

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER (ST) NO.7776 OF 2021
IN
NOTICE OF MOTION NO.1589 OF 2020
WITH
INTERIM APPLICATION (ST) NO.7780 OF 2021**

Abhanga Samata Co-op. Housing
Society Ltd.,
A society registered under the
provision of Maharashtra
Co-op. Societies Act, having office
at L-2, Sunder Nagar, Ground Floor,
S.V.Road, Malad (West),
Mumbai 400 064

... Appellant

Vs

1. Parag S/O. Arun Binani
of Mumbai, adult, Indian Inhabitant,
Residing at L-2/7, Abhanga Samata
Co-op. Housing Society Limited,
Sunder Nagar, S.V.Road, Malad (W),
Mumbai 400 064.

2. Arkade Developers Pvt. Ltd.
a Company incorporated under
Companies Act, 1956, having its
office at Arkade House,
Opp: Bhoomi Arkade, Near Children's
Academy, A.S.Marg, Ashok Nagar,
Kandivali (East), Mumbai- 400 101. ... Respondents

...

Mr. Girish Godbole, Senior Advocate, with Charul Abuwalla and Mayank Vira I/by Dave & Co. for the Appellant.

Mr. Ashok M. Saraogi for Respondent No.1.

Mr. Cyrus Ardeshir i/by Ms. Smita Sawant for the Respondent No.2.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : APRIL 30, 2021.
PRONOUNCED ON : MAY 7, 2021

JUDGMENT :

Heard. With consent of the learned counsel for the parties, Appeal from Order is taken up for final hearing at the admission stage.

2 At the instance of a solitary member of Abhang Samata Co-operative Housing Society Ltd., the learned trial Court vide order dated 19th March, 2021 (Impugned Order), injuncted appellant/society from proceeding with the process of re-development of its building. Appellant-society,

seeks to challenge the impugned order under Section 104 read with Order 43(1)(2) of the Code of Civil Procedure, 1908 ('CPC' for short).

3 The facts, which have led the appellant to file the present appeal in brief are as under:

The appellant is a co-operative housing society formed and registered under the provisions of the Maharashtra Co-operative Societies, Act, 1960 ("**MCS Act**" for short) and is owner of the land and the building which is subject matter of this appeal, i.e., property bearing CTS No.33 of 2014, Survey No. Plot-15 admeasuring about 2748.70 sq.mtrs. situated at Sunder Nagar, S.V.Road, Malad (West), Mumbai 400 064 ('Property' for short). Respondent No.1 (Plaintiff) is a member of the society, who came to be admitted to the membership in the year 2020. Respondent no.2 is developer/builder, who has been appointed as , 'developer' by the appellant/society for carrying out

development of its property.

4 Respondent No.1 filed Short Cause Suit No.1240 of 2020 in the Court of City Civil Court, Dindoshi against the society and the developer inter-alia, seeking declaration that any arrangement made between the society and the developer for the purpose of developing the subject property is bad in law and is contrary to the provisions of law on the ground that re-development process initiated, violates guide-lines issued by the State vide its directives under Section 79-A of the MCS Act. As also on the ground that process of selection of developer itself, is vitiated by fraud. Thus, pleaded, directives issued under Section 79-A were not followed in its letter and spirit.

5 The learned trial Court vide the order dated 19th March, 2021 injuncted the society from proceeding with the re-development.

6 The facts discernible from the record are as under:

Existing building of the society consists of four units, viz. L1 to L4 having ground plus 3 / 4 upper floors, occupied by the existing members of the society. Out of said four existing buildings, L1 and L2 consists of 16 flats each and L3 and L4 consists of 14 flats each. Existing buildings being 45 year old, its, structural audit was done by M/s. Arvind Singh Consultant Pvt. Ltd., and recommended substantial repairs. However, cost of such repairs, renovation and improvements was found, not workable and, therefore, members explored the possibility of re-development of the said property through reputed developers. The society, therefore, in its Special General Body Meeting (SGM) held on 1st November, 2015 by requisite majority, decided to re-develop the property by demolishing the existing buildings. Admittedly, respondent no.1 (plaintiff) was not a member of the society in the year 2015. The Special General Meeting decided to appoint

