

(2008) 04 BOM CK 0008

In the Bombay High Court

Case No : Appeal No. 430 of 2007 in Notice of Motion No. 3665 of 2006 in Suit No. 132 of 2007

White Towers Co-op. Hsg. Society Ltd.

APPELLANT

Vs

S.K. Builders and Others

RESPONDENT

Date of Decision : 22-04-2008

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 3, 4

Citation : (2008) 4 ALLMR 838 : (2008) 6 BomCR 371 : (2008) 4 MhLj 894

Hon'ble Judges : R.M.S. Khandeparkar, J;A.V. Nirgude, J

Bench : Division Bench

Advocate : M.M. Vashi, for the Appellant; Saleh Doctor and S.U. Kamdar, instructed by Deepak Chitnis - Chiparikar and Co. for Respondent No. 1, K.N. Gaikwad, for Respondent Nos. 2, 3 and 4 and Vijay Thorat and R.A. Thorat and Vaibhav Sugdare, instructed by R.D. Thorat, for the Respondent

Final Decision : Allowed

Judgement

R.M.S. Khandeparkar, J.—Heard. Admit. Learned Counsel appearing on behalf of the respective respondents waive service. By consent, heard forthwith.

2. This appeal arises from the order dated 3-5-2007 passed in Notice of Motion No. 3665 of 2006 in Suit No. 132 of 2007. By the impugned order, the learned single Judge granted ad-interim relief in the nature of prayer Clause c(ii) thereby restrained the defendant No. 5 and any person claiming through the respondents, from constructing any building other than 7 floors in "E" Wing while rejecting the other reliefs which were asked for in the notice of motion.

3. The main grievance of the appellants relate to the plot of land forming part of the plot wherein the societies building is situated and claims to have been amalgamated with the adjoining plot and wherein the new layout thereof has been approved for the developments therein by the competent authorities sans the consent of the appellants in relation to the portion of their plot so

amalgamated with the adjoining plot.

4. It is the contention on behalf of the appellants that ignoring the law laid down by the Apex Court in *Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others*, and particularly whereby the Apex Court had clearly held that once the entire project is placed before the flat takers at the time of the agreement in terms of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, then the promoter is not expected to carry out development in the plot contrary to the disclosure made to the flat takers. It is the contention on behalf of the appellants that the learned single Judge by merely referring to para 17 of the judgment in *Jayantilal Investments*" case (supra), had totally ignored the right assured to the flat takers and the co-operative societies having their structures in the land which is sought to be developed by the builders and promoters contrary to the disclosure made regarding the proposed development in such plots at the time of entering into the agreement with the flat takers in the building either already constructed and to be constructed in such plot.

5. On the other hand, it is the case of the respondents that the ratio of the decision in *Jayantilal Investments*" case has been correctly understood by the learned single Judge and considering the same the only right which has been assured to the flat takers is that the original FSI available to the society, as disclosed at the time of entering into the agreement, is not disturbed and except that all the other rights of the promoters and builders to develop the plot of land are safe-guarded and considering the same, no fault can be found in the impugned order. Besides, there is already the layout plan approved in relation to the amalgamated plot which includes the part of the society's plot and the same has not been challenged by the appellants. It is the further contention on behalf of the respondents that the impugned order is merely an ad-interim order and the notice of motion is still pending before the learned single Judge to be disposed of.

6. Bare perusal of the impugned order discloses that the same has been passed solely referring to para 17 of the decision in *Jayantilal Investments*" case by merely observing that if the contention based on paragraphs 19 and 21 of the said decision are taken into consideration, then the para 17 of the decision would stand diluted. With respect, we are unable to agree with the view taken by the learned single Judge. The Apex Court in *Jayantilal Investments*" case, has clearly observed in para 20, after taking into consideration the provisions of Clauses 3 and 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964, that the said provisions are declared to be statutory and mandatory by the Legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at

the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers, the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one building scheme or multiple number of buildings scheme. Having observed so in relation to the statutory provisions in Clauses 3 and 4 of the said Rules, the Apex Court has further ruled that:

the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of develop ability has to be harmoniously read with the concept of registration of society and conveyance of title.

7. Obviously, the flat takers stand assured that in case of any change to be made in the project, as was disclosed to the flat takers at the time of entering into agreement, the same has to be by following the proper procedure and without disturbance of the rights accrued to the flat purchasers in relation to the flats and all benefits attached to the flats including in relation to the land on which the building having such flat is situated. Taking into consideration the same, if a portion of the plot wherein the structure having the flat is situated is to be excluded and is to be amalgamated in the neighbouring plot, and the project in this regard is not disclosed to the flat takers at the time of the agreement being entered with the flat takers, it would be totally contrary to the decision of the Apex Court in Jayantilal Investments" case. This aspect has not been considered by the learned single Judge while passing the impugned order.

Taking into consideration the law laid down by the Apex Court in Jayantilal Investments" case, therefore, it cannot be said that the respondent No. 5 would be entitled to carry out the construction as a matter of right in the portion of the land of the society"s plot which is stated to have been amalgamated with the neighbouring plot. In fact, the learned single Judge, in para 9 of the impugned order, does make reference to this aspect. However, without considering the same, thereafter, proceeded to grant the relief of injunction. Being so, the impugned order to the extent it excludes such portion of the society"s plot from being subject to restraint, needs to be modified and the relief in the nature of Clause c(ii) granted by the impugned order needs to be modified to exclude such relief in relation to the society"s plot which is said to have been amalgamated in the adjoining plot till disposal of the notice of motion and subject to the decision in the notice of motion.

8. Needless to say that all the observations made hereinabove are for the purpose of disposal of the present appeal against the ad-interim order and the learned single Judge should not get influenced in any manner with the said observations while deciding the notice of motion on merits, after hearing the parties.

9. The appeal accordingly succeeds; the impugned order is accordingly modified in above terms till the disposal of the notice of motion. There shall be no order as to costs.