

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION

APPEAL FROM ORDER NO.514 OF 2013

Shah & Mody Developers – Appellant
V/s.
Alka Ketan Shah & Ors. – Respondents

S.C. Naidu, Adv. a/w. Saurabh Kulkarni, Adv. i/b. M/s. C.R. Naidu & Co for the Appellant.

S.G. Karandikar, Adv. for the Respondent Nos.1 and 2.

S.K. Sonawane, Adv. for the MMC Respondent No.3 and 4.

CORAM : MRS. ROSHAN DALVI, J.

Date of Reserving the Judgment : 25th July, 2013
Date of Pronouncing the Judgment : 5th August, 2013

J U D G M E N T

1. This appeal has been filed by the Defendant No.1 in the two suits filed by purchasers of commercial premises in the development construction of the Appellants as flat purchasers for enforcing compliance of the obligations of the Appellants as promoters under the Maharashtra Ownership of Flats Act, 1963 (MOFA). The Appellants, original Defendant No.1, has challenged the order of interim injunction restraining further construction sought to be put up by them as not having been consented by the flat purchasers as statutorily required.

2. The Defendant No.1 contends that it has obtained consent of the Plaintiffs as flat purchasers.

3. The parties entered into an agreement for purchase of the suit premises on 12th July, 1988. Clause 1 of the agreement shows that Defendant No.1 as promoter has commenced construction of the building under IOD dated 29th June, 1996 and commencement

certificate (CC) dated 5th November, 1998. An addendum to clause 1 in the agreement shows that the CC dated 5th November, 1998 was then valid and extended further for **entire work** i.e. ground + **three upper floors** as per approved plans dated 3rd May, 1988.

Since these were the plans and specifications shown to and made known to the Plaintiffs, the Plaintiffs consented for such construction.

The proviso to clause 1 showed that **no further consent of the flat purchasers would be required for any modification, variation or amendment of the plaint including additions / alterations / modifications in the building to be constructed save and except the premises of the purchasers (the Plaintiffs).**

This proviso is, therefore, directly contrary to the statutory mandate U/s.7 of MOFA Act which requires such promoter to take consent of all the flat purchasers if any alteration was to be made in the structures of the flat or any alteration or addition was to be made in the structure of the buildings after the plans and specifications were disclosed. It may be mentioned that the only plans and specifications up to the 3rd floor were disclosed and thereafter the agreement that no further consent was required for further construction cannot be countenanced.

4. The further paragraph in clause 1 of the agreement shows that **the purchasers expressly consent to the promoters constructing additional upper floors to the proposed building or extend the proposed building as if such construction was incorporated in the approved plans and agree not to object or raise any dispute with regard to such construction.**

Such clause is also wholly inconsistent with and contrary to legislative mandate U/s.7 as stated above. No such consent can be

expressly given and every promoter would be required to take express previous consent of all the flat purchasers for all such additional construction which was not incorporated in the approved plans until then disclosed to the flat purchasers.

5. It is argued on behalf of the Appellants / promoters / developers that express consent was obtained under the said agreement itself for all future construction under clauses 14 and 26 of the said agreement.

6. In the clause 24 it is recited that **it was possible for the promoters to acquire TDR and construct additional areas which would be their property.**

7. That may be so. However how much to construct and when to construct, what they would be able to construct upon the acquisition of the TDR which was "possible" would be subject to consent of all the flat purchasers. Mere mentioning that it was possible to acquire cannot impute consent. No implied consent is contemplated U/s.7 of the MOFA Act.

8. Under clause 26 of the agreement the promoters were to be entitled to **use any additional FSI (TDR) for constructing additional structures which would be their sole property and the purchasers under the said clause is stated to have irrevocably consented to the same.**

9. No such irrevocable consent can be imputed or taken since express previous consent is required to be obtained for all additions and alterations after the plans and specifications are disclosed. Hence this clause is also against the spirit and object of Section 7 of the MOFA Act.

10. Under the addendum to clause 24 of the agreement it is stated **that the promoters have already purchased TDR to**

construct additional areas dated 12th December, 2007 which would be their property.

11. This TDR was for construction up to the 4th floor hence that much of plans and specifications were disclosed to the Plaintiffs as the flat purchasers at the time of the agreement. The Plaintiffs consent could be imputed for that much construction. For any further construction the Plaintiffs' express previous written consent would have to be obtained and cannot be avoided by any clause directly contrary to the legislative provision.

12. Under such agreement the promoters continued the construction. The Plaintiffs sought to restrain additional construction not consented by them. It has been the Plaintiffs' case that the developers were to put up construction up to the 4th floor and the Plaintiffs were assured that the building would consist of Ground + four upper floors. The Plaintiffs purchased their respective premises on the 3rd floor and thereafter the Defendants got the plans amended without notice to the Plaintiffs, knowledge of the Plaintiffs and consent of the Plaintiffs for putting up additional construction of the 5th floor and later even of the 6th floor. The construction was put up at a frenetic speed and hence the Plaintiff applied for reliefs against promoters to comply with their statutory provisions under MOFA Act and reliefs against the Municipality (MMC) to issue stop work notice to stop further construction which relief has been granted to the Plaintiffs upon seeing essentially that their consent was not obtained.