architect and Project Management Consultant ('PMC') to carry out re-development in accordance with directives issued under Section 79-A of the MCS Act. Thereafter, M/s. Strut Consultants Pvt. Ltd. were appointed in November, 2015. PMC, submitted its feasibility report on 14th December, 2018. Pursuant to which, the appellants/society opted for open tender process; in response thereto, three developers submitted their proposals, i.e., M/s. Mayfair Housing; Balaji Land Makers LLP and Arkade Developers Pvt. Ltd. (Respondent No.2 herein). It appears from the pleadings, the proposals were placed before the members in Special General Body Meeting held on 29th September, 2019 and the existing members, who attended the meeting unanimously accepted the proposal of the respondent no.2. Whereafter respondent no.2 submitted final offer dated 30th April, 2019 of the appellants. Thereupon, in the Special General Body Meeting dated 6th October, 2019, resolution was passed for appointing respondent no.2 as 'developer' and in pursuant thereto, letter dated 5th November, 2019

was issued to the Deputy Registrar of the Co-operative Societies for conducting the meeting for approving appointment of developer, as per the directives issued under Section 79-A of the MCS Act.

7 In Special General Body meeting held on 8th December, 2019, appointment of respondent no.2 as a 'developer' was duly approved by the authorised officer Class-II (Co-operative Societies). It is evident from the letter dated 9th December, 2018 of the office of the Deputy Registrar.

8 Pursuant to the said approval, appellant/society vide letter dated 19th December, 2019 confirmed, appointment of respondent no.2 as 'developer'. Since, after appointment, draft development agreement, was circulated amongst members including plans of proposed building of the society for their considerations/suggestions. It is

society's case that draft development agreement, POA and plans of the proposed buildings were approved in the Special General Body Meeting dated 8th November, 2020 on the basis of consent letters given by majority members of the society. Following that secretary, chairman and treasurers, committee members were authorised to execute, development agreement and POA on behalf of the society.

9 On 22nd December, 2020, development agreement was registered with the Sub-Registrar duly executed by and between the appellant/society and 39 existing members (out of 51) as confirming parties and respondent no.2 herein, therein referred to as developer.

10 It may be stated that out of 51 members of the society and 60 flats in the existing buildings, 39 existing members executed the development agreement as confirming parties in respect of their 48 flats.

SUIT

11 Plaintiff instituted the suit on 27th October, 2020 seeking declaration that arrangement made between the society and the developer for re-development of the property is contrary to the provisions of the law and, therefore, society be restrained from proceeding with the re-development on the basis of said arrangements.

12 The learned Trial Judge vide impugned order dated 19th March, 2021 restrained the appellants/society from proceeding with the re-development. Aggrieved by it, society has preferred this appeal.

ARGUMENTS:

13 Mr. Godbole, the learned Senior Counsel for the appellant, submitted that the process of re-development

had commenced in 2015 and it finally translated into registered Development Agreement executed in December, 2020. It is submitted through out, the society has maintained complete transparency and there is no suppression of facts in the entire process. Mr. Godbole, submitted pleadings as, to 'fraud' are as vague, as possible and material particulars of the 'fraud' have not been pleaded at all. It is submitted that after considering the structural audit report, majority of members after due discussion, had resolved to demolish the existing buildings and to construct new buildings with the assistance of Project Management Consultants. Mr. Godbole submitted all the decisions were taken in the Special General Body Meetings of the Society and such decisions taken by the majority, of the members bind the descending members, unless it is shown that re-development scheme is sanctioned by fraud, misrepresentation or by collusion. Mr. Godbole, thus, submitted that decisions taken in accordance with the principles of democracy cannot be

displaced for asking, as has been done in the case in hand. Mr. Godbole further submitted that the learned Judge ought to have considered that there is clear consent of the majority members for re-development of the project and in absence of any evidence of fraud, the trial Court ought not to have interfered with the decision of re-development taken by the society. It is submitted that the learned Trial Judge has not recorded findings either as to prima-facie case, balance of convenience and/irreparable loss, before granting the injunction. Mr. Godbole, the learned Senior Counsel further submitted, that the trial Court has failed to notice that the reliefs sought by the plaintiff were rendered infructuous by virtue of execution of registered development agreement entered into between the appellant and majority members of the society. It is submitted that since majority members have consented for re-development process and accepted the development agreement, no prejudice, losses, damages were caused to the plaintiff/respondent no.1. Mr. Godbole also submitted

that the learned Judge has failed to appreciate that the directives issued under Section 79A of the MCS Act are directory and not mandatory. Besides, Mr. Godbole submitted that the learned trial Court ignored the settled position of law in the matter of re-development of the co-operative housing societies pronounced by this Court in following cases,

