Messrs. Manratna Developers vs Megh Ratan Co-Operative on 23 October, 2008

Author: Swatanter Kumar

Bench: Swatanter Kumar

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IN THE HIGH OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 297 OF 2008
IN
NOTICE OF MOTION NO. 1966 OF 2008

IN
SUIT NO. 1698 OF 2008

MESSRS. MANRATNA DEVELOPERS,

a Partnership Firm registered under the
provisions of Indian Partnership Act,

having its Office at 12th Floor,
Krushal Commercial Complex
G.M. Road, Chembur (West),

Mumbai 400 089. ..... Appellants.

Versus.

1. MEGH RATAN CO-OPERATIVE

HOUSING SOCIETY LIMITED,

a co-operative housing society
Registered under the provisions of
The Maharashtra Co-operative Societies
Act, 1960 and having its Office at

Meghratan Building, Junction of Tilak and
Derasar Lane, Ghatkopar (East)
Mumbai 400 077.

2. MESSRS. RUSHABH RIKHAV

ENTERPRISES,a firm registered
under the provisions of
Indian Partnership Act, having Office
at present at 505, Churchgate Chambers,
5, New Marine Line, Mumbai 400 023.

3. NEELKANTH MANSIONS PVT. LTD.,
a company registered under the provisions

of Companies Act, 1956,
having its office at Fine House,

Anandji Lane, Ghatkopar (east),
Mumbai 400 077

4. MUNICIPAL CORPORATION OF

GREATER MUMBAI,
A statutory Corporation having its
registered Office at Mahapalika Bhavan,
2nd Floor, Mahapalika Marg.,

Fort, Mumbai 400 001. ..... Respondents.

Dr. Virendra Tulzapurkar, Sr. Advocate a/w Mr. S. V. Doijode and Mr. Meenaxi Iyer i/b. Doijode Associates for the appellants.

Mr. M. P. Vashi a/w. Mr. H.J. Topat i/b, M/s. M. P. Vasti & Associates for the respondents.

CORAM : SWATANTER KUMAR , C.J., &

A.P. DESHPANDE, J.

Date of Reserving the Judgment :
12/9/2008

Date pronouncing the Judgment.:
23/10/2008

J U D G M E N T :

(Per A.P. DESHPANDE, J.) This appeal is directed against an ad interim order passed by the learned Single Judge dated 25th June, 2008, restraining the appellants from carrying on the construction in according with the modified sanctioned plan dated 10th April, 2007 (Exhibit-L to the plaint) till disposal of the Notice of Motion. The appellants are also restrained by an order of injunction from removing existing underground water tank and pump room.

2. The facts leading to the controversy in this appeal are briefly stated herein below :

The original defendant No.1 was owner in possession of a large plot of land which comprised of some vacant area, together with various dilapidated old structures occupied by the tenants. As there were many structures on the premises, defendant No.1 decided to develop the entire plot in phased manner anticipating that in due course of time the tenants would vacate the premises. Defendant No.1 with the said object in mind, got the original plans sanctioned from the Municipal Corporation of Mumbai in the year 1987. The original plans proposed construction of two buildings i.e. Building "A"

and Building "B". Building "A" was in the form of letter "C", having 3 wings, the lower wing, middle wing and upper wing. Defendant No.1 did construct only the lower wing/arm of building "A"; whereas, the other two parts of building "A" and the entire building "B" were not constructed. This, according to defendant No. 1 was for the reason that the tenants did not vacate the adjoining area and, hence, it was not possible for defendant No.1 to carry out the construction in accordance with the then sanctioned plans.

3. As stated hereinabove, the lower arm of building "A" is already constructed and the same is consisting of ground plus 7 upper floors. The said constructed building is occupied by the flat purchasers who are the members of the Plaintiff Co-operative Housing Society. The suit has been filed by the co-operative housing society, voicing the grievance of the Society and its Members who are in occupation of their respective flats in the constructed portion of building "A". The plaintiff has placed on record a specimen of an agreement of sale entered into by defendant No.1 in favour of one of its Members by name Smt. Vijayaben Sobhagchand Shah & anr. dated 15.9.1988. It is not much in dispute that other agreements entered into by defendant No.1 with other flat owners, during that period, are akin to the agreement of which a copy has been filed along with the plaint. Subsequent thereto, the defendant No.1 entered into an agreement with defendant No.2 in respect of the development of the property, which agreement, ultimately, culminated in execution of a conveyance in favour of defendant No.2 on 21.6.06.

4. At a later point of time, defendants No.1 and 2 together, further conveyed the property to defendant No.3. Defendant No.3, in turn, submitted amended/modified plans to the Municipal Corporation and the Municipal Corporation has sanctioned the modified plans as it found the same to be in conformity with the Development Control Rules/Building Buy-laws. The modified sanctioned plans obtained by defendant No.3 from the Corporation forms the subject-matter of dispute in this suit instituted by the plaintiff. The modified plans have been sanctioned by the Corporation on 10.4.07. One of the prayers made by the plaintiff is that the said modified plans are contrary to law and not enforceable. In short, the case of the plaintiff is that in the first place the modified plans reduced the area of recreation ground meant for the use of the flat owners. Secondly, by the modified plans which are sanctioned, the area of FSI largely increases and the same could not have been permitted by the Corporation, as what was represented to the flat purchasers was lesser FSI. Lastly, it was contended that without the consent of the flat purchasers, no modification of the building plan can be sanctioned which permits construction of additional structure which was not shown in the original sanctioned plan, relying on which the flat purchasers had agreed to purchase

the flats.

