
(2014) 05 BOM CK 0074

In the Bombay High Court

Case No : Writ Petition No. 3483 of 2014

Zircon Venture Co-operative Housing Society Ltd.

APPELLANT

Vs

M/s. Zircon Ventures and Others

RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:

Constitution of India, 1950 — Article 227
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 3, 7, 7A

Citation : (2014) 4 ABR 284 : (2014) 4 ALLMR 580 : (2014) 5 BomCR 158 : (2014) 4 MhLj 481

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

Bench : Single Bench

Advocate : N.V. Walawalkar, Senior Advocate and Mr. Sanjay Kshirsagar, Advocate for the Appellant; P.K. Dhakephalkar, Senior Advocate, Mr. Nabar, Ms. T Kamat i/by Sonal Doshi and Co. for the Respondent No. 1, Mr. G.S. Godbole, Senior Advocate and Mr. Sumit S. Kothari for the Respondent Nos. 2 to 111, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R.M. Savant, J.—Rule, with the consent of the learned counsel appearing of the parties made returnable forthwith and heard.

2. The contentious issue whether the Promoter/Developer has made a true and full disclosure of the entire scheme and is consequently entitled to put up construction in the plot in question has once again engaged the attention of this Court.

3. The Petitioner No. 1 is a Society comprising of 288 flat purchasers of the 9 buildings developed by the Joint Venture i.e. the Respondent No. 1, of one M/s. Vascon Engineers Pvt. Ltd. and M/s. Sreemangal Pristine Builders, the Petitioner has taken exception to the order dated 03/02/2014 passed by the learned District Judge-17 Pune by which order the Appeal filed by the Petitioner-Society

being Misc. Civil Appeal No. 498 of 2012 came to be dismissed and resultantly, the dismissal of the application for temporary injunction (Exhibit 5) by the Trial Court by order dated 09/11/2012 came to be confirmed. The Petitioner is the original Plaintiff, The Respondent No. 1 is the original Defendant No. 1 and the Respondent Nos. 2 to 111 are the original owners of the suit plot and who are the Defendant Nos. 2 to 111 in the suit in question.

4. The facts giving rise to the filing of the above Petition can, in brief, be stated thus:-

The Respondent No. 1 herein, as indicated above, which is a Joint Venture of Sreemangal Pristine Builders and M/s. Vascon Engineers Pvt. Ltd. has undertaken development of the property being Survey No. 197 Hissa No. 3 totally admeasuring about 4 Hectar 37 Ares i.e. 43700 sq. mtrs. The development of the said property was commenced sometime in the year 2005 pursuant to the commencement certificate No. CC/4080/04 dated 31/01/2005. The said property was divided into two plots i.e. Plot No. 1 admeasuring 12238 sq. mtrs. and Plot No. 2 admeasuring 31461.78 sq. mtrs. The controversy in the Suit in question is in respect of the development of Plot No. 2. In the said Plot No. 2 as per the sanctioned layout 12 buildings were proposed. The development was commenced and the construction of 9 buildings was completed and the completion certificate in respect of the said 9 buildings was obtained on 31/03/2008. The Petitioner Society came to be registered in respect of the flat purchasers of the said 9 buildings on 18/04/2009. On the registration of the Society it seems that the Respondent No. 1 herein i.e. the Defendant No. 1 to the Suit handed over the management and surrendered all the accounts to the Managing Committee of the Society. It appears that the Society sometime in the year 2008 sought a copy of the last revised sanctioned layout plan dated 13/6/2008 (wrongly referred to as 10/06/2008). The copy of the said plan was accordingly furnished to the Society. In the said plan there is a mention of 9 buildings and one covered car parking with open space. On 19/7/2012 the Respondent No. 1 informed the Society that it is intending to start construction of the 10th building in the said Plot No. 2 and on the Respondent No. 1 sending construction material in the Society premises, the Society resisted the same by obstructing the entry of the vehicles of the Respondent No. 1. The Respondent No. 1 again on 16/08/2012 and 24/08/2012 informed the Society that it is intending to start construction of the 10th building in Plot No. 2 and requested the Society to arrange a meeting in that behalf. Since it is the case of the Society that 10th building is sought to be constructed in the area earmarked for closed car parking as per last sanctioned layout plan dated 13/06/2008, the Society along with its two office bearers filed the Suit in question being Regular Civil Suit No. 6087 of 2012.