- (1) M/s. Maya Developers v. Neelam R. Thakkar of this Court in Notice of Motion (L) No.834 of 2015;
- (2) Girish M. Mehta and Anr. v. Mahesh S. Mehta and Anr. 2010(2) Mh.L.J. 657;
- (3) Kamgar Swa Sadan Co-operative Hsg. Society Ltd. v. Divisional Joint Registrar of this Court in Writ Petition No.6701 of 2013;
- (4) Vikram Delite CHS Ltd. v. Mrs. Meenakshi C. Shah and Ors. in Notice of Motion (L) No.1341 of 2016;
- (5) Harsha CHS Ltd. v. Kishandas S. Rajpal and Ors. of this Court in Writ Petition No.10285 of 2009;

Mr. Godbole by relying upon the aforesaid judgments and on the facts of the case, submits that the impugned order passed by the trial Judge is illegal, arbitrary and bad in law and, therefore, same be quashed and set aside.

14 Mr. Cyrus Ardeshir, learned counsel for the respondent no.2/developer, adopts the arguments of Mr. Godbole and would also submit that, out of 51 members (60 flats), 39 members (48 flats) have signed the development agreement. He submits, four more members have agreed to sign development agreement. He submits that 40 flats have been vacated by the respective members to whom the alternate accommodation has been provided at developer's cost. It is submitted that about 7-8 members are in search of alternate accommodation. The learned counsel has invited my attention to the photographs of the buildings, to contend that major damage is caused to the structure of the buildings, which are 45 year old. The learned counsel would further submit that IOD has been

received on 11th February, 2021 besides, the NOC from fire department dated 16th January, 2021. He would submit on 8th February, 2021, the Corporation has approved the building plans. The learned counsel has taken me through the IOD, NOC and the approved plan, which are part of the record. The learned counsel, therefore, submits that the subsequent development, i.e., execution of the development agreement by majority members, sanction of buildings plans, IOD have rendered the prayers, in the suit infructuous. He, therefore, submits that the impugned order be quashed and set aside.

15 Mr. Saraogi, the learned counsel for the respondent no.1, has taken me through the plaint and the replies filed by the society and the developer. He submits that the society has not maintained the transparency in the process and procedure, undertaken for re-development. He

submitted, the guide-lines issued under Section 79A of the MCS Act were not followed at all. Mr. Saraogi submits, the various meetings were either attended by non-members and/or meetings proceeded without requisite quorum. Submission is that, various resolutions passed in the Special General Body Meetings were illegal and not enforceable. He submits that appellants had not invited tenders and, therefore, entire process was undertaken in secret way for the reasons best known to the office bearers of the society. Mr. Saraogi, therefore, supports the impugned order.

REASONS:

16 It is not in dispute that the redevelopment process began in the year 2015 and at the material time, the respondent no.1-Plaintiff, was not a member of the society until 2020. It is evident that appellant/society upon

perusing the structural audit report, took conscious decision that the cost of the repairs, renovation being not feasible, members explored the prospects, of redevelopment of the property through reputed developers. Evidently, in consultation with PMC in Special General Body Meeting held on September, 2019, the proposals/tenders/bids were discussed by the members. After, which, society passed a resolution in the SGM dated 6th October, 2019 and appointed respondent no.2, as 'developer'. On 5th September, 2019, Deputy Registrar was requested to attend the meeting to verify and ensure compliance of directives under Section 79A of the MCS Act. Minutes of the meeting dated 8th December, 2019 shows that the meeting was attended by the 36 members and the proceedings were conducted in presence of Mr. Sanjay Rokde, officer from the office of Deputy Registrar. Resolution Nos.2 and 4 show that the society had received three quotations from M/s. Mayfair Housing, M/s. Balaji Land Makers LLP and M/s. Arcade Developers (Respondent No.2), Resolution further shows

that Special General Body Meeting was held on 26th September, 2019 wherein respondent no.2 was short-listed and selected as 'developer', of the society.

. Resolution No.4 passed in the General Body Meeting dated 8th September, 2019 reads as under:

"4. To finally select the developer for re-development along with Terms and Conditions and to approve the quotation.

Mr. Sanjay Rokade informed general body to approve the quotation presented by Mr. Zuben Chheda of M/s. Arkade Developer. General body unanimously accepted and approved the quotation of M/s. Arkade Developer, which was already passed in society special general body meeting held on 29.09.19.

