

(2010) 04 BOM CK 0034

In the Bombay High Court

Case No : Writ Petition No. 1170 of 2010

Radhika Property Developers Pvt. Ltd.

APPELLANT

Vs

Ahuna T.P.Z.A. Cooperative Housing Ltd. and Others

RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 227
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 7, 7A

Citation : (2011) 2 ALLMR 356 : (2011) 1 BomCR 444

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : P.K. Dhakephalkar and Sanjay Borkar, instructed by Kailas Dewal, for the Appellant; E.P. Bharucha, instructed by V.P. Sawant, for Respondent No. 1, S.S. Kanetkar and A.P. Vanarse, AGP, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—Rule, returnable forthwith. Heard finally by consent.

2. The Petitioner has invoked Article 227 of the Constitution of India and thereby challenged the impugned judgment and order dated 07.01.2010 passed by the learned Principal District Judge, Thane in Misc. Civil Appeal No. 66 of 2009 in Regular Civil Suit No. 733/2008, whereby granted an ad-interim relief/injunction in the following words:

Appeal is hereby allowed.

Order dt.25.3.2009 rejecting Exh. 5 in RCS No. 733/08 by Jt. Civil Judge, S.D., Thane is hereby set aside.

Exh. 5 is hereby allowed and respondent No. 1/defendant No. 1 is hereby injuncted temporarily, or for that matter, pending hearing and disposal of the suit from proceeding with construction of proposed building in remaining portion of

plot over CTS Nos. 57A and 85B.

In the peculiar circumstances of this matter, parties are, however, left to bear their own costs.

3. Cawasji Beharamji Divecha Trust, (respondent No. 5) (the Trust) is owner of 8593.28 sq.mt. Of land out of City Survey No. 57-A, 85-B, 88, 89 and 90, Tikka No. 11, situated at Charai, Panchpakhadi, Thane (the property).

4. By an Agreement dated 02.02.1988, the petitioner/developer agreed with the Trust (respondent No. 5) to develop the larger property and accordingly, entered into an Agreement after obtaining the requisite permission from the Charity Commissioner. The same was challenged in Writ Petition No. 1041/1989 by respondent No. 3-The Thane Parsi Zoroastrian Anjuman. However, the parties settled the matter by Consent Terms (the Consent terms) on 30.04.1991. The petitioner/developer agreed to provide/construct a building of 33,000 sq.ft. On City Survey Nos. 57-A and 85B (the suit property) for the Zoroastrian community. The plan was submitted by the petitioner/developer was approved on 20.04.1992. Various separate Agreements entered into with the members of the community for sale of flats in the building to be constructed in the year 1992 itself. The building named as "Ahuna"-respondent No. 1(original plaintiff). The respective members/persons formed the plaintiff/society and occupied their respective flats and enjoying all the facilities and the area as per the Agreements accordingly. The petitioner is under obligation to execute Conveyance, subject to cooperation from all members, as per the Consent Terms and the Agreements as claimed after completion of the construction on the property. The petitioner, as permitted, submitted and got the Plan sanctioned in the year 1992 of the proposed suit building to the west of the Ahuna building. As per the Consent Terms, Ahuna building was to be constructed on 20,000 sq.ft. Of land demarcated and it was constructed accordingly. All the parties have full knowledge of the area, flat and their respective rights to use and utilise the flats and the surrounding area.

5. Respondent No. 2-The Municipal Corporation supported the fact that the Plans as approved are legal and valid. Respondent No. 3 (defendant No. 3) supported the original plaintiff. Mr. S.S. Kanetkar, the learned Counsel for respondent No. 3 and adopted the same line of arguments of Mr. Bharucha, the learned senior Counsel for respondent No. 1.

6. Admittedly, based upon the Consent Terms, the parties proceeded to develop the particular plot/area. The Consent Terms provide various clauses giving various rights and obligations of the respective parties. Those includes to develop and construct building on other remaining portion of the land. There is no dispute that the subject matter of the Consent Terms refers to total admeasuring area of about 8593.28 sq.mts. together with the buildings and structures standing therein.

7. There is no dispute that based upon the said Consent Terms, after getting the

approval and commencement certificate in the year 1992 constructed two buildings viz. "Sheetal" on Survey No. 88 and "Gautam Sagar" on Survey Nos. 89 and 90, based upon the Sanction dated 22.09.1987 and 09.08.1994. It was never agreed that development should be made on the plot at one phase. It was the petitioner's choice and right to construct and develop rest of the property.