5. The said Suit as can be seen from the reading of the plaint is founded on the fact that in the last revised sanctioned layout plan dated 13/06/2008 there is a mention of only 9 buildings and one covered car parking and the open space. Hence as per the said revised sanctioned layout plan particular area is earmarked

as car parking space which has been left open by the developer till date. It is the case of the Society that the builder is supposed to build a car park at the place which is earmarked for the same which is not executed and is therefore a case of non-performance by the developer. It is the case of the Society that if the developer plans to use the car parking area for the 10th building, then the plan has been changed without the Society's knowledge and concurrence and therefore illegal and invalid. In the subsequent Paragraph No. 11 of the plaint, the Plaintiff has averred as regarding deficiency in respect of installation of grills and fencing on the entire southern wall towards Cygna and Cassia Buildings. It is averred that the same has not been done in spite of the management being handed over to the Society. In Paragraph No. 12 of the plaint it has been averred that the Defendant No. 1 by using muscle power tried to encroach on the Plaintiffs property and start the construction of the 10th building on the place kept reserved for the covered parking on the western side as per the final sanctioned layout plan dated 13/06/2008 in the Society premises. In paragraph 15 of the plaint it has been averred that if the Defendant No. 1 is not restrained from constructing the 10th building on the suit property, the entire infrastructure like STP and PMC water pipelines etc. which originally are not sufficient for the present members i.e. 288 families would further deteriorate with additional load and the problems of the Society members will escalate disturbing their fundamental right of peaceful living of all 288 families. The Plaintiffs in Paragraph No. 21 have therefore prayed that the Defendants be directed to execute a Conveyance Deed, that Defendant No. 1 be directed to rectify the construction defects of building namely "Pluton", to construct/erect/install grills/fencing on the south west wall behind Cassia building, the Defendant No. 1 be restrained by an order of perpetual injunction from entering upon the Society premises and from carrying out the construction of 10th building in the Society premises. Hence the substantive relief sought in the Suit is against the Defendant No. 1 from constructing the 10th building in the Society premises which is Plot No. 2.

6. At this stage it would apposite to refer to the Agreement for Sale executed by and between the flat purchasers and the Developers i.e. the Respondent No. 1. One such Agreement is the Agreement dated 14/06/2005 entered into by the Developer with Shri Sitendra Subhash Soni. In the context of the issue which arises for consideration it would be necessary to reproduce the covenants of the said Agreement. Clauses 1(e), 1(g), 1(i), 1(l), 1(o), 9, 23 and 27 are relevant and reproduced herein under:-

1(e) The said property is divided into two plots being Plot A admeasuring about 11,500 sq. mts. and Plot B admeasuring about 32,200 sq. mts. The title of the Developers to the said property is setout more particularly in the Title Certificate dated 02nd February 2005 issued by the Advocates of the Developers annexed hereto as Annexure "A".

1(g) The said Developers have got the layout plan and building plan of the Buildings bearing No. CC/4080/04 dated 31st Jan 2005 approved and sanctioned

from the Pune Municipal Corporation. All the necessary permission and approvals to develop the said property by construction of buildings thereon as may be sanctioned have been obtained by the Developers from the concerned authorities.

1(i) The Developers are constructing on the said property commercial/residential buildings on Plot No. A and residential buildings on Plot B in phased manner comprising of multi storeyed buildings, units, shopping units etc. to be known as "ZIRCON". The Developers have commenced the construction of the said building on the said property as shown on the location plan annexed hereto.

1(l) The purchaser/s has/have demanded from the Developers and the Developers have duly given and the Purchaser/s has duly taken full, free and complete inspection of documents of title relating to the said property (including those recited herein above) as also the plans, designs and specifications prepared by the Developers/Architects and all other documents specified under the Maharashtra Ownership Flats (Regulation of Promotion, Construction, Sale, Management and Transfer) Act, 1963 (hereinafter called "the said Act") and the rules made there under and amended up to date and is/are fully satisfied with the same.

1(o) Relying upon the aforesaid the Developers have agreed to sell to the Purchaser/s and the Purchaser/s has/have agreed to buy from the Developers the said Unit at the price and on the terms and conditions herein contained.

9. The Purchaser/s is/are aware that the perspectives/elevation plans shown on the plans (approved by the PMC) and/or in the brochures are tentative and are likely to undergo change/s in course of construction which the Developers at their sole discretion may think fit and proper or as may be required by the concerned Authorities/Government to be made in them or any of them. The Purchaser/s shall have no objection/complaints of whatsoever on that account and hereby give their irrevocable consent for such changes.