. Resolution No.5 reads as under:

"5. To take on record the consent of the selected Re-developer.

Mr. Sanjay Rokade informed general body that consent of members will be required by raising their hands in front of video shooting in which votes will be counted.

General Body gave their consent by raising their hands for M/s. Arkade Developer by majority, while one member Ms. Naina Shetty did not give her consent for M/s. Arkade Developer.

Mr. Sanjay Rokade informed general body that 99% of members have voted in favour of M/s. Arkade Developer for society redevelopment and passed following resolution:

“Resolved that general body by majority selected M/s. Arkade Developer for society redevelopment.”

17 It is noticeable from the record that since 2015, the society had held more than four Special General Body Meetings, wherein different resolutions were passed to further the re-development process. It shows, decisions/resolutions, were passed by the General Body and not by the managing committee. Additionally, all these resolutions were acted upon and none of its members has challenged it, within the stipulated period. Admittedly, respondent/plaintiff has not challenged resolutions before the appropriate forum but attempted to challenge it in the subject suit in the most uncertain terms, saying/describing it as “some arrangement” between the society, developers and members. Plaintiff prays decree in following terms:

*“**Clause A** : that it be declared that any arrangement made interse between the Defendants for the purpose of redevelopment of the property being property bearing CTS No. 33/14 Survey No. Plot - 15 admeasuring about 2748.70 sq. mtrs situated at Sunder Nagar, S.V. Road, Malad (W), Mumbai - 400 064 is bad in*

law and contrary to the facts of the case and contrary to the provision of law and the Defendants have no rights to act upon the same in any manner whatsoever.”

Therefore, without first challenging primary decisions, i.e., various resolutions passed by the General Body, plaintiff in the most uncertain terms seeks to challenge the, ‘arrangement’ arrived at between the society and the developer. In my view, this is fundamental defect in suit and it goes to the root of the matter. However, the learned trial Judge, failed to notice the same. Be that as it may, it is noticeable that at every stage of re-development process, members of the society had participated and, therefore, all the decisions were taken on the wishes of the majority members of the society. To say, meeting dated 8th December, 2019 was attended by 36 persons/members out of 51. Thus, in consideration of the material on record, it is to be held that the appellant/society’s decision to re-develop the building was with the consent of the majority members of the society and decision, has been, acted upon

and culminated into registered development agreement as stated above, signed by 39 members as consenting parties.

18 Thus, it is to be held that the society has not suppressed any material from its members in process of re-development. In fact, the plaintiff could not show prejudice, and/or irreparable loss, if any caused to him in the process of re-development undertaken by the society. On the contrary, plaintiff would be benefited in terms of the development agreement as other members, who have consented for re-development. Therefore, in my view, the plaintiff could not establish prima-facie case, for granting temporary injunction. It is well settled that for grant of temporary injunction, three factors have to be satisfied, which are, prima-facie case, balance of convenience and irreparable loss. All these factors were, completely ignored, by the learned trial Judge in exercise of the powers under Order 39 Rules 1 and 2 of the CPC. As such impugned order

is not sustainable in law.

19 In so far as reasoning in order is concerned, it is apparent that the learned trial Judge while granting temporary injunction was impressed by the following factors:

- (a) That the society has not, created web-site on the internet as required under the directives issued under Section 79A of the MCS Act;
- (b) That the society did not invite tenders for re-development of the society by issuing notices or advertisement in different news-papers;
- (c) Resolutions were passed in Special General Body Meeting in absence of 1/5 members of the society ;
- (d) Society did not produce written consent letters from the members of the society;
- (e) There was no video recording of the meetings;
- (f) That the authorised members were not present in the

meeting.

20 Thus, it seems, the learned trial Court was of the opinion that the guide-lines under Section 79A of the MCS Act being not followed in, its' letter and spirit, it vitiated the entire process of redevelopment. However, the learned trial Court failed to notice, that the alleged irregularities, if any crept in, the Special General Meeting dated 8th December, 2019 cannot *ipso-facto* nullify the resolutions passed by General body from time to time since 2015. As such, the irregularities noted by the learned trial Judge cannot displace the decisions taken by the majority members of the society. Even otherwise, the findings recorded by the learned trial Court as noted above, are contrary to the evidence on record. The learned trial Court held that the video recording was not done; however, the plaintiff admits in his letter dated 13th January, 2020 that he had seen DVD of the meeting. Be that as it may, non-creation of the web-site cannot be a reason to stall the re-development process.

