

NO PRIOR CONSENT OF A FLAT TAKER IS REQUIRED BY A PROMOTER FOR ADDITIONAL CONSTRUCTION ONCE THE ENTIRE PROJECT IS DISCLOSED

INTRODUCTION:

*The Bombay Court in its decision in **M/s Krishna Constructions & Ors vs. Mr. Subhash Uttam Dalvi & Ors**¹, held that once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations.*

FACTS:

The Appellants have challenged the interim order passed by the Trial Court in an Interim Application preferred in a suit filed by Respondent No. 1 wherein the Appellants are arrayed as Defendant Nos. 1 to 3.

Respondent No. 1 (original Plaintiff) is a purchaser of Flat No. 502, admeasuring 67.11 Sq. mtrs, 5th floor ("suit flat") in the building, Lotus Court ("said building") developed by the Appellants.

Appellant No. 1 is a promoter of the said building whereas, Appellant Nos. 2 and 3 are the directors of Appellant No. 1.

The Appellants executed an agreement dated 20th January, 2017 in favour of Respondent No. 1 in respect of the suit flat under the provisions of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA") for a total consideration of INR. 43 lakhs.

The said suit challenges the sanctioned layout on the ground that it was altered without the

informed consent of Respondent No. 1 and *inter alia* prayed for rectification in terms of the agreement and specific performance of the rectified agreement and challenging the amendment to the sanctioned layout. Respondent No. 1 has also prayed for a declaration that the additional floors constructed as per the amended plan are illegal and therefore challenged the flat purchaser agreements in favour of the flat purchasers of the said additional floors.

In the interim application filed by Respondent No. 1, the Trial Court was pleased to reject Respondent No. 1's prayer for a temporary mandatory injunction to hand over possession of the suit flat; however, the Trial Court restrained the Appellants from carrying out any activity in the said project with respect to additional construction and from dealing with or creating any further third party interest and handing over the possession of the flat purchasers of the additional floors. Likewise, Respondent Nos. 2 to 4 were restrained from sanctioning and revising any plan, issuing any permission, sanction with respect to additional

¹ Appeal From Order No. 744 of 2024

construction not forming part of the disclosure made to Respondent No. 1 (original plaintiff).

The present appeal was admitted *vide* order dated 21st January, 2022 and by way of an ad-interim relief, the Bombay High Court stayed the temporary injunction granted by the Trial Court. Thereafter, Respondent No. 1 filed a Special Leave Petition ("SLP") in the Apex Court which was accordingly allowed and the ad-interim relief granted by the Appellate Court was vacated. The Bombay High Court was also requested to hear and finally decide the appeal.

ISSUE FOR CONSIDERATION:

The main issue for consideration before the Bombay High Court was whether the impugned judgment and order dated 16th July, 2024 passed by the Trial Court is sustainable.

SUBMISSIONS ON BEHALF OF THE APPELLANTS:

The Appellants submitted that after filing of the suit, Respondent No. 1 called upon them by his letter dated 25th November, 2023, seeking possession of the suit flat. In reply, the Appellants intimated Respondent No. 1 of cancellation of the agreement executed in Respondent No. 1's favour with a refund – the Appellant accordingly filed a Written Statement-cum-Counter Claim and prayed for a declaration that the agreement in favour of Respondent No. 1 stands cancelled.

It was submitted that Respondent No. 1 did not challenge the termination of the agreement in the said suit. Hence, the suit for specific performance of a terminated agreement was not maintainable.

The Appellants also submitted that the notice dated 20th February, 2023 issued by Respondent

No. 1 was suppressed by him at the time of filing the said suit, hence, the Appellant had contended the same in his written statement. The only grievance made by Respondent No. 1 was regarding the extension of time for completion of the construction – Respondent No. 1 never raised any grievance with regards to the informed consent for the additional construction. The notice issued by Respondent No. 1 is silent about the challenge raised by him in the suit. The conduct of Respondent No. 1 indicates that the grounds raised in the suit are by way of an afterthought – Respondent No. 1 had already accepted the additional construction and had called upon the Appellants to handover possession of the suit flat.

It was further submitted that, the cause of action pleaded by Respondent No. 1 was of December, 2022; however, the suit was filed on 14th September, 2023 which was after the construction of the said building was completed and the third-party rights had been created in favour of flat purchasers for the additional floors.