23. It is hereby agreed between the parties that balance FSI/TDR if any in respect of the said property belongs to the Developers alone and that the Purchaser/s as also other purchasers of various Units in the said building shall not have any right, title and interest therein. It is agreed by and between the parties that if the permitted floor space index or density is not consumed in the building being put up and/or at any time further construction on the said property is allowed the Developers shall always have the right to put additional construction and/or consume the balance floor space index and/or additional floor space index of any other property whatsoever and the Purchaser/s shall not be entitled to claim any share, right title or interest in such additional F.S.I./TDR as aforesaid nor shall they be entitled to raise any objection whatsoever in respect of its use by the Developers in any manner they choose. The Developers shall be entitled to float the FSI/TDR of the property in the present scheme to any other property and vice versa if so permitted by the concerned authority. It is distinctly agreed that even after the said property is conveyed to the

Cooperative Society or Condominium the unutilised/balance and future FSI/TDR shall remain the property of the Developers and the Developers shall be entitled to use the same in any manner at their sole discretion.

27. The Developers shall have a right to make additions, and/or alterations and raise or put up additional structures or storeys on the said property, as may be permitted by the Pune Municipal Corporation and other Competent Authorities. If any portion of the said property is acquired or notified to be acquired by the Government, Pune Municipal Corporation or any other public body or authority the Developers shall be entitled to receive all the benefits in respect thereof and/or compensatory F.S.I. or all other benefits which may be permitted by the Pune Municipal Corporation or any other local body or concerned authority. Such additional structures and storeys will be the sole property of the Developers, who will be entitled to dispose it off in any way they choose and the Purchaser/s hereby irrevocably consents to the same. Under the circumstances aforesaid, the Purchaser/s shall not be entitled to raise any objection to or to any abatement in the price of the said Unit agreed to be acquired by him and/or any compensation or damage on the ground of inconvenience or any other ground whatsoever.

The defining clauses as it were are Clauses 1(e), 1(g), 1(i), 1(l), 1(o), 9, 23 and 27. In clause 1(e) there is a reference to both the plots and the title certificate of the Developers. In clause 1(g) there is a reference to the layout plan and building plan bearing No. CC/4080/04 dated 31st Jan 2005 approved and sanctioned by the Pune Municipal Corporation. In clause 1(i) it has been stated that the Developers are constructing on the said property commercial/residential buildings in phased manner comprising of multi storeyed buildings, units, shopping units etc. to be known as "ZIRCON". It has further been stated that the construction has been commenced of the said buildings on the said property as shown on the location plan annexed. In clause 1(l) it has been stated that the purchasers have been given full, free and complete inspection of documents of title relating to the said property as also the plans, designs and specifications prepared by the Developers/Architects and all other documents specified under the Maharashtra Ownership Flats (Regulation of Promotion, Construction, Sale, Management and Transfer) Act, 1963. In clause 1(o) it has been stated that relying upon the aforesaid the Developer has agreed to sell to the Purchasers and the Purchasers have agreed to buy from the Developers the said Unit at the price and on the terms and conditions herein contained. By clause 9 it is provided that the perspectives/elevation plans shown on the plans (approved by the PMC) and/or in the brochures are tentative and are likely to undergo change/s in course of construction which the Developers at their sole discretion may think fit and proper. By clause 23 it is provided that the parties agree that balance FSI/TDR if any in respect of the said property belongs to the Developers alone and that the Purchasers as also other purchasers of various Units in the said building shall not have any right, title and interest. It is further provided that if the permitted floor space index or density is not consumed in the building being put up and/or at any time further construction on the said property is allowed the

Developers shall always have the right to put up additional construction and/or consume the balance floor space index and/or additional floor space index of any other property whatsoever and the Purchaser/s shall not be entitled to claim any share, right title or interest in such additional F.S.I./TDR as aforesaid nor shall they be entitled to raise any objection whatsoever in respect of its use by the Developers in any manner they choose. It is further provided that the said property is conveyed to the Cooperative Society or Condominium the unutilised/balance and future FSI/TDR shall remain the property of the Developers and the Developers shall be entitled to use the same in any manner at their sole discretion. By clause 27 it is provided that the Developers shall have a right to make additions, and/or alterations and raise or put up additional structures or storeys on the said property, as may be permitted by the Pune Municipal Corporation and other Competent Authorities. The Agreement for Sale of the flats in question which are referable to clause 4 of the said Act contains the stipulations as above.

It is also required to be noted that in the location plan which has been annexed to the said Agreement 10 buildings have been shown. The said 10 buildings have been identified by different names. In so far as Building No. 4 is concerned, it is identified by the name "Aurum."

