(2010) 03 BOM CK 0178

Bombay High Court

Case No: Appeal No. 342 of 2009 in Notice of Motion No. 2691 of 2008 in Suit No. 2314 of 2008

Shailaja Kamalakar Limaye and Others		APPELLANT
	Vs	
Nilkanth Ganesh Pethe, Pethe Engineering and Construction Co., Pooja and Poonam Builders and The Municipal Corporation of Greater Bombay		RESPONDENT

Date of Decision: March 25, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2
- Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 - Section 10, 11, 13, 3, 3(2)

Citation: (2010) 3 ALLMR 678 : (2011) 1 BomCR 353 : (2010) 112 BOMLR 1425

Hon'ble Judges: Anil R. Dave, C.J; S.C. Dharmadhikari, J

Bench: Division Bench

Advocate: S.U. Kamdar and S.J. Ghogre, for the Appellant; Virag Tulzapurkar Sanjay Jain, Rajmani Varma and Navdeep Vora, instructed by Navdeep Vora and Associates, for the Respondent

Judgement

S.C. Dharmadhikari, J.
Admit. Respondents waive service. By consent of parties heard forthwith.

2. This appeal under Clause 15 of the Letters Patent challenges the order of the learned Single Judge passed in the above Notice of Motion. By the order under challenge delivered on 16th April, 2009, the learned Single Judge has dismissed the appellants'' Notice of Motion.

3. The appellants before us are the original plaintiffs whereas the respondents are the original defendants.

3.1 The appellants filed a suit in this Court being Suit No. 2314 of 2008 against the original defendants for a declaration that the Deed of Conveyance dated 25th October, 2004 executed between the original defendant No. 1 and original defendant No. 3 in respect of a plot of land No. 442, TPS IV, Mahim Division, Mumbai is illegal, bad in law and not binding on the plaintiffs. The original defendant Nos. 1 to 3 are respondent Nos. 1 to 3 to this appeal.

4. The further relief that the plaintiffs claim is a permanent injunction restraining the defendants, their servants or anybody claiming through them from utilizing the FSI available on the plot in respect of the portion of the building viz. Building No. 2, Pethe Building, Baburao Parulekar Road, Off. Bhavani Shankar Road, Dada (West), Mumbai 400 028. It is the case of the plaintiffs that they have occupied this building.

5. The other final relief claimed is a direction to the defendants to convey the said plot to the Cooperative Housing Society formed by the plaintiffs viz. Space Cooperative Housing Society Limited.

6. It would be convenient to refer to the parties by their original description.

7. Final Plot No. 442 TPS IV, Mahim Division admeasures about 1998 sq. yards. It was owned by Hindu Undivided Family of the defendant No. 1. A portion of the plot admeasuring about 900 sq. yards together with the structures standing thereon was acquired by the respondent No. 4 (original defendant No. 4) Municipal Corporation of Greater Bombay under a Town Planning Scheme. Compensation was awarded to defendant No. 1. Remaining portion of the final plot No. 442 admeasuring about 1098 sq. yards viz. 918 square meters is the subject/suit plot. It is alleged in the plaint that the first defendant by an agreement for sale dated 11th April, 1966 in his capacity as Karta of Hindu Undivided Family consisting of his wife and minor son sold the plot to M/s. Pethe Engineering and Construction Company i.e. original defendant No. 2.

8. The original defendant No. 1 also in his capacity as Karta executed an agreement of Leave and Licence dated 16th April, 1966 with the original defendant No. 2 for entering upon the said plot and constructing building thereon and also to sell the flats constructed therein.

9. Then it is alleged that there was an oral partition in or about 1968 between the defendant No. 1 and his family in respect of the properties of the Joint Hindu Family. The oral partition was then put in writing in the form of Registered Deed of partition dated 26th April, 1968. Pursuant to the arrangement between defendant Nos. 1 and 2, the defendant No. 2 undertook construction of two buildings on the plot. Defendant No. 2 constructed a building on the area admeasuring 590 sq. mts. of the said plot consisting of stilt plus four upper floors being Building No. 2, Pethe

Building, Baburao Parulekar Road, Off. Bhavani Shankar Road, Dadar (West), Mumbai 400 028. However, second defendant partly constructed building No. 1 on an area admeasuring 328 sq.mts. of the said plot but it was not completed by defendant No. 2.

10. Reference is then made to a certificate issued by the Architect in this behalf (Annexure `C'' to the Plaint) to support the allegation of incomplete construction.