The Appellants argued that the consent as contemplated under Section 7(1)(ii) of MOFA was obtained from Respondent No. 1 as recorded in paragraph 11 of Respondent No. 1's agreement – the clauses in the said agreement showing the informed consent of Respondent No. 1 are challenged for the first time in the suit. Further, that Respondent No. 1 was aware of the informed consent as contemplated under the provisions of MOFA. Thus, the clauses in paragraph 11 of the agreement containing the informed consent of Respondent No. 1 are valid and subsisting unless the Respondent No. 1 succeeds in the prayers in the suit challenging the said clauses.

The Appellants also submitted that the Trial Court was required to consider the three golden

rules for the grant of a temporary injunction which it had completely ignored.

The sanctioned plan attached to Respondent No. 1's agreement and the relevant clauses in the agreement clearly indicate disclosure of full potential of land under development among other things and that there is no substance in the grievance raised by Respondent No 1 that the additional construction would hamper the structural integrity of the said building.

In support of its submissions, reliance was placed upon the following judgments in *Jayantilal Investments vs. Madhuvihar Co-op Housing & Ors.*²; *Manratna Developers, Mumbai vs. Megh Ratan Co-operative Housing Society Ltd. Mumbai & Ors.*³; *Zircon Venture Co-operative Housing Society Ltd., Lohagaon, Pune vs. Zircon Ventures, Pune & Ors.*⁴; *Ambalal Sarabhai Enterprise Limited vs. KS Infraspace LLP Limited & Anr.*⁵; *Lakeview Developers vs. Eternia Co-operative Housing Society Ltd.*⁶; *Dosti Corporation, Mumbai vs. Sea Flama Co-operative Housing Society Ltd. Mumbai & ors.*⁷ and *Madhuvihar Co-operative Housing Society, Mumbai & Ors vs. Jayantilal Investments, Mumbai & Ors.*⁸

The Appellants submitted that the conduct of Respondent No. 1 does not deserve any discretionary relief as envisaged under Order 39 Rule (1) and (2) of the CPC and that the principle of delay defeats equity would fairly apply to the facts of the case. It was submitted that in view of suppression of issuance of notice in January, 2023 calling upon the Appellants to handover the possession of the suit flat, without making any grievances about the additional

construction, Respondent No. 1 is not entitled to any discretionary relief as granted by the Trial Court.

The Appellants submitted that what was held in *Jayantilal Investment (supra)* was that in absence of consent of flat purchasers, the promoter cannot raise additional structure without sanction of the modified plan – in the present case, no express consent was necessary since the additional structure has come up after the sanction of the local authority.

According to the Appellants, Respondent No. 1 had failed to prove any *prima facie* case, a balance of convenience, irreparable loss and therefore, the impugned order deserved interference of the Bombay High Court.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

It was submitted by Respondent No. 1 that the entire complexion of the project due to additional constructions and that the Trial Court has considered Respondent No. 1's contention regarding the change in the nature of the amenities while granting the interim injunction.

On the aspect of informed consent, Respondent No. 1 relied upon paragraphs 14 and 15 of *Jayantilal Investments (supra)* to submit that only in the event of constructing an additional building, informed consent from the flat purchasers will not be necessary; however, in view of Section 7(1) (ii) of MOFA, the informed consent of the flat purchasers would be necessary in the event any additional construction is proposed in the same building, which amounts to a change in the nature of the

² (2007) 9 SCC 220 2 2009

³ Mh.L.J. 115 3 2014

⁴ Civil Application No. 103 of 2019

⁵ Mh. L. J. 481 4 (2020) 5 SCC 410

⁶ SCC 410 5 2015

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⁷ AO No.117 of 2016

⁸ First Appeal No. 786 of 2004 with First Appeal No. 989 of 2004

building – a separate consent may not be necessary only when there is a specific disclosure in the agreement of any proposed change or addition to the building. Respondent No. 1 submitted that the FSI potential was increased by way of amended plans.

It was also submitted that the term 'prior consent' would include the disclosure of everything – the Appellant is not entitled to carry out changes which would amount to change in the complete complexion of the building – the clauses in paragraph 11 of the agreement would amount to a blanket consent contrary to the provisions of MOFA.

In support of his submission, Respondent No. 1 placed reliance on the judgment in *Madhuvihar Co-operative Housing Society (supra)* to submit that the legal principles settled therein apply squarely in Respondent No. 1's favour. It was also submitted that the legal principles settled in *Manratna Developers (supra)* are distinguished in the decision of *Lakeview Developers (supra)*.

