
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.95 OF 2024
IN
NOTICE OF MOTION NO.601 OF 2017

Shree Ameya CHSL

.. Appellant
(Org Plaintiff)

Versus

Laxmibai Ganpat Chogle & Ors.

.. Respondents
(Org Defendants)

WITH
INTERIM APPLICATION NO.1803 OF 2024
IN
APPEAL NO.95 OF 2024

Shree Ameya CHSL

.. Applicant
(Org Appellant)

In the matter between:-

Shree Ameya CHSL

.. Appellant
(Org Plaintiff)

Versus

Laxmibai Ganpat Chogle & Ors.

.. Respondents
(Org Defendants)

Mr.Susheel Mahadeshwar a/w Sonali Humane i/b Ranjana Todankar, Advocates for the Appellant.

Mr.Niranjan Pandit a/w Cherag Balsara, Ashvin Bhalekar, Abdetaiyeb Q. Motiwala i/b A.Q.Motiwala, Advocates for Respondent No.5, 14 and 15.

Mr.Himanshu B. Takke, AGP for Respondent No.16/State of Maharashtra.

Ms.Vaishali Ugale i/b Komal Punjabi, Advocate for Respondent No.17/MCGM.

**CORAM : B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.**
DATE : DECEMBER 05, 2024

P. C.

1. The above Appeal has been filed, challenging the order passed by the learned Single Judge in Notice of Motion No.601 of 2017 in Suit No.839 of 2016. The Suit was filed by the Appellant/Plaintiff Society seeking to direct Defendant Nos.1 to 15 to execute a conveyance in favour of the Plaintiff Society and transfer Defendant Nos.1 to 15's right, title and interest in the suit lands to the extent of 4561.03 square meters, together with the building standing thereon, alongwith benefits of common recreation ground and access road from Shani Mandir Road. Further, a declaration was sought by the Plaintiff Society that it has a share in the proportion to the built-up area of the society's building of 4561.03 square meters, in the additional FSI/TDR sanctioned by the Municipal Corporation in the Building Plan dated 17th November 2015 in respect of Building No.6; Building Plan dated 25th May 2016 in respect of Building No.4; and Building Plan dated 25th May 2016 in respect of Building No.7; which sanctioned FSI/TDR encroaches upon the FSI/TDR utilization potential by the Plaintiff Society.

2. The Notice of Motion filed in the above Suit, and in which the impugned order is passed, firstly sought an interim restraint against Defendant Nos.1 to 15 from constructing on, or developing the lands that are the subject matter of the suit by using any additional Floor Space Index (FSI) or Transferrable Development Rights (TDR) in the building plans sanctioned on 17th November 2015 for building No.6; 25th May 2016 for building No.4; and 25th May 2016 for building No.7. The building of the Plaintiff Society is building No.3. It was completed and received an Occupation Certificate on 21st March 1997. The Sample Agreement with one of the flat purchasers of the Plaintiff Society is also on record and dated 25th March 1998. The argument of the Plaintiff Society, in a nutshell, is that the developers cannot put up additional construction by way of an additional building/s without there having been a full and proper disclosure as contemplated under the provisions of the *Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963* [for short “***the MOFA, 1963***”]. The learned Single Judge, by the impugned order, *inter alia* came to the conclusion that there was adequate disclosure as contemplated under MOFA, 1963 and proceeded to dismiss the Notice of Motion.

3. We have carefully gone through the impugned order as well as the relevant clauses of the agreement. As far as the grant or refusal of interim relief is concerned, the same will really turn on the interpretation of clause 4 of the flat purchaser's agreement. For the sake of convenience clause 4 is reproduced hereunder:-

“4. THE PROMOTERS hereby declare that they have utilized available Floor Space Index (FSI) in respect of the said lands and that no part of the said Floor Space Index has been utilised by them elsewhere for any purpose whatsoever. The Promoters hereby further declare that if any time prior to the execution of the final Conveyances or other Deed of Transfer or document as provided in this Agreement for Sale, the Floor Space Index at present applicable to the said lands is increased such increase of FSI shall enure for the benefit of the Promoters alone without the Purchaser/s being entitled to claim any rebate or right in any manner whatsoever in respect thereof.”

4. In contrast, clause 4 of the Model Agreement which can be found in FORM V of the *Maharashtra Ownership Flats Rules, 1964* reads as under:-

“4. The Promoter hereby declares that the Floor Space Index available in respect of the said land is _____ square meters only and that no part of the said floor space index has been utilised by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilisation of the said floor space index by him. In case while developing the said land the Promoter has utilised any floor space index of any other land or property by way of floating floor, space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser.

