

Presented on : 16/07/2010
Registered on : 16/07/2010
Decided on : 27/06/2018
Duration : 7 Y 11 M 11 D

Ext. 65

**IN THE CITY CIVIL COURT AT DINDOSHI
BORIVALI DIVISION, MUMBAI**

S. G. SUIT NO.1608 OF 2010
(CNR NO.MHCC04-001474-2010)

Jai Sai Dham Co-operative Housing Society Ltd.

Duly registered under the provisions of the
Maharashtra Co-operative Societies Act, 1960,
bearing Registration No. BOM/WR/HSG/
HC/2864 of 1987-88, situated at 'Sai Dham',
Sodawala Lane, Borivali (W),
Mumbai 400 092.

.....Plaintiff

V/s.

1. Bai Mehree Sorabji Painter [Deleted as per order
An adult, Indian Inhabitant, **dtd.04/07/13]**

2. Nargis Sorabji Painter
An adult, Indian Inhabitant,

3. Bomi Mehree Sorabji Painter [Deleted as per order
An adult, Indian Inhabitant, **dtd.04/07/13]**

3 (a). Mrs. Roshni Bomi Painter

3 (b). Mr. Parvez Bomi Painter
Both adults, Indian Inhabitants,
having residing at Flat No. D-101,
Vintage CHS Ltd., Behind Citizen Bank,
I. C. Colony, Borivali (West),
Mumbai – 400 103.

4. Maneek Sorabji Painter

An adult, Indian Inhabitant,
Above defendant Nos. 1 to 4 residing
at C/311, Dena Apartment, Sodawala
Lane, Borivali (W), Mumbai 400 092.

5. Virchand Popat Shah

An adult, Indian Inhabitant,
Having address at A-2, Shree Krishna Complex,
Opp. National Park, Western Express High Way,
Borivali (E), Mumbai 400 066.

6. Laxmichand Sunderji Shah

An adult, Indian Inhabitant,
Residing at 202, Vrashabh Maharashtra
Nagar Road, Borivali (W), Mumbai 400 092.

7. Bhanvati Khimji Shah

An adult, Indian Inhabitant,

8. Khetsi Popat Shah

An adult, Indian Inhabitant,

9. Mukesh Khimji Shah

An adult, Indian Inhabitant,
Above defendant Nos. 7 to 9 residing at
Laxmi Niwas, 1st Floor, Opp. M. G. High
School, Borivali (E), Mumbai 400 066.

**10. Borivali Sai Darshan Co-operative Housing
Society Ltd.,**

Duly registered under the provisions of the
Maharashtra Co-operative Societies Act, 1960,
bearing Registration No. BOM/WR/HSG/
(T. C.)/1536 of 19875-68, dated 5th August, 1985
having their registered office at Sodawala Lane,
Borivali (W), Mumbai 400 092.

11. M/s. Rite Developers Pvt. Ltd.

A company incorporated and registered under the Companies Act, 1950 and having its office at A-2, Shree Krishna Complex, Opp. National Park, Western Express High Way, Borivali (E), Mumbai 400 066.

.....Defendants

Adv. Mr. Mehta for plaintiff.

Adv. Ms. Bhandari for defendant Nos. 1 to 9.

None for defendant Nos. 10 & 11.

**CORAM: H.H. JUDGE SHRI S. U. BAGHELE
(C.R.NO.3)**

DATE: 27TH JUNE, 2018

J U D G M E N T

(Delivered on 27/06/2018)

1. This is a suit for the execution of conveyance and for perpetual injunction.

2. The brief facts, giving rise to the litigation, can be stated as under :-

(A) The plaintiff is a co-operative housing society, duly registered under the Maharashtra Co-operative Societies Act, 1960. The defendant Nos. 1 to 9 are the builders-cum-promoters, who constructed the building, known as "Jai Sai Dham", as they were forming a partnership firm, which came to be dissolved, subsequently. The defendant No. 10 is also a housing society, which is adjacent to the building of the plaintiff society. The defendant No. 11 is the builder-cum-promoter of the said building. The defendant Nos. 1 to 4 were the original owners, respectively, of the plots, on which the building of the plaintiff society and the defendant No. 10 society are situated. The building of the plaintiff society is situated on

the plots bearing CTS Nos.487 & 2424, situated at Village - Borivali, Taluka – Borivali, Bombay Suburban District, specifically described in paragraph Nos. 2 & 3 of the plaint. There are 60 residential premises in the building of the plaintiff society, and the same have been occupied by the members thereof. (The entire property is hereinafter referred to as the 'suit property' for the sake of brevity]. The building of the defendant No. 10 is situated on the plot bearing CTS No. 507, which is adjacent to the building of the plaintiff society.