Respondent No. 1 placed reliance upon the decision in *Malad Kokil Co-operative Housing Society vs. The Modern Construction Co. Ltd.*⁹ to submit that the Bombay High Court had held that if the floor space index is utilized by the promoter elsewhere, then the promoter is required to furnish to flat purchasers with all the detailed particulars in respect of such utilization. The promoter is not only required to make disclosure concerning the inherent FSI but also required to declare whether the plot in question in future is capable of being loaded with additional FSI/TDR. Therefore, in the absence of disclosure of the project's full potential, the clauses in paragraph 11 of Respondent No. 1's agreement would amount to taking a blanket

consent contrary to the legal principles settled by this court in the case of *Madhuvihar CHS*.

Respondent No. 1 further submitted that the termination letter issued after filing of the suit would not be relevant for deciding the prayers for an interim injunction and since the suit was filed on 14th September, 2023 and the Appellant issued the termination on 27th November, 2023, it would be open to Respondent No. 1 to challenge the termination. Hence, on the ground of termination not being challenged at this stage, Respondent No. 1 cannot be denied the relief of a temporary injunction.

Placing reliance upon the decision in *Wander Ltd. vs Antox India (P) Ltd*¹⁰ Respondent No. 1 submitted that in view of the legal principles settled therein, the plausible view taken by the Trial Court may not be interfered with only on the ground that a different view would be possible.

JUDGMENT:

The Bombay High Court observed that in the decision of the Apex Court in *Jayantilal Investments (supra)*, the Court has held that once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations.

The Court observed that it's been its consistent view that the consent as contemplated under Section 7 (1) of the MOFA has to be an informed consent which is to be obtained upon a full disclosure by the developer of the entire project

⁹ (2012) 46 BOM C.R. 476

¹⁰ 1990 (Supp) SCC 727

and that a blanket consent or authority obtained by the promoter at the time of entering into agreement of sale would not be consent contemplated under the provisions of MOFA.

The Court observed that the decision in the case of *Lakeview Developers (supra)* and *Dosti Corporation (supra)* relied upon by Respondent No. 1 would not be of any assistance to him. The Court also observed that in *Malad Kokil CHS (supra)*, what was held was that the very purpose that the entire layout should be presented to the flat purchasers and that there should be full disclosure made to him is with the purpose that he should be aware as to what is the entire layout of the scheme in which he is going to purchase the property and that the consent as contemplated under Section 7 (1) of the MOFA has to be an informed consent which is to be obtained upon a full disclosure by the developer of the entire project and that a blanket consent or authority obtained by the promoter at the time of entering into an agreement of sale would not be a consent.

In view of the facts, the Court observed that in all the aforesaid decisions, the suit was filed after the construction was complete and the society of the flat purchasers was formed and registered. Hence, the issue of informed consent was examined in the context of full disclosure about the potentiality of the permissible construction.

The Bombay High Court also observed that in its the decision in *Zircon Venture CHS (supra)* it was held that the sanction of the layout is evidenced by the certificate issued by the architect and therefore, the promoter would be entitled to put up the building as per the layout sanction by the local authority and that the contention with respect to the pressure on the infrastructure on account of additional construction cannot be countenanced once there is true and full

disclosure of the complete scheme by the developer in accordance with the layout plan, building rules and Development Control Regulations – the issue of disclosure of the full potential of the project and developability, and the informed consent of the flat purchaser cannot be decided on any straitjacket formula, in as much as, these issues would depend upon the facts of each case, The Court held that the concept of informed consent cannot be stretched beyond the statutory obligations of the promoter as contemplated under Section 3 and 4 of the MOFA.

The Court also held that Respondent No. 1 signed the agreement with full knowledge about the scope of the project and him consenting for the promoter to utilize the full potentiality of the project. The Court observed that the objection to the clauses of the agreement was raised for the first time in the suit filed by him – *prima facie*, the clauses in the agreement contain Respondent No. 1's informed consent as contemplated under Section 7 of the MOFA and the Appellants have complied with the requirement of true and full disclosure, as contemplated under Section 3 of MOFA.

In view of the above, the Court held that the Trial Court had misinterpreted all the relevant terms and conditions of the agreement and had completely ignored that the substantive prayer in the suit is to challenge the clauses in paragraph 11 of the agreement pertaining to the informed consent of Respondent No. 1.

The Court observed that Respondent No. 1 had not even challenged the termination of his agreement and though it may be open to him to amend his plaint to challenge the termination, it cannot be ignored that there is no challenge to the termination of the agreement at this stage.

The Court held that the Trial Court ignored the vital facts and misappreciated the legal principles settled by the Apex Court in the decision of *Ambalal Sarabhai Enterprises (supra)* for the grant of specific performance and exercised the discretion arbitrarily and that the reasons to grant the injunction are perverse and based on unreasonable grounds.

Accordingly, the appeal was allowed and the impugned judgment dated 16th July, 2024 passed by the Trial Court was set aside.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.