7. In the Suit in question the Plaintiffs filed an application for temporary injunction which was numbered as Exhibit 5. In the said application the fact that the 10th building is sought to be constructed on the plot reserved for car parking as per the plan dated 13/06/2008 was averred. It has also been averred that the Defendant No. 1 has contravened the provisions of the said Act and also contravened the terms and conditions of the Agreement by not providing the basic amenities like fencing etc and repair of major construction faults in Pluton building. It has further been averred that the Defendant No. 1 has flouted the mandatory responsibility to rectify the construction defects and thereby contravened the provisions of Section 7 of the said Act. It was further averred that in view of the said fact that the Plaintiffs were constrained to file the Suit in question. It is also averred that if the Defendant No. 1 is not restrained from constructing the 10th building on the suit property there would be pressure on the entire infrastructure like STP and PMC which is not sufficient for 288 families. The Plaintiffs therefore by way of the said application sought injunction against the Defendant No. 1 to restrain them from entering upon the Society premises and from carrying out the construction of 10th building in the Society premises till disposal of the Suit on merits.

8. The said application for temporary injunction was replied to on behalf of the Defendant No. 1. The Defendant No. 1 traced the sanction of the plans right from one of the first plans being 4080/2004 dated 31/01/2005 till the revalidation of the layout under the commencement certificate dated 7/9/2012. It was further averred in the said reply that the 1st approved lay out specifically provided that the development of the entire suit property consisting of two plots i.e. Plot No. 1

admeasuring 12238 sq. mtrs and plot No. 2 admeasuring 31461.78 sq. mtrs. It is further averred that Plot No. 1 provided for the construction of one commercial and one residential building each consisting of lower parking + 7 upper floor and building No. 3 sanctioned up to parking slab, whereas Plot No. 2 provided for the construction of 12 residential building, out of which the building Nos. 10, 11 and 12 as per the said layout were sanctioned up to the parking slab and rest of the buildings, including building No. 4 described by the Plaintiffs in the Suit as "10th building", was sanctioned for lower parking + 8 upper floors. In the said reply reference was made to the revised sanctioned layout plan under No. 8287/2005, further revised sanctioned layout plan under No. 7892/2006 under which the property was subdivided into 3 plots i.e. Plot No. 1 admeasuring 1655 sq. mtrs. providing for construction of residential building to be allotted to the landowners, Plot No. 2 admeasuring 30982.19 sq. mtrs. providing for construction of 9 residential buildings with lower parking + 8 floors and one building i.e. building No. 4 as per the original layout, which is described by the Plaintiffs as 10th building in the Suit is shown under the said layout as "Covered Parking No. 4", further expansion against TDR lower parking + 8 floors, 23.95 M.HT" and, plot No. 3 admeasuring 11062.81 sq. mtrs. including the open space No. 4 and amenity space thereby making provision for construction of commercial building. Hence in so far as Building No. 4 "Aurum" which was shown in the plan dated 31/01/2005 is concerned, the said building was not shown in the aforesaid approved layout at the location shown for the said building on account of the FSI being utilized in the construction of 9 buildings. However, the said building No. 4 as per the original plan was sanctioned upto covered parking and shown a covered parking No. 4 within an endorsement about future expansion against TDR thereby Defendant No. 1 had made its intention clear that a residential building was proposed to be constructed there at in future by acquiring TDR permissible as per DC Rules. The reply makes further reference to the further revised sanctioned layout plan No. 0146/08 dated 13/06/2008. Under this layout the land under road, amenity space, open space and internal road were segregated and the balance portion of land from the said entire property were subdivided into 3 plots i.e. Plot Nos. 1, 2 and 3 the area of Plot No. 1 remaining unchanged, the area of Plot No. 2 admeasuring 27287.19 sq. mtrs with a provision for construction of 9 residential buildings with lower parking + 8 floors and one building i.e. building No. 4 described in the original layout as 10th building is shown as sanctioned up to covered parking and shown as covered parking No. 4 i.e. up to first slab of 10th building. It has further been averred by the Defendant No. 1 that the said building i.e. Building No. 4 is completed up to plinth level about 3 to 4 years back. It has further been averred that the Defendant No. 1 had acquired TDR admeasuring 3050 sq. mtrs. It has been further averred that the Society is purposely trying to mis-interpret the provisions under the revised sanctioned layout plan bearing No. 0146/08 dated 13/06/2008 showing covered parking No. 4 where the construction of the 10th building i.e. building No. 4 as per the original sanctioned layout was and is intended to be constructed since beginning and which fact is made known to one

and all unit purchasers, in view of the fact that the first layout is expressly mentioned in the said Unit Purchaser Agreement and that the Defendant No. 1 as a promoter builder is clothed and vested with right and authority to make changes, additions, alterations, various and modifications in the plans and specifications. The Defendant No. 1 has referred to the covenants in the Agreement, in the said reply which have a bearing on the entitlement of the Plaintiffs to the relief of temporary injunction.