(B) According to the plaintiff, the defendant Nos. 1 to 9 represented the plaintiff that 22 ft. wide access road shall be available to the purchasers of the residential accommodations in the suit property from Sodawala Lane. The said access road is being used by the members of the plaintiff society for more than 22 years continuously, which access road is passing through the defendant No. 10's plot, bearing CTS No. 2422-A. It is the contention of the plaintiff society that the defendants are intending to obstruct the plaintiff's right of way, which is specifically shown in the rough sketch Ext.'F' in the plaint. It is the further contention of the plaintiff that the defendant Nos. 1 to 9 did not execute the deed of conveyance in favour of the plaintiff society, in respect of the plot and the structure, developed by them. It is its further contention that five covered car parkings were converted into seven garages by the defendant Nos. 1 to 9, by seeking approval from the Municipal Corporation, without the consent from the plaintiff society.

(C) The plaintiff sought for the relief of conveyance of the suit property in its favour. It further sought for perpetual injunction against the defendants, for restraining them from obstructing its access road.

Perpetual injunction is further sought, for restraining the defendant Nos. 1 to 9 from creating third party interest. Perpetual injunction is further sought, for preventing the defendant Nos. 4, 5, 10 and 11 from applying and processing application for occupancy certificate and also, for applying for the sanction of any further plan, till the restoration of the compound wall of the plaintiff society. The cost of the suit is also prayed for.

3. According to the defendant Nos. 1 to 9, the alleged access road having 22 ft. width is in existence, and it is being used by the plaintiff society. It is contended that the same was never obstructed by the defendants. The said road has been conveyed by the defendant No. 4 to the defendant No. 10 society. It is denied that the defendant Nos. 1 to 9 did not take efforts to get the deed of conveyance executed in favour of the plaintiff society. Regarding the garages, it is contended that the garages were purchased by seven members of the plaintiff society. They sought for the dismissal of the suit with cost.

4. According to the defendant No. 10, it is the owner of the access road. It denied the right of way of the plaintiff for the access road and contended that the defendant No. 10 is willing to provide the access road to the plaintiff society on the gratuitous basis, without granting any legal right or interest, only till the plaintiff society obtains the right of way for the suit property. It sought for the dismissal of the suit with compensatory cost.

5. There are several aspects, sought to be putforth by the parties, vide their respective pleadings de hors the real controversy, as sought to be putforth, and hence, the same are not being dealt with herein.

6. In the light of the respective pleadings taken by the parties, the following issues were framed by my learned predecessor at Ext.11, and I record my findings thereon, for the reasons to follow hereunder :-

| Sr. No. | Issues | Findings |
|---------|--|----------------------------|
| 1. | Whether plaintiff proves that defendant Nos. 1 to 9 have agreed to convey and are under statutory obligations to convey the suit property to plaintiff ? | In the affirmative. |
| 2. | Whether defendant Nos. 1 to 10 prove that members of the plaintiff were in wrongful possession of the area admeasuring 240 sq. mtrs. and bore well ? | Redundant. |
| 3. | Whether defendant Nos. 1 to 10 prove that survey was carried out on 21 st May, 2007 of the suit property as well as adjacent property after due notice to the plaintiff ? | Redundant. |
| 4. | Whether plaintiff proves that defendant No. 5 misused his position as Chairman and did not take any action in respect of shifting of existing compound wall and consequently loosing occupation of 240 sq. mtrs. of land alongwith bore well ? | Redundant. |
| 5. | Whether defendant Nos. 1 to 9 prove that 7 garages constructed by defendant Nos. 1 to 9 are as per approved plan ? | In the affirmative. |
| 6. | Whether defendant Nos. 1 to 9 prove that 22 feet access road is always made available to the plaintiff and whether | In the affirmative. |

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|----|--|-----------------------------------|
| | defendant No. 10 proves that defendant No. 10 is owner of the 22 feet wide access road and defendant No. 10 is willing to provide to the plaintiff common access road without granting any legal right or interest ? | |
| 7. | Whether plaintiff proves that shifting of compound wall is illegal on account of Fire Brigade problem ? | Redundant. |
| 8. | Whether the plaintiff is entitled to perpetual injunction as prayed ? | Partly in the affirmative. |
| 9. | What order and decree ? | As per the final order. |

REASONS

As to Issue Nos. 2, 3, 4 & 7 :-

7. Though these issues have been framed by my learned predecessor, the same are not required to be adjudicated upon, in the light of the controversy sought to be put forth by the parties, and the reliefs prayed for in the plaint, for the simple reason that the decision upon these issues is of no factual or legal consequence, for deciding the lis on its own merits. Hence, as these issues are redundant, I answered these issues accordingly.