*[* * * * *]”*

5. It is now well settled that clause 4 of the Model Agreement is a statutory/mandatory clause and which cannot be derogated from. This is not only made clear by Note No.1 of the Explanatory/Statutory Notes as set out in the *Maharashtra Ownership Flats Rules, 1964* but also held so in the judgment of the Hon'ble Supreme Court in the case of ***Jayantilal Investments V/S Madhuvihar Cooperative Housing Society & Ors. [(2007) 9 SCC 220]***. Note No.1 of the Explanatory Notes reads thus:-

“Note No.1- This is only a model form of agreement, which will have to be modified and adapted in each case having regard to the facts and circumstances of each case but in any event such clauses 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13 and which are statutory and mandatory according to the provisions of the Act and these rules shall be retained in each and every individual agreement/s executed between the Promoter and Flat Purchaser. Any departure or variation from these statutory and mandatory conditions, being violative and ultra vires of the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as “the said Act”) will not be binding and enforceable upon the parties, such condition being void ab initio.”

6. In fact, after noticing the aforesaid Explanatory Note the Hon'ble Supreme Court in *Jayantilal Investments (supra)* has held as under:-

“17. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the layout plan on the one hand vis-à-vis his obligations to form the

society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Form V of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, etc.) Rules, 1964 are quoted hereinbelow:

- “3. The promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions, if any, which may have been imposed by the local authority concerned at the time of sanctioning the said plans or thereafter and shall, before handing over possession of the flat to the flat purchaser, obtain from the local authority concerned occupation and/or completion certificates in respect of the flat.*
- 4. The promoter hereby declares that the floor space index available in respect of the said land is ... square metres only and that no part of the said floor space index has been utilised by the promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of said floor space index by him. In case while developing the said land the promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the promoter to the flat purchaser. The residual FAR (FSI) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the society the residual FAR*

(FSI), shall be available to the society.”

(emphasis supplied)

- 18.** *The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.”*

7. When one juxtaposes clause 4 in the Model Agreement with clause 4 in the Flat Purchaser’s Agreement reproduced by us above, it is clear that it is in complete variance with clause 4 of the Model Agreement. Clause 4 in the Flat Purchasers Agreement can never, at least *prima facie*, be construed to mean that there has been a full and complete disclosure as required under the provisions of MOFA, 1963 and more particularly Sections 3 and 4(1A) of thereof. In fact, another learned Single Judge of this Court in the case of ***Malad Kokil Cooperative Housing Society Limited V/S Modern Construction Co. Ltd. & Ors. [2012 SCC OnLine Bom 1310 : (2012) 6 AIR Bom R 257]***, has also held that the entire layout should be presented to the flat purchasers and there should be a full disclosure

made to him so that he should be aware as to what is the entire layout of the scheme in which he is going to purchase the property. It is only when the entire layout is properly disclosed to the purchasers that they then take an informed decision as to whether they should purchase a flat in a particular project or otherwise. Paragraph 38 of the decision in the case of *Malad Kokil CHSL (supra)* is reproduced hereunder:-

“38. The above Clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of lay out plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.”

8. When one looks at all this material, we are of the view that not only does the above Appeal require consideration, but the Appellant has also made out a strong *prima facie* case for granting ad-interim relief.

9. In these circumstances, the above Appeal is admitted. There will be interim relief in terms of prayer clause (a) of Interim Application No.1803 of 2024, which reads thus:-

“(a) Pending the hearing and final disposal of the Appeal, the Respondent Nos.1 to 15 by themselves or by their servants, agents, partners, representatives or officers be restrained by an order of temporary injunction from carrying out any construction or development in the suit lands by utilizing or exploiting any additional F.S.I. /T.D.R. sanctioned in Building Plans dated 17.11.2015 in respect of Building No.6, Building Plans dated 25.05.2016 in respect of Building No.4 and Building Plans dated 25.05.2016 in respect of Building No.7;”

10. Since the issue in the present Appeal lies in a narrow compass, we direct that the Appeal be placed on board for directions on 15th January 2025. On that date the Court will decide when to place the above Appeal on board for hearing.

11. Interim Application No.1803 of 2024 is accordingly disposed of in terms of this order. However, there shall be no order as to costs.

12. This order will be digitally signed by the Private Secretary/
Personal Assistant of this Court. All concerned will act on production by
fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

[B. P. COLABAWALLA, J.]