9. The Trial Court considered the said application (Exhibit 5) and has by its order dated 9/11/2012 rejected the said application. The gist of the reasoning of the Trial Court is that the intention of the Defendant No. 1 i.e. Developer to construct 10th building i.e. building No. 4 can be seen from the sanctioned layout plan dated 31/01/2005 and the brochure, and therefore, the said building was part of the entire project of the Defendant No. 1. The Trial Court held that the copy of the sanctioned plan dated 31/01/2005 and the brochure placed by the Defendant No. 1 on record, is not in dispute, that the plot in question was shown to be reserved for building No. 4 i.e. Aurum building which is described as 10th building in the Suit. The Trial Court further held that since beginning the Developer intends to construct building No. 4 described as the 10th building. The Trial Court held that though the plans are revised from time to time, there is no increase or decrease in the area of each unit and the amenities provided to them as well as open spaces. The Trial Court held that since Section 7A of the said Act allows a builder to construct additional building provided the construction forms part of the scheme or project and further held that if the promoter has disclosed the fact of additional FSI/TDR, then consent of the flat purchasers for additional construction would not be necessary. The Trial Court therefore held that the Defendant No. 1 has a right to construct building No. 4 i.e. 10th building shown as covered car parking and the Plaintiff Society has no right to seek stay of the said construction, and that the consent of the Society and its members is not necessary for carrying out the said construction. The Trial Court held that the Plaintiff Society has not made out a prima facie case for grant of discretionary relief of temporary injunction. The Trial Court as indicated above has accordingly rejected the application by its order dated 9/11/2012.

10. The Plaintiff Society aggrieved by the said order dated 9/11/2012 carried the matter in Appeal by filing Misc. Civil Appeal No. 498 of 2012. The Lower Appellate Court on a re-consideration of the material on record did not deem it appropriate to interfere with the discretion exercised by the Trial Court in rejecting the application for temporary injunction. The Lower Appellate Court held that in view of clauses 23 and 27, the Defendant No. 1 was entitled to put up additional construction. The Lower Appellate Court referred to the sanctioned plan in question and its revision and held that since in the said plan, the construction of building No. 4, described as 10th building, is proposed, the Defendants have made a full disclosure and cannot be said to have suppressed any material particulars which are required to be disclosed as contemplated in Section 3 of the said Act. The Lower Appellate Court accordingly dismissed the

said Appeal by the impugned order

11. Heard Shri N.V. Walawalkar, the learned Senior Counsel for the Petitioner-Society, Shri P.K. Dhakephalkar, the learned Senior Counsel for the Respondent No. 1, and Shri G.S. Godbole, the learned Counsel for the Respondent Nos. 2 to 111.

12. Submissions On Behalf Of The Petitioner By Learned Senior Counsel Shri N.V. Walawalkar

[A] That the Promoter/Developer is obliged in terms of Rule of the Rules of 1964 to make a full and true disclosure of the development potentiality of the plot which is the subject of the Agreement. If such disclosure is not made, then he has to take prior consent of the flat purchasers for carrying out additional construction in the plot. In support of the said contention, a reliance is placed on the judgment of the Apex Court reported in Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, .

[B] That in the instant case the fact that the covered parking No. 4 show in the revised sanctioned layout plan dated 13/06/2008 is being utilized for the 10th building has not been disclosed and therefore the Defendant No. 1 is not entitled to put up the 10th building without prior consent of the flat purchasers.

[C] That clauses 9, 23, and 27 of the Agreement cannot be construed as consent as such clauses have been termed as blanket consent which do not meet the requirements of clause 4 and Section 7A of the said Act. Reliance is placed on the judgments of the learned Single Judges of this Court in 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 in Shah and Mody Developers Vs. Alka Ketan Shah and Others, .

[D] That since the area of Plot No. 2 has been reduced to 27287.19 sq. mtrs from 31461.78 sq. mtrs. as is evidenced in the reply filed to the application for temporary injunction and as shown in the latest revised sanctioned layout, the same could not have been done without the consent of the flat purchasers. In support of the said contention, reliance is placed on the Judgment of the Division Bench of this Court reported in White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, .