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Even otherwise, the learned trial Court has failed to appreciate effect of the subsequent developments/events, i.e., execution and registration of the development agreement and various permissions granted by the Planning Authority have rendered the suit infructuous. As a matter of record, though the development agreement was executed and registered, during the pendency of the suit, plaintiff did not amend the plaint and challenged the Development Agreement.

21 In so far as the settled position in law in the matter of re-development of the co-operative society is concerned, it may be stated that the trial Court ignored the judgments of this Court with cryptic comments, either by saying that facts in the cited judgments were different than the case in hand. In fact, ratio laid down in the judgments were squarely applicable to the facts of the case in hand. In **Harsha Co-operative Housing Society Ltd. (Supra)**, the learned Single Judge of this Court has held in paragraph

11 as under:

“11 The reliance upon the Government Notification is itself misplaced. When the members of the co-operative housing society which, under law of co-operation, decides by a majority of 11:1 members that the society premises be developed in a particular fashion by a particular developer, it would be contrary to principles of democracy by which the society is governed, for the sole dissenting member to interfere and require a procedure, not required by the majority of the members to be followed which would only consume time and the counter-productive. The Government Resolution would be required to be followed by the society where the members are unable to come to any decision by a resolution of their own.”

22 In the case of **Maya Developers (Supra)**, the learned Single Judge of this Court in paragraph 85 has held thus;

“85. Apart from the decision in Girish Mulchand Mehta¹⁰⁷ in regard to the majority principle, Mr. Kapadia cites Supreme Mega Construction LLP v Symphony Co-operative Housing Society Ltd & Ors.¹⁰⁸ In paragraph 7 of this decision, Mr. Justice Gupte in terms held that substantial compliance with the very same 2009 Directive under [Section 79A](#) was sufficient. An earlier decision, that of R. D. Dhanuka J in Bharat Infrastructure & Engineering Pvt. Ltd. v Park Darshan Co-operative Housing Society Ltd & Ors.¹⁰⁹ puts the controversy beyond the pale. In paragraph 19, the Court expressly negated the submission that this very 2009 Directive does not bind the third party, viz., Maya Developers; they

cannot be read into the agreement between the society and the developer. While this was in the context of an arbitration clause, it nonetheless tells us that this Directive is not of the kind of mandatory nature that Mr. Pai makes it out to be. Further, Bharat Infrastructure in the very next paragraph reaffirms the principle that the General Body is the supreme authority, and that the view of the majority will bind.”

. These, two cited judgments, affirm and declare that; that

- (i) General body is supreme;
- (ii) View of majority will bind minority;
- (iii) Directives under Section 79A of the MCS Act are not mandatory and its sufficient compliance is sufficient;
- (iv) Directives under Section 79A of the MCS Act, do not bind the third party;
- (v) Decisions taken in accordance with the principles of democracy cannot be interfered with or displaced, unless it is shown, that same were sanctioned by fraud or misrepresentation.

- 23 In the case in hand, the learned trial Court,
- (i) ignored the law settled by this Court, in relation to re-development of the co-operative housing societies;
 - (ii) did not record findings on factors, like prima-facie case; balance of convenience and irreparable loss; and failed to
 - (iii) appreciate; nature of directives issued under Section 79A of the MCS Act;
 - (iv) ignored the vague pleadings and uncertain prayers;
 - (v) did not notice, absence of pleadings in support of allegations of 'fraud and suppression'.
 - (vi) ignored subsequent events and its effect;
 - (vii) validity of subsisting resolutions of General Body in relation to 'redevelopment' project passed since 2015, which have not been questioned and challenged;
 - (viii) effect of the resolutions being acted upon and culminated into Development Agreement.

24 Thus, in consideration of the facts of the case, plaintiff has neither made out a prima-facie case nor could show as to how redevelopment, would cause loss to him nor could establish, re-development project if implemented would cause inconvenience to him.

25 In view of the facts and for the reasons stated, appeal is allowed and the impugned order dated 19th March, 2021 in Notice of Motion No.1589 of 2020 in Short Cause Suit No.1240 of 2020 passed by the learned Judge, City Civil Court, Bombay is quashed and set aside.

26 Appeal is allowed in the aforesaid term and disposed of.

27 Since the appeal itself has been disposed of, nothing survives in the civil application therein and the

same is also disposed of.

28 Mr. Saraogi's request to stay the order is
hereby declined.

(SANDEEP K. SHINDE, J.)