5. Before we deal with the contentions raised by the learned Advocates appearing for the respective parties, it would be appropriate to refer to the factual premise on which the learned Single Judge has proceeded to grant the ad interim relief.

The learned Single Judge has held that in the new modified plan at Exhibit L the area of the recreation ground is kept blank; whereas the plan at Exhibit J dated 26.8.87 shows the area of the recreation ground to be 315.93 sq. metres. On this factual premise, the learned Single Judge concludes that the proposed modification which reduces or eliminates the common area would go to deprive the members of the plaintiff of the amenities provided and represented to them under the original sanctioned plan. In para 15 of the order, the learned Single Judge observes thus : "In the circumstances, prima facie it appears that the amenities of the flat holders would be reduced if the building is allowed to be constructed in accordance with the modified plan at Exh. "L". In the circumstances, in my view the plaintiffs are entitled to an injunction, restraining the defendants from carrying on construction in accordance with the modified plan dated 10th April, 2007." The said observation is factually incorrect. We have perused the modified plan which has been sanctioned by the Corporation, of which a copy is also placed on record by the Commissioner. Perusal of the said documents clearly indicates that the area of the recreation ground has not been reduced, but has been increased to some extent. The area of the recreation ground under the modified plan is shown to be 367.85 sq. metres as against an area of 315.93 sq. metres shown in the original plans. This factual position is not disputed by the learned Counsel appearing for the respondents/plaintiffs. Thus, the finding recorded by the learned Single Judge about non-stipulation of the recreation ground area in the modified plain is wholly unsustainable being contrary to the fact situation. This appears to be the main reason to prompt the learned Single Judge to grant ad interim injunction, as in the opinion of the learned Single Judge the said modification in regard to the recreation area has deprived the flat purchasers of the amenities represented under the original plan.

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 Co-operative Housing Society vs. Kiran Builders Pvt. Ltd., reported in 1986 MLJ 110 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 7-A was newly inserted which was of a clarificatory nature.

By amending Section 7, the words "or construct any additional structures" were deleted. Section 7-A 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 7-A, 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.

7. Interpreting the relevant provisions of the MOFA, the Supreme Court in the case of M/s. Jayantilal Investments vs. Madhuvihar Co-op. Housing Society & Ors. reported in 2007(2) All MR 398, held in paragraph 15, thus :

> " 15. ... Consequently, reading Section 7 and Section 7-A, it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any construction of additional structures. However, the right to make any construction of additional structures/buildings would come into existence only on the approval of the plan by the competent authority. That, unless and until, such a plan stood approved, the promoter does not get any right to make additional construction. This position is clear when one reads the amended Section 7(1)(ii) with Section 7-
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> A of the MOFA as amended. Therefore, having regard to the Statement of Objects and Reasons for substitution of Section 7(1)(ii) by the Amendment Act 36/86, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act No.36/86 was to change the basis of the judgment of the Bombay High Court in Kalpita Enclave case (supra). By insertion of Section 7-A vide Maharashtra Amendment Act 36/86 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total layout allows construction of more buildings, subject to compliance of the building rules or building by-laws or Development Control Regulations."

Thus, it is clear that the contention of the plaintiff that in the absence of the consent of flat purchasers that the developer/promoter cannot raise additional structure or building despite sanction of the modified plan by the local authority, is illfounded.

8. The learned Single Judge has placed emphasis on the observations made by the Supreme Court in M/s. Jayantilal Investments case in para 17 of the Judgment. It is observed therein that clauses 3 and 4 of prescribed Form V is statutory and mandatory and shall be retained in individual agreements between the promoter and the flat taker. However, while reproducing clause 4 in the impugned order, the learned Single Judge has also reproduced the deleted portion from the said clause and it appears to have relied upon the deleted portion as well. The following portion which has been extracted as part of clause 4 has been deleted by a Notification issued in that regard : "Whereas after the registration of the Society the residual F.A.R.(F.S.I.) shall be available to the Society". Clauses 3 and 4 oblige the promoter under MOFA to make true and full disclosure even

after inclusion of Section 7A. It will have to be seen with reference to the terms of the agreement as to whether the promoter/developer has made true and full disclosure.