[E] That since the construction of 10th building would lay additional burden on the infrastructure like STP and PMC water pipelines etc, prior consent of the Petitioner-Society is required to be taken. In support of the said contention, reliance is placed on the judgment of a learned Single Judge of this Court dated 7th September 2012 in Notice of Motion No. 1359 in Suit No. 1005 of 2011 in the matter of Malad Kokil Co-operative Housing Society Ltd. v/s. The Modern Construction Co. Ltd. and ors.

[F] That the Courts below have erred in coming to a conclusion that in view of

clauses 23 and 27 as also in view of reference to the sanctioned layout dated 31/01/2005 and the location map annexed to the brochure, the Plaintiffs have not made out a prima facie case for the grant of injunction.

13. Submissions On Behalf Of The Respondent No. 1 By Learned Senior Counsel Shri P.K. Dhakephalkar

[1] That the Promoter/Developer has made true and full disclosure of the scheme to be implemented on the plot in question. In the Suit Agreement there is a reference to the sanctioned layout plan and the commencement certificate No. CC/4080/04 dated 31/01/2005 wherein in fact twelve buildings have been shown on Plot No. 2 including Building No. 4 which is described as Building No. 10 by the Plaintiff.

[2] That in the revised sanctioned layout under No. 7892/2006 though Building No. 4 is shown as covered parking No. 4, it is clarified that future expansion against TDR lower parking + 8 floors, with height of 23.95 mtrs. and the flats proposed are shown as 320. Hence Building No. 4 is shown in the plan dated 31/01/2005 and though in place of Building No. 4 in the revised sanctioned layout is shown as covered parking, it is was clarified that it was subject to future expansion against TDR and the proposed building is also shown to be of 8 floors with the height also specified, as also the number of flats.

[3] That considering the fact that the sanctioned layout dated 31/01/2005 is a part of the Agreement for Sale and considering clauses 23 and 27 therein, the flat purchasers can be said to have consented to the development as per the scheme proposed and therefore there is no warrant to take prior consent of the flat purchasers in respect of the construction of Building No. 10.

[4] That full inspection has been given to the flat purchasers which is evidenced by clause No. 1(I) of the Agreement and it is after taking full inspection that the parties have entered into an agreement. The flat purchasers therefore cannot be heard to say that there is no true and full disclosure.

[5] That the contentions which are sought to be raised in the above Petition are not raised in the Suit and that the Suit is only founded on the basis of the averments referable to the revised sanctioned layout plan dated 13/06/2008 without making any reference to the earlier sanctioned layout i.e. the layout bearing No. 4080/04 dated 31/01/2005

[6] That instant Suit is a piece of clever drafting as without making any reference to the earlier sanctioned layout, reference to which is made in the Agreement, the Plaintiff by referring to the revised sanctioned layout plan dated 13/06/2008 is thereby making an attempt to project that the Promoter/Developer wants to change the user of the covered parking No. 4 to construct Building No. 10 without taking consent of the flat purchasers.

[7] That there is no change in the area of the Plot No. 2 as the area mentioned in the revised sanctioned layout dated 13/06/2008 is the net plot area without

amenity area and open space which can be seen from the sanctioned layout.

[8] That no area from Plot No. 2 is transferred or amalgamated with any adjoining plot and therefore the judgment of the Division Bench reported in White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, . has no application. There is a common thread running in all the judgments relied upon by the Petitioner which is to the effect that the Promoter/Developer has to make a true and full disclosure of the scheme of development. In the instant case, the said condition can be said to be fulfilled as in the Agreement there is a reference to the sanctioned layout dated 31/01/2005 and also in the location map in the brochure 10 buildings by name have been shown.

[9] That the orders passed by the Courts below are based on the clauses/covenants in the Agreement, and the disclosure of the entire scheme is made at the time of entering into the Agreement, the orders of the Courts below therefore call for no interdiction at the hands of this Court under Article 227 of the Constitution of India.

14. Submissions On Behalf of The Respondent No. 2 to 111 by Learned Counsel Shri G.S. Godbole

[i] That the location plan annexed to the Agreement shows in all 10 buildings wherein Building No. 4 "Aurum" is shown which is now described as Building No. 10 by the Plaintiff and therefore the disclosure as regards the 10th Building has been made in the brochure itself.