13. In the case of *Bajranglal Eriwal & Ors. Vs. Sagarmal Chunilal & Ors., 2008(5) Mh L J*, it has been held by this Court that consent shown to be given in that case is no consent at all and that any irrevocable consent permitting the developer to put up additional construction for utilising the total FSI for construction of additional

floors not in the plans which were disclosed to the flat purchasers can be allowed. That is precisely because the alterations and additions without such consent are prohibited U/s.7 (1) of the MOFA Act.

14. It has been the case of the Appellants / Defendants in the suit that they purchased TDR from time to time on 12th December, 2007, 3rd January, 2008, 20th May, 2008 and 13th January, 2011. All these have been purchased after the Plaintiffs' agreement. Construction pursuant to the TDR has been put up by way of amended plans after the agreement with the Plaintiffs. The Plaintiffs' consent has not been obtained.

15. The Appellants have relied upon the CC issued initially and later from time to time as endorsed. The initial CC dated 5th November, 1998 of which reference is made in the agreement itself showed, as stated above, construction upto 3rd floor. Thereafter CC has been issued on 7th May, 2008 for construction up to the 4th floor which forms an part of addendum to clause 24 of the agreement. The Plaintiffs have allowed construction upto such level as having been consented by them. The CC has been further extended by a further endorsement dated 13th August, 2002 for construction of 5th floor. That has been challenged by the Plaintiff and in view of the aforesaid clear law, rightly.

16. The Appellant has relied upon Memorandum of Understanding dated 13th December, 2007 executed by other parties prior to the Plaintiffs' agreement. These are the Plaintiffs' relatives. The MOU is for sale and in respect of three premises on the 4th floor being premises No.401. The MOU makes a reference to the fact that the Appellants as the promoters had completed construction up to 3rd floor and were desirous of purchasing TDR for 4, 5 and 6 floors of the building. It is contended on their behalf that this constitutes notice to

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the Plaintiffs. That does not. What is the actual construction as ultimately shown in the plans which is sought to be put up as desired by the promoters is what has to be consented by the Plaintiffs but which consent is not obtained. Consequently the MOU executed by the relatives of the Plaintiffs cannot either bind the Plaintiffs or constitute their consent.

17. The Appellants have similarly relied upon the foundation plan stated to be sent to “concerned authorities” which shows six floors of the building to be constructed. This was what they desired to do. The foundation plan is not an approved plan. Construction cannot proceed as per the foundation plan. It has to be approved by the Municipality. An approval has to be obtained upon the consent of the Plaintiffs as flat purchasers. The foundation plan may assist the Defendants in construction but has no statutory significance.

18. The learned Judge has dealt with all these aspects in the impugned order. After setting out case of the parties, the case of the Defendants in the suit that the Plaintiff were given to understand that further additional floors will be constructed and were explained the entire factual details under the MOU (which is not even executed with the Plaintiffs) the learned Judge has correctly dismissed as irrelevant defence the contention that the Plaintiffs were aware of the construction being put up. That would indeed be irrelevant as it would not constitute consent.

19. The learned Judge has also correctly considered the Defendants' case with regard to the foundation plan and the further work done as per the amended sanctioned plan after considering various judgments including the case of *Bajranglal (Supra)* and several judgments expressing similar views. The learned Judge has considered the strength of clause 24 of the agreement together with

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the addendum and has concluded that there was no further disclosure for construction of 5th and 6th floors and the oral agreement, if at all, was for four floors which the Plaintiffs have conceded. The learned Judge has also considered the Defendants allegations that the Plaintiffs had brought up the case of no consent to coerce the Defendants to agree to certain transactions which were referred to arbitration by the parties and has dismissed such a suggestion. The learned Judge has found the prima facie case.

20. It is argued on behalf of the Defendants that the observation of the learned Judge in the last paragraph relating to the prima facie case mentioning that the circumstances as per the case of the Defendants for an agreement for construction of ground + upper floors requires evidence to be led shows that the Plaintiffs have made out a prima facie case. It does not.

21. Upon seeing the lack of consent itself prima facie case for restraint on further construction is made out.

22. The learned Judge has observed the implicit consent / agreement on part of the Plaintiffs for construction upto 4th floor. Certain part of the construction upto 5th floor was carried on by them. Since the CC for the 6th floor was not obtained he has stopped that construction so that the question raised by the Plaintiff could be decided in the trial. Hence even though the construction of 5th floor is against the provisions of MOFA and could have been restrained, the learned Judge restrained construction from the 6th floor onwards only.

23. Mr. Karandikar on behalf of the Plaintiffs has shown that the promoters have expressed that they can construct upto 4060 Sq. mtrs. of the building which would take it up to 15th floors. Upon the argument made by them, which would be contrary to law, the order of injunction becomes most opportune. Hence despite the tremendous

effort of Mr. Naidu on behalf of the Appellant, no further construction can be allowed save and except with the consent of all the flat purchasers including the Plaintiffs by way of additions to the structure of their building U/s.7 (1) of the MOFA.

24. Hence the order of the learned Judge granting the injunction against the construction of the 6th floor is seen to be in order. The order of injunction cannot be set aside.

25. Hence the Appeal from Order is dismissed.

(ROSHAN DALVI, J.)

This print replica of the raw text of the judgment is as appearing on court website (authoritative source)

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Publisher has only added the Page para for convenience in referencing.

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