8. For the plaintiff's society, a plan was sanctioned some time in the year 2001 and the construction was completed in the year 2004. Hence, there is no dispute that apart from the Consent Terms, individual Agreements have been entered into by the plaintiffs members with the petitioner/builder in the year 1992 itself, which also refers and provides various clauses of the Consent Terms. The rights of the builder as well as member of the plaintiff/society have been clearly demarcated and defined along with the obligations. Even otherwise, while entering into such contract, it is always necessary to define and describe the property, area and all other respective rights referring to the surrounding area. Any such agreement without providing the detail and description of the property just cannot be acted upon. Therefore, both the parties have full knowledge of the nature of the property, proposed construction/development by the petitioner/promoter and all related aspects.

10. The plaintiff has filed the Suit on 06.11.2008 and prayed as under:

a) The Defendant No. 1 may be ordered and decreed to execute the conveyance of the suit plot bearing City Survey No. 57-A and 85-B of Tikka No. 11, situate at Charai, Thane, Taluka and District Thane, in favour of the plaintiff Society by joining the Defendant No. 5 Trust as the party to such conveyance.

b) It may be declared that the plan approved by the Defendant No. 2 vide V.P. No. 2005/26, submitted by the Defendant No. 1 with respect to the proposed building in City Survey No. 57-A and 85-B is illegal, null and void.

c) The said plan V.P. No. 2005/26 may be cancelled and revoked by and under the order and decree of this Honourable Court.

d) The Defendant No. 1 its agents servants, assignees, transferees and person or persons claiming through it may be restrained by the order of permanent injunction from constructing any building or structure in the land bearing City Survey No. 57-A and 85-B of Tika No. 11.

e) The Defendant No. 1 may be directed to dismantle and remove the building partly constructed in the open space in City Survey No. 85-B and deliver vacant and peaceful possession of the suit plot to the plaintiff Society along with the execution of conveyance in favour of the plaintiff Society.

f) It may be declared that the D.P. Reservation of the portion of land admeasuring about 688 sq.meters in City Survey No. 85-B as a playground declared by the Defendant No. 2 and 4 is illegal, null and void.

g) The portion of land admeasuring about 688 sq.meters, in City Survey No. 85-

B of Tika No. 11, earmarked as a play ground in the impugned D.P. Reservation of the Defendant No. 2 Corporation may be set aside, cancelled and revoked by and under the order and decree of this Honourable Court and after its de-reservation earlier user thereof as recreation garden may be ordered to be resumed.

h) Pending the hearing and final disposal of this Suit, the Defendant No. 1, its agents servants, assignees, transferees and person or persons claiming through it may be restrained by the order of ad-interim injunction from carrying out any construction in the suit land bearing City Survey No. 57-A and 85-B.

i) Pending the hearing and final disposal of this Suit the Defendant No. 1 may be restrained by the order of ad-interim injunction from creating third party interest in the suit plot or the building proposed to be constructed thereon.

j) The Defendant No. 1, 2 and 4 may be ordered and decreed to pay costs of this suit to the plaintiff Society.

k) Any other and further relief this Honourable Court deems just and property may be awarded to the plaintiff Society.

9. An Application for interim injunction was also moved along with the same. After hearing both the parties, by giving detailed reasoning the trial Judge rejected the said injunction application. The plaintiff thereafter preferred Misc. Appeal No. 66/2009 on 11.06.2009. Finally, by the impugned order, the learned Appellate Court on 07.01.2010 has granted injunction as referred above.

10. There is no serious dispute that in view of the prayers so raised and as there are questions of interpretation of the Consent Terms/decreed read with the provisions of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short, "the MOFA Act"), specially Sections 7, 7A and the respective Agreements including the rights of developer/petitioner to proceed with the construction/development of the property are involved. The learned Judge has also, therefore, observed that there are triable issues raised in the matter.

11. The reversal order, therefore, so passed and whereby the injunction has been granted for the first time, if case is made out, can be interfered with even in such private dispute, though contended otherwise, by the learned Senior Counsel appearing for the respondent No. 1, based upon the judgments of the Apex Court in Radhey Shyam and Another Vs. Chhabi Nath and Others, and Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, . The aggrieved party just cannot be rendered remedy-less in such situation.

12. The High Court, therefore, in a Writ Petition under Article 227 of the Constitution of India, in its supervisory jurisdiction, if case is made out, is empowered to entertain such Petition and may pass appropriate order in the interest of justice.