[ii] All the layouts have been sanctioned and there is a certificate of the Architect concerned to the said effect. Hence the contention of the learned Senior Counsel for the Petitioner that there is no sanction to the layouts cannot be accepted and the Courts below were therefore right in holding that the Defendant No. 1 cannot be restrained from putting up the construction as per the sanctioned layout.

Consideration

15. Having heard the learned Senior Counsel for the parties, I have bestowed my anxious consideration to the rival contentions. The issue which arises for consideration is whether the Promoter/Developer has made a true and full disclosure of the scheme? Or whether the Promoter/Developer is liable to take prior consent of the flat purchasers now represented by the Plaintiff No. 1 Society for putting up 10th Building? The answer to the said issue lies in the agreement for Sale which has been referred to in the impugned orders. As indicated herein above in this judgment, in the said Agreement a reference is made to the sanctioned layout No. 4080/04 dated 31/01/2005 in which sanctioned layout 12 residential buildings have been shown which includes Building No. 4 which is described by the Plaintiff as Building No. 10. In the brochure which was printed by the Promoter/Developer the location map has been annexed wherein 10 buildings which are proposed to be constructed in the Suit plot are shown amongst which is Building No. 4 by the name of "Aurum". In

so far as the Agreement for Sale entered into with the flat purchasers is concerned, there is a specific reference to the sanctioned layout dated 31/01/2005 which contains 12 buildings. Even prior thereto in the brochure printed by the Developer, the Building No. 4 by the name of "Aurum" is shown.

16. Now coming to the covenants as indicated herein above Covenant Nos. 9, 23 and 27 are relevant in the context of the issue which has been referred to herein above. In terms clause 9 it is provided that the perspectives/elevation plans shown on the plans (approved by the PMC) and/or in the brochures are tentative and are likely to undergone change/s in course of construction which the Developers at their sole discretion may think fit and proper. By clause 23 it is provided that the parties agreed that balance FSI/TDR if any in respect of the said property belongs to the Developers alone and that the Purchaser/s as also other purchasers of various Units in the said building shall not have any right, title and interest. It is further provided that if the permitted floor space index or density is not consumed in the building being put up and/or at any time further construction on the said property is allowed the Developers shall always have the right to put up additional construction and/or consume the balance floor space index and/or additional floor space index of any other property whatsoever and the Purchaser/s shall not be entitled to claim any share, right title or interest in such additional F.S.I./TDR as aforesaid nor shall they be entitled to raise any objection whatsoever in respect of its use by the Developers in any manner they choose. What is further relevant to note is that even after the said property is conveyed to the Cooperative Society or Condominium the unutilised/balance and future FSI/TDR shall remain the property of the Developers and the Developers shall be entitled to use the same in any manner at their sole discretion. By clause 27 it is provided that the Developers shall have a right to make additions, and/or alterations and raise or put up additional structures or storeys on the said property, as may be permitted by the Pune Municipal Corporation and other Competent Authorities. The said Agreement for Sale as indicated above is referable to Clause 4 of the said Rules and which Agreement the stipulations as above are contained. In clause 1(i) it has been stated that the Developers are developing the said property in a phased manner. A reference could also be made to clause 1(l) of the Agreement for Sale wherein it is stated that the Developer has given full inspection and the Purchaser/s has taken such inspection and after taking inspection has entered into the Agreement after satisfying himself. Having regard to the Agreement in question as also the stipulations contained in the covenants thereto, prima facie it can be said that there is a full and true disclosure made by the Promoter/Developer and therefore the Promoter/Developer is not liable to take prior consent of the flat purchasers for putting up the 10th Building i.e. the building original shown as Building No. 4.

17. Now coming to the plaint in question, it is significant to note that the Plaintiff which is a Society of the flat purchasers who have executed individual agreements with the developer has chosen the starting point, to be the revised sanctioned layout No. 0146/08 dated 13/06/2008 which was furnished to it. The

averments are made on the said basis. The breach of the obligation imposed by the said Act is sought to be alleged on the basis that the covered parking No. 4, which is shown in the revised sanctioned layout, is now sought to be utilized for constructing Building No. 10. Significantly in the plaint there is no reference to the sanctioned layout dated 31/01/2005 which is referred to in the Agreement for Sale or even a reference to the location map which is a part of the brochure. This in my view seems to have been advisedly done as otherwise in view of the reference to the sanctioned layout dated 31/01/2005 and the stipulations contained in the covenants in the Agreement the contention of the Plaintiff-Society that the Developer is seeking to put up a building in the place of covered parking No. 4 holds no water. There is therefore substance in the contention of the learned Senior Counsel appearing for the Respondent No. 1 that the plaint in the Suit is a piece of clever drafting as by directly referring to the revised sanctioned layout dated 13/06/2008 without referring to the antecedent sanctioned layout plans, the Plaintiff wanted to project that a change is being made by the Developer without seeking prior consent of the flat purchasers.