As to Issue No. 1 :-

8. Though the defendant Nos. 1 to 9 disputed their obligation to execute the conveyance, the same has not been disputed to, during the course of arguments on their behalf, but it is only sought to be submitted that it is the plaintiff society, which is responsible for the delay in getting the conveyance executed. Even otherwise, as per section 11 of the

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 [hereinafter referred to as the 'MOFA' for the sake of brevity], it is an obligation of the promoter to execute the conveyance, in respect of the piece of land as well as the structure. Moreover, an authority is sought to be relied upon on behalf of the plaintiff in the case of **Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society [2007 Law Suit (SC) 28]**, wherein it was observed that the promoter has to take necessary steps to convey the title to the society. In the light of these observations, I answered the issue No. 1 in the affirmative.

As to Issue No. 5 :-

9. In respect of this issue, it is submitted by Ms. Bhandari, the learned counsel for the defendant Nos. 1 to 9, that commencement certificate and completion certificate in respect of the garages have been produced on the record. Exts. 53 and 54 are the commencement and the completion certificates, respectively, in respect of the said garages. It shows that the seven garages were constructed as per the approved plan. Hence, I answered the issue No. 5 in the affirmative.

As to Issue No. 6 :-

10. It is not in dispute that 22 ft. wide access road is made available to the plaintiff society. It is also not in dispute that the ownership of the said road came to be transferred to the defendant No. 10 society. It is the contention of the defendant No. 10 that it is willing to provide access to the plaintiff society, without granting any legal right or interest. In the light of this undisputed position, the issue No. 6 is answered in the affirmative.

As to Issue Nos. 8 & 9 :-

11. It is submitted by Ms. Bhandari, the learned counsel for the defendant Nos. 1 to 9, that the plaintiff did not recognise the garage owners, which delayed the conveyance. She invited the attention of this court to the agreement Ext. 21, which shows that there is a clear recital contained therein, that the vendor was entitled to erect additional structure. Apart from the same, she further invited the attention of this court to the Minutes of the Resolution passed by the plaintiff society at Ext. 39, which shows that the plaintiff society had passed a Resolution, inter alia, permitting the developer to construct the garages. It is submitted by Mr. Mehta, the learned counsel for the plaintiff, that the garages are common amenities, and the same cannot be sold out. He placed his reliance upon an authority from the Hon'ble Apex Court in the case of **Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd. [2010 Law Suit (SC) 577]**, wherein it was held that a garage, as an independent unit, is not a flat. However, a garage is included in the definition of flat. It has further been observed therein that the promoter has no right to sell stilt parking spaces, as it is not a flat or an attachment to a flat. It is further observed that the promoter cannot sell any portion of the building, which is not a flat.

12. The plaintiff examined one Mr. Oney Joseph Colaco as PW-1 at Ext.13. The defendant Nos. 1 to 9 also examined the defendant No. 4 Maneck Sorabji Painter as DW-1 at Ext.50. They deposed in consonance with the respective pleadings of the parties. PW-1 Mr. Oney Joseph Colaco admitted in his cross-examination that the owners/occupiers of the garages are the members of the plaintiff society. It is, thus, clear from the

cross-examination of the witness examined by the plaintiff itself, that the garages came to be sold out to the members of the plaintiff society, and not independently. Therefore, the garages formed the part and parcel of the residential flats, purchased by the said members of the plaintiff society. It is needless to observe that those members are entitled to the additional shares in respect of those garages, which are also the part and parcel of the property, to be conveyed to the plaintiff society. Notwithstanding the rival contentions of the plaintiff and the defendant Nos. 1 to 9, it is the legal obligation of the defendant Nos. 1 to 9 under the MOFA, to execute the conveyance, in respect of the suit property, in favour of the plaintiff society. The plaintiff society is entitled to the conveyance.