13. All the aspects which are necessary to grant interim injunction as contemplated under Order 39, Rules 1 & 2 of CPC (CPC), in such circumstances, need consideration. The balance of convenience, irreparable injury, equity and the requisite compensation and such other factors are also relevant even though there are arguable points raised.

14. The submission revolving around Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, , referring to Sections 7 and 7-A of the MOFA Act itself provides that "the Promoter is also required to declare that no part of that FSI has been utilised elsewhere, and if it is utilised, the promoter has to give particulars of such utilisation to the flat takers. Further, under the proforma agreement, the promoter has to further declare utilisation of FSI of any other land for the purposes of developing the land in question which is covered by the agreement."

14-A There is no doubt that the activities of the promoter/developers need to be regulated and checked. The full & proper disclosure by the builder/promoter as contemplated under the MOFA Act is a must to avoid various complications. If allegations are so raised/made, it is always subject to proof and material on record. Mere averments are not sufficient to pass such interim orders.

15. Once acted upon the Consent Terms/Decree of the year 1991, both the parties proceeded further. The total area of the land in question and the respective terms of the Consent Terms, respective Agreements are not in dispute. There was no objection of any kind raised at the earliest point of time though, based upon the same Agreement on the same land in question, two buildings were constructed as referred above i.e. In the years 1987 and 1994. The plan of the plaintiffs' building was sanctioned in the year 2001. The construction based upon the same was completed in 2004. The submission which they are now making, merely because the petitioner/developer started construction on the remaining portion of the land by raising vague pleas of collusion between defendants 1 to 4 and also of fraud referring to generation of additional FSI and the aspect of subdivision of the land is afterthought. The allegations of collusion and the conspiracy so raised cannot be accepted unless are supported by the material and related evidence. The development plan reservation (D.P. Reservation) at the relevant time was duly sanctioned after following the procedure under the respective Rules. To say now that the D.P. Reservation is illegal, null and void is also a matter which just cannot be accepted at this late stage only at the instance of the plaintiff. Apart from the Consent Terms and the Agreements and the development so made by the petitioner, based upon the same and as other societies members including the plaintiffs' members have been enjoying the construction and all the facilities as provided by the petitioner/developer. All in all the issues or the pleas so raised by the plaintiffs are intermixed and cannot be decided in isolation. The trial is a must.

16. Even if a case is made out as contended and the triable issues are raised, as

contended, still that itself is not sufficient to grant ad-interim relief/injunction as prayed by overlooking the other basic elements of grant of injunction, like balance of convenience, equity, the conduct of the parties, delay in taking steps and moving injunction applications and entitlement of damages or monetary compensation.

17. If there are breaches committed by the petitioner, based upon the Consent Terms/Decree/Agreements and even of the provisions of the MOFA Act, unless those are proved and/or substantiated, at this prima facie stage it is difficult to accept the case merely because the averments are made by the plaintiffs revolving around the same.

18. The prayers so raised by the plaintiffs as reproduced above are of multiple in nature ranging from direction against the petitioner/builder to execute the Conveyance of the suit plot; the plan approved by the defendant No. 2 vide V.P. No. 2005/26, with respect to the proposed building in City Survey No. 57-A and 85-B is illegal, null and void; the plan be cancelled and revoked; the reservation on the development plan of the portion of the land with regard to the playground is illegal, null and void, portion of the land earmarked for the play ground be set aside and cancelled and even ask for the de-reservation now. Based upon this, the prayer is also made to dismantle and remove the construction already commenced on the open space in City Survey No. 85-B and deliver the vacant possession of the land to the plaintiff/society. Unless all other prayers are not granted and/or decided, in my view, there is no case of granting the prayer of dismantling and/or removing of the building already constructed, specially at the instance of plaintiffs/society alone, specially when there is no dispute that based upon the said Consent Terms/Decree and individual Agreements, the parties have acted upon and are enjoying the peaceful possession and facilities of the constructed building as well as of the area. All things are interlinked and interconnected. It is difficult to accept the case of the learned Counsel for the original plaintiffs that no further construction can be made on any vacant portion of the land referred in the Consent Terms by overlooking the Agreements entered into by the respective members of the respective societies. I am not deciding all those issues at this prima facie stage as agitated and those averments itself, in my view, just cannot be the reason to grant interim injunction as ordered by the Appellate Court for the first time to frustrate the project and the scheme.