18. In so far as Building No. 4, which is described as Building No. 10 by the Plaintiff, is concerned, it is pertinent to note that in the sanctioned layout dated 31/01/2005 the said building is shown and though in the sanctioned layout of 2006 it is shown as car parking No. 4. It is clarified that there would be future expansion against TDR and the extent of the construction that would be put up is also disclosed i.e. lower parking + 8 floors and height of the building is mentioned as 23.95 mtrs. It is after obtaining TDR that the Building No. 4 which has always been a part of the original scheme of development is now sought to be constructed. The flat purchasers therefore cannot be heard to say that their prior consent was required to be taken, as firstly the Building No. 4 was proposed in the original scheme of development which has been disclosed to the flat purchasers in terms of the sanctioned layout dated 31/1/2005 and secondly the flat purchasers cannot object to the use of TDR in view of clauses 23 and 27 of the Agreement.

19. The learned Senior Counsel appearing on behalf of the Petitioner vehemently urged that there is a change in the area of Suit Plot No. 2. It was the submission of the learned Senior Counsel for the Petitioner that the area of Plot No. 2 has been changed from 31461.28 sq. mtrs to 27287.19 sq. mtrs. It is required to be noted that there is no such ground in the Suit as the only ground is that covered parking No. 4 is sought to be utilized for construction of residential Building No. 10. In so far as the said contention is concerned, the learned Senior Counsel for the Respondent No. 1 submitted that there is no change in the area of Plot No. 2 and the reduced area is on account of the fact that only the net plot area is shown minus the pro-rata amenity area and the open space. This the learned Senior Counsel for the Respondent No. 1 sought to buttress by relying upon the revised sanctioned layout plan. Prima facie the contention of the learned Senior Counsel for the Respondent No. 1 has substance, as in the sanctioned layout in the table the net plot area is shown and the area of amenities and open space is

separately shown. Hence at the prima facie stage there does not appear to be substance in the said contention. There is also no amalgamation of any area of Plot No. 2 with any adjoining property, hence the judgment of the Division Bench in White Towers Co-op. Housing Society Ltd. (supra) wherein there was amalgamation of a part of the suit plot with the neighbouring plot has no application.

20. A contention was also raised on behalf of the Petitioner by the learned Senior Counsel Shri Walawalkar that all the revised layouts have not been sanctioned. In my view, there is no substance in the said contention also. As the sanction of the layouts is evidenced by the certificate issued by the Architect of the Respondent No. 1 and therefore the Promoter/Developer would be entitled to put up Building No. 10 as per the layout sanctioned by the Local Authority i.e. the Pune Municipal Corporation. In so far as contention in respect of the pressure on the infrastructure on account of the construction of the Building No. 10 is concerned, in my view, the said objection cannot be countenanced once there is a true and full disclosure of the complete scheme by the Developer. It is only when there is no full disclosure that the said contention would be available to the flat purchasers. The instant case is a case wherein the scheme of development has been disclosed and in fact the sanctioned layout dated 31/01/2005 envisages the construction of 12 buildings amongst which is the Building No. 4 described as Building No. 10 by the Plaintiff, and therefore, this is not a case where the nature of construction has undergone a drastic change, for example from a building having 5 storeys to a building having 25 storeys. In my view therefore the judgment of the learned Single Judge in Malad Kokil Co-operative Housing Society Ltd. (supra) would have no application in so far as the contention regarding pressure on infrastructure is concerned.

As indicated above in the judgments cited (supra) on behalf of the Petitioner-Society the common thread running can be crystallized thus:-

The 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.

Conclusion

21. In the light of the covenants contained in the Agreement, the reference to the sanctioned layout No. 4080/2004 dated 31/01/2005 therein, as also the brochure, at the prima facie stage it can be said that the Defendant No. 1 has made a true and full disclosure of the complete scheme of development to the flat purchasers, hence there is no necessity for the Defendant No. 1 to take prior consent of the flat purchasers for the construction of the 10th building. The

Plaintiff therefore cannot be said to have made out a prima facie case for the grant of the discretionary relief of injunction. In my view, the view taken by the Courts below cannot be said to be a view which could not be taken in the facts and circumstances of the case. Hence no case for interdiction in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed. Rule discharged with parties left to bear their respective costs.