respect of the Flat.

4. The Promoter hereby declares that the Floor Space Index available in respect of the said land is square metres only and that no part of the said floor space index has been utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilized by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilization of said floor space index by him. In case while developing the said land the Promoter has utilized any floor space index of any other land or property by way of floating floor, space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser. The residual F.A.R. (F.S.I.) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the Society the residual F.A.R. (F.S.I.), shall be available to the Society.

Reliance is also placed on the judgment Division Bench of this Court in the case of *M/s. Manratna Developers v. Megh Ratan Cooperative Housing Soc.Ltd.* (supra). In paragraph 6 of the judgment, it is observed thus:

6. Coming to the question as to whether the consent of the flat owners is required by the developer/promoter for raising the additional structure/ building, the change in position of law will have to be addressed to. Section 7 of Maharashtra Ownership Flats Act, 1963 (MOFA for short) was interpreted by the Bombay High Court in *Kalpita Enclave Cooperative Housing Society v. Kiran Builders Pvt. Ltd.* reported in holding that a promoter was not entitled to put up additional structure not shown in the original lay out plan without consent of the flat purchasers. The said interpretation of Section 7 by the High Court prompted the legislature to amend Section 7. Section 7 was amended with retrospective effect and Section 7A was newly inserted which was of a clarificatory nature. By amending Section 7, the words or construct any additional structures were deleted. Section 7A which was newly added, clarifies the position that the consent of flat holders in a building is not necessary in respect of construction in the scheme or lay out, after obtaining approval of the local authority in accordance with the building buy laws or Development Control Rules. Section 7A, thus, does not enable the flat purchasers to prevent construction of the additional structures once the plan is modified and sanctioned under the building bye laws or Development Control Rules.

11. It is contended that the consent of the flat owners in the building is not necessary in respect of construction in the scheme and/or layout after obtaining approval of the local authority in accordance with the building byelaws or development control rules. The flat purchasers cannot prevent the construction of the additional structures once the plan is modified and sanctioned under the building byelaws or development control rules.

12. Here is the case where the builder proposes to construct an additional wing after 14 years of securing occupation certificate in respect of other two wings. The proposed C Wing which is to be constructed forms part of the same building. The construction in respect of other two wings is completed way back in the year 1994 and 1996 and the addition to the building is as per the modified plan sanctioned in the year 2009. The question here is whether such modified plan also requires consent of the flat owners. It is not disputed that the society is formed without cooperation from the builder in the year 1997 itself and the society is looking after the affairs of the building. Peculiarity of the case is that the plan which was sanctioned in the year 1991, which indicates the existence of proposed C Wing, was substantially amended. There was a development in respect of certain area of the disputed plot and the acquisition of the additional area for the road widening purpose is out of or adjoining the proposed C Wing. The builders and developers, thereafter, appear to have secured amendment to the plan in the year 1994 and 1996 whereby proposed C Wing was deleted. The construction in respect of B Wing was also shown to be ground + 7 floors whereas it was ground + 2 floors in initial sanctioned plan. Thus, during the period during which the construction was proceeded and the occupation certificate was issued, existence of C Wing was not at all there as per the approved plan and it was not permissible for the developers at the relevant time to raise construction of C Wing. The revised permission appears to have been secured in the year 2009 thereby the alignment of C Wing was changed in view of acquisition of certain area of the plot for road widening. Thus, while changing the alignment as well as the plan, there are certain changes in the building design and the facilities available for the existing flat occupiers are surely affected to their prejudice. It is, therefore, contended by the appellant that if the builders and developers want to raise construction after securing proposed amendment to the plan in 2009 and want to carry out construction, the consent of the existing flat occupiers would be necessary and the builders and developers cannot bank upon the consent obtained some 16 to 17 years back and, that too, in respect of different plans. In this context reliance is placed on the judgment of this Court in the case of Ravindra Mutenja & others v. Bhavan Corporation & others (supra). In paragraph 13 of the judgment, learned single Judge has observed thus:

13. The real issue as has been noted earlier is what is the stage upto which the developer/owner can put up additional construction after the building in terms of the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events. That would be so at the stage the building is under construction or the building is not completed and/or

purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the rules framed under MOFA is over, the permission of such purchasers would be required.

In the instant case, the building completion certificate for the plaintiff's building, was issued in the year 1997. The builder/owner Defendant Nos. 1, 3 and 4 had to put up the construction, based upon the permission/license granted. The defendant Nos. 1, 3 and 4 had to construct the building and to convey the title by sale deed in terms of Rule 9. If property had been conveyed, prima facie the remaining FSI or FSI which become subsequently available on the facts of the case, would be to the society to whom the land had to be conveyed. The record shows that the building was approved in December, 2001. It cannot prima facie, be said that defendant Nos. 1, 2, 4 and 5 have any rights under which they are entitled to put up an additional building contrary to Section 7A of the Act.

Reliance is also placed on the judgment of this Court in the case of Madhuvihar Cooperative Housing Society, Mumbai v. Jayantilal Investments, Mumbai (supra). In paragraphs 40 and 41 of the judgment, the learned single Judge observed thus:

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

On reading of the judgment, it is, thus, clear that subsequent amendment of the layout plan, after the building plan is registered under MOFA, without the consent of the flat purchasers, prima facie; would not be permissible. Once the building is constructed and the occupation certificate is issued and the society is formed, if any further construction is to be raised in respect of the same building, the consent of the flat purchasers would, obviously, be required.

13. Since I have already observed in earlier paragraphs that the basis of the arguments advanced by the counsel appearing for the appellant is various amended approved plans of the year 1991, 1994, 1996 and 2009 and since those plans were not placed on record of the trial Court, the respondents/

original defendants did not have opportunity to meet the challenge. In order to extend opportunity to the respondents/ defendants and with a view to facilitate the appellant to place on record the material, which is being produced before this Court, on the record of the trial Court, it is necessary to remit the matter back to the trial court. The appellant shall place on record the copies of the approved plans on which reliance is placed by them and it would be open for the respondents to submit their contentions. The trial Court, after hearing the arguments and after extending opportunity to both parties to place on record material in support of their case, shall proceed to decide the notice of motion afresh on its own merits and in accordance with the provisions of law. The trial Court while deciding notice of motion shall not be influenced by the observations made by this Court in the instant judgment and shall proceed to decide the controversy on its own merits and in accordance with law. Thus the impugned order passed by the trial court is quashed and set aside. The trial Court is directed to decide Notice of Motion No.2214/2009 afresh after affording opportunity of hearing to both parties and to submit their contentions before the Court, in accordance with the provisions of law as expeditiously as possible, preferably, within twelve weeks from the date of receipt of writ of this order. The order of statusquo granted by this Court in the instant appeal from order shall remain operative till the trial Court decides notice of motion.

14. With the aforesaid directions, appeal from order stands allowed. In view of disposal of appeal from order, pending civil application does not survive and stands disposed of accordingly.