19. The aspect of delay and the conduct are also relevant in the present case. As noted above, except after the construction commenced, respondent No. 1 has filed the Suit with above prayer clauses and with specific prayer to dismantle the construction already commenced. There was no ad-interim relief/injunction in favour of the plaintiff at any point of time. Though Suit was filed in the year 2008, even after rejection of Injunction Application, except filing the Miscellaneous Appeal, no further steps were taken by the plaintiff for interim protection or injunction. During this period, the construction was going on. Now a statement is also made and which is not in dispute that the basic building has

been constructed as per the sanctioned plan. The aspect of investment and construction so made in such type of matter just cannot be overlooked specially when it is based upon the Consent Terms/Decree and the Agreements of the year 1991/1992. The submission that they moved immediately for interim relief after having knowledge of the sanctioned plan dated 11.02.2008 by the petitioner and/or immediately from the knowledge of commencement of the construction in question and, therefore, the construction so made in spite of pendency of the present Suit, just cannot be the reason not to grant equitable relief, in my view, in the present facts and circumstances of the case, is unacceptable. Heavy burden lies upon the plaintiff by putting material to substantiate other prayer clauses first to get the order of dismantling and/or removal of such construction so raised and even of injunction so prayed. Therefore, the conduct read with delay, in my view, goes against the plaintiffs.

20. The irreparable injury, the balance of convenience and equity, in view of above, in my view, lies in favour of the petitioner/defendant No. 1. The respondent No. 1/plaintiffs, in view of above, failed to prove the case for interim injunction. There is no prima facie a case; no balance of convenience, no equity and on the contrary, the petitioner/defendant No. 1 who proceeded on the basis of Consent Terms/individual Agreements of the year 1991 and 1992 and now has started/commenced the construction on the remaining portion of the land, which they are entitled to do so, subject to terms and conditions, just cannot be prevented on the grounds so raised in the plaint which requires detailed inquiry, evidence and interpretation of the clauses itself. Even otherwise, unless those are answered in their favour merely because substantial grounds are raised and the case as alleged to be arguable, in my view, just cannot be the reason to grant the injunction for the first time as is done by the Appellate Court in the Appeal. The petitioner/promoter/developer is not constructing or making any alteration in the exclusive demarcated area and the constructed building of the plaintiff. The parties have full knowledge of the areas, plans and their respective obligations and rights. Having once obtained the benefits, the plaintiff at this stage cannot be permitted to deny the benefits/rights of the petitioner/developer, specially when they themselves cannot restore the condition and the position of the original area/land.

21. The Petitioner has made out a case. Therefore, I am interfering with the order passed by the Appellate Judge/Court, who by reversing the order passed by the trial Judge/Court, has granted the Interim injunction. In my view, the reasoning given by the trial Judge just cannot be said to be perverse, unjust or contrary to law. The trial Court referred to various clauses of the Consent Terms/individual Agreements and dealt with the subject and, the discretion so exercised by the trial Court is well within the frame work, based upon various relevant authorities and the record. The interference of the Appellate Court in the present case, in my view, is not correct. There is no perversity, illegality in the order of the trial Judge. Therefore, the petitioner has made out the case for interference under Article 227 of the Constitution of India in the interest of justice.

22. The submission with regard to the aspect of prior consent from members of the society as contemplated u/s 7 and 7-A of the MOFA Act, though disputed, still that itself means the petitioner/developer can construct but subject to consent, therefore, any loss of land, will be subject to decision in favour of the plaintiffs & in a given case, can be compensated in terms of money. The parties can waive their rights also and settle the matter.

23. It is made clear that the petitioner/developer is not prevented from performing his part of obligation as per the Consent Terms and the Agreements and the law. The petitioner/developer is bound to perform his part of the obligation as per the Consent Terms/agreements.

24. Resultantly, the impugned order passed by the Appellate Court dated 07.01.2010 is quashed and set aside. The order passed by the trial Court dated 25.03.2009 is maintained. The Injunction Application as filed is rejected. However, it is made clear that any construction made by the petitioner/original defendant No. 1 and any transfer of property in question by any means will be subject to the decision of the present Suit. The Suit is expedited. The issues of jurisdiction & the maintainability are kept open.

25. The Petition is accordingly allowed in terms of prayer (a).

26. Rule is made absolute in the above terms. No order as to costs.

27. The learned Counsel for the respondent No. 1 seeks stay of this order. The learned Counsel for the petitioner oppose the same. The statement is made that apart from the construction of the building, the constructed, unfinished flats have been sold and respective Agreements have been entered into with the third person also. In view of this and as already observed, that any transactions and the transfer, will be subject to the decision of the Suit. I am not inclined to grant any stay of this order. The oral application is rejected.