13. The existence of the access road is not in dispute. PW-1 Mr. Oney Joseph Colaco admitted in his cross-examination that the flat purchasers of the plaintiff society are using the said access road. It is the contention of the defendant No. 10 society in its pleadings, that the plaintiff does not have the right to use the access road, but the defendant No. 10 society is willing to provide the access road on humanitarian ground, only till the plaintiff society obtains the right of way for the suit property. The said stand taken by the defendant No. 10 ipso facto reveals its intention to permit the plaintiff to use the access way, till it obtains the right of way for the suit property, meaning thereby, that the defendant No. 10 desires to accord permission to the plaintiff to use the access way, only till the time an alternative way is secured. It is needless to mention here that the said stand taken by the defendant No. 10 gives rise to an unequivocal inference, that the defendant No. 10 is likely to obstruct the user of the said way at any point of time in the future.

14. DW-1 Maneck Sorabji Painter clearly stated in his cross-examination that an Undertaking was given to the Municipal Corporation, in relation to the right of way of the plaintiff society. It is submitted by Ms. Bhandari, the learned counsel for the defendant Nos. 1 to 9, that the right of way was never obstructed. Per contra, it is submitted by Mr. Mehta, the learned counsel for the plaintiff, that the way cannot be conveyed, and that DW-1 Maneck Sorabji Painter admitted the Undertaking. He placed his reliance upon an authority from the Hon'ble Bombay High Court in the case of **Smt. Vimal Narayan Kabre & Ors. Vs. The State of Maharashtra [C. A. No. 4223/12 in C. A. No. 491/11 decided on 21/01/2013]**, wherein it was observed by His Lordship that the word 'Undertaking' has to be equated with guarantee or promise.

15. Indisputedly, only because an Undertaking vis-a-vis the access road was given by the promoters to the Municipal Corporation, the Municipal Corporation granted sanction for the erection of the structure, to the promoters of the plaintiff society. There cannot be any conveyance, by taking any departure to the said Undertaking. The right of way granted by the promoters to the plaintiff society cannot be taken away, by any instrument. As the conveyance in respect of the access road in favour of the defendant No. 10 is not under challenge in this suit and as no relief in that regard has been prayed for, the same is not being dealt with herein. Notwithstanding the same, it has to be observed here that the plaintiff has got the legal right to use the access road, and the same cannot be obstructed by the defendants. Therefore, as there is the likelihood of obstruction in the future, the plaintiff is entitled to perpetual injunction in that regard. The plaintiff is also entitled to perpetual injunction, for

restraining the defendant Nos. 1 to 9 from creating any third party interest in respect of the suit property. Insofar as the other reliefs, relating to the structure erected by the defendant No. 10 and 11 are concerned, the plaintiff cannot be legally held to be entitled to the said reliefs, which are in the nature of perpetual injunction, for preventing them from applying and processing application before the statutory authority.

16. In the light of the forgoing observations, the issue No. 8 is answered partly in the affirmative, and I proceed to pass the following order :-

ORDER

1. The suit is hereby partly decreed with proportionate cost.
2. The relief of conveyance of the suit property is hereby granted, and the defendant Nos. 1 to 9 are hereby directed to execute the conveyance in respect of the suit property, comprising of a piece of land with the structures standing thereon, which are specifically described in the paragraph Nos. 2 & 3 of the plaint, together with the garages, within one month from the date of this order. If the defendant Nos. 1 to 9 fail to execute the Deed, the same shall be executed through this court, by appointing an appropriate officer of this court in that regard.
3. The relief of perpetual injunction is hereby partly granted, and the defendants are hereby permanently restrained from obstructing the access road of the plaintiff society, as shown in Ext. 'F' to the plaint, either personally or through any of their agents. Ext. 'F' shall form the part and parcel of the decree.

4. The defendant Nos. 1 to 9 are permanently restrained from creating third party interest in respect of the above mentioned suit property.
5. The rest of the reliefs relating to perpetual injunction are hereby rejected.
6. A decree be drawn up accordingly.

(S. U. Baghele)

Dt.27/06/18

Civil Judge,
City Civil Court,
Borivali Div., Dindoshi, Mumbai

Dictated on : 27/06/18
Transcribed on : 27/06/18
Checked & Corrected on : 28/06/18
Signed by HHJ on : 28/06/18

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGEMENT/ORDER.”

Uploaded on: 28/06/18 at 01.19 p.m. H.G.Steno:Mrs. M. M. Paranjape

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|--|---|
| Name of the Judge (with Court room no.) | HHJ Shri S. U. Baghele Court Room No.3 |
| Date of pronouncement of judgment/order: | 27.06.2018 |
| Judgment/order signed by P.O. on | 28.06.2018 |
| Judgment/order uploaded on | 28.06.2018 |