The main grievance of the plaintiffs is that the FSI revealed in the agreements entered into in the year 1988 with the flat purchasers clearly reveals the FSI proposed to be consumed to be 2490.84 sq. metres; whereas the modified plan shows the FSI to be 4460 sq. metres. This increase is obviously by utilising the floating FSI/transferable development rights (for short "TDR") of another property to the extent of 1970 sq. metres. According to the plaintiffs, this use of floating FSI/TDR has not been stated and/or represented to the flat purchasers. According to the defendants, the concept of TDR was not prevailing in the year 1988 when defendant No.1 had entered into agreement with the flat purchasers and the same has been introduced for the first time in the year 1991 on account of changes brought about in the Development Control Rules. According to the learned Counsel for the appellants, the promoter/developer cannot be blamed for the so called non-disclosure of their intention to use the TDR in the year 1988, as such loading of TDR was for the first time permitted in the year 1991. It cannot, thus, be said to be a non-

disclosure because the same was then not even known to the builder/promoter. The said submission deserves consideration. This issue, with respect to the learned Single Judge, has not been addressed.

9. Let us now examine the various clauses in the specimen agreement, to find out as to what was represented by defendant No.1 to the flat purchasers when the agreement was executed in the year 1988.

10. Clause (1) of the agreement records the fact that a building consisting of ground and 7 upper floors has been constructed in accordance with the approved plans and the relevant portion of clause (1) reads as under :

> " The Promoters also intend to commence in due course, further development of the said property in accordance with the said sanctioned Plans phase wise or any variation or modification or any amendments thereof, as may be approved by the concerned authorities, from time to time."

Clause 4 declares the FSI to be approximately 27,540 sq. feet and it further records that "the said Floor Space Index is to be utilized/developed phase wise as per sanctioned plans or further amendment thereof and that no part of the said floor space index has been utilized by the Promoters elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the Promoters elsewhere then the Promoters shall furnish to the Purchaser all the detailed particulars in respect of such utilization of the said floor space index by him. In case while developing the said property the Promoters utilized any floor space index of any other land or property by way of floating floor space index etc. then the particulars of such floor space index shall be disclosed by the Promoters to the Purchaser. The Purchaser shall have no right/Title/interest in the said FSI of the Plot for Present and Future and only Promoters are entitled for the same. The residual F.S.I. in the plot or the layout not consumed will be available to the Promoters till the conveyance of the said property in favour of the Society."

11. From the agreement it is revealed that the parties had agreed that the promoters would be developing the property in phased manner and in accordance with the sanctioned plans or modified sanctioned plan as approved by the concerned authority. The entire FSI/TDR was to be used by the Promoter to the exclusion of the flat purchasers or the Society that they would form. The disclosure only in regard to TDR is not made in the agreement, as according to the appellant the very concept of TDR was non-existent in the year 1988.

Thus, on that count, it could not be said that the appellants have not made true and full disclosure, as is obliged to be made by them under under clauses 3 and 4 of the agreement.

12. Taking over all view of the matter whats surfaces is that the defendants have constructed only one wing of a building which is very small portion even according to the original sanctioned plan. Rest of the property could not be developed though was intended to be developed in phased manner, as according to the appellants, the premises were not vacated by the tenants. However, after a portion of the plot was vacated by the tenants residing in the dilapidated structures, it became feasible for the defendants to develop the property upto its permissible full potential and thus modified plans in accordance with the building bye-laws were submitted to the Corporation. The local authority, on being satisfied that the defendants were not constructing anything in excess of what is permissible according to the potential of the property, sanctioned the modified plan and after approval of the modified plans, the appellant was proceeding to carry out the construction which was objected to by the flat purchasers of erstwhile lower arm of Building "A". The amenities in the form of recreation ground are, in no way, reduced.

The consent of the flat purchasers after amendment of Section 7 and insertion of Section 7A is not necessary if additional structures/buildings are to be raised after obtaining approvals or sanction from the Municipal Corporation. The balance of convenience lies in favour of the defendants, as restraining them from carrying out the proposed construction which has been sanctioned by the Municipal Corporation, would cause undue hardships and inconvenience and lock the property for years. We are also of the view that the agreements entered into with the flat purchasers clearly postulate the development of the property in phased manner, according to the sanctioned plans or modified plans sanctioned in due course of time. Thus, prima facie, the appellants/defendants appear to have complied with the requirement of true and full disclosure as envisaged by Clauses 3 and 4. There could not have been disclosure in regard to TDR, as the very concept of TDR was not prevailing when the agreement was entered into in the year 1988 and had been introduced by the Development Control Rules in the year 1991.

Hence, the appellants/defendants cannot be blamed on that count.

13. Having regard to these and other relevant factors, we are of the view that the plaintiff had failed in making out a prima facie case for grant of an injunction. The modified plans do not, in any manner, affect the individual flats or the existing building wherein the flat holders are residing. The modified plans also do not reduce the area of recreation ground represented way back in the year 1988. On the contrary, the area is increased.

14. In this view of the matter, it is not possible to hold that any irreparable loss would be caused to the plaintiff if ad interim injunction is refused. In the result, and for the reasons stated herein above, we are constrained to interfere with the impugned order. The appeal, thus, succeeds and the impugned order passed by the learned Single Judge dated 25/6/2008 in Notice of Motion No.1966 of 2008 in Suit No.1698 of 2008 is quashed and set aside.

CHIEF JUSTICE A.P. DESHPANDE, ssm