11. It is alleged thereafter that by registered agreement for sale dated 10th October, 1968, plaintiff No. 1 purchased flat being Flat No. 7 on the 3rd floor with parking space in the said building No. 2 from M/s. Pethe Engineering and Construction Company viz. defendant No. 2. Likewise, the other plaintiffs purchased the flats in their occupation which have been constructed by the defendant No. 2.

12. In para 12 of the plaint, it is alleged that as per the approved plan of the plot, defendant No. 2 was to construct two buildings being Building No. 1 and Building No. 2 on the plot. Building No. 1 consisted of ground plus three upper floors whereas building No. 2 consists of stilt plus four upper floors. A copy of the approved plan is annexed to the plaint. It is common ground that construction of Building No. 1 was not completed whereas each of the plaintiffs are occupants of Building No. 2. They, therefore, claimed to have formed a Cooperative Housing Society and reasons leading to the said formation are set out in subsequent paragraphs of the plaint.

13. It is also alleged that an application made by the defendant No. 2 for subdivision of plot came to be rejected on the ground that there were temporary structures on the portion subdividing the plot.

14. It is alleged that in May, 2006, defendant No. 3 undertook demolition of the incomplete building in Building No. 1 on the portion of the plot and at that time, it was revealed that defendant No. 3 had purchased the plot from defendant No. 1. The plaintiffs were under a bonafide impression that defendant No. 3 intends to put up a new building on the said plot. However, in December, 2007, defendant No. 3 started digging activities and to the knowledge of the plaintiffs, he started excavating from below the building of the plaintiffs. The plaintiffs, therefore, approached the original defendant No. 4 Corporation by making an application under the Right to Information Act. They were shocked to receive the information that defendant No. 3 had submitted a proposal for additions and alterations of the existing building through their Architect M/s. Space Age Consultants. The plaintiffs alleged that the plans submitted by defendant No. 3 are such that it poses grave danger to the building occupied by them. Therefore, they approached the City Civil Court, Bombay by filing L.C. Suit No. 525 of 2008 against the third defendant and the Bombay Municipal Corporation. During the course of suit, it was revealed that defendant No. 3 has stated that by Deed of Conveyance dated 25th October, 2004 between defendant No. 1, his wife, the third defendant purchased the entire final

plot No. 442 TPS IV. A copy of the Deed of Conveyance is annexed to the plaint as Annexure `Q''. Thus, it is stated that once the suit plot was sold in the year 1966 to defendant No. 2 and defendant No. 2 had carried out construction so also entered into agreements in respect of the flats which are in occupation of the plaintiffs, then, defendant No. 1 has no right, title or interest to convey the plot and particularly, the portion on which the building occupied by the plaintiffs stands, to defendant No. 3.

15. It is in these circumstances that the challenge to the conveyance has been raised and the permanent injunction claimed by the plaintiffs.

16. In the Notice of Motion, interim reliefs in furtherance of the aforementioned final prayers have been claimed.

17. The application for interim reliefs was supported by the affidavit of one of the plaintiffs.

18. The Notice of Motion was contested by the contesting party. The defendant No. 3 through its partner filed an affidavit in reply and contended that the suit is liable to be dismissed because it is bad for misjoinder of causes of action as well as of parties. It is alleged that the plaintiffs are not the only owners in as much as in some cases there is joint ownership and some of the plaintiffs have not been able to establish even prima facie their title to the flats.

19. It was alleged that the suit is barred by virtue of Order II Rule 2 of the CPC in as much as the suit filed in the City Civil Court being Long Cause Suit No. 525 of 2008 concerning the same subject matter is pending.

20. It is alleged that the plaintiffs are seeking reliefs contrary to the express terms and conditions of the agreements under which they were put in possession of the respective premises. It is stated that each of the agreements entered into by defendant No. 2 with the plaintiffs as purchasers preclude the purchasers from transferring their alleged rights without the written consent of defendant No. 2. Further, the defendant No. 3 has acquired the plot in the month of October, 2004 and the present suit is filed in the year 2008. The application for interim reliefs is also made after four years of this conveyance and hence, no interlocutory orders in favour of the plaintiffs be passed.

21. The third defendants then contended that the suit Plot of Land admeasures about 1098 sq. yds. and is referred as final Plot No. 442 of Town Planning Scheme No. IV, Mahim. The said plot was originally owned by Mr. Ganesh Hari Pethe and subsequently inherited by Mr. Nilkanth Ganesh Pethe and his children Prasad and Preeti Pethe ("The Pethe Family"). In or about 1964 when the Town Planning Scheme was finalized, out of the original plot admeasuring about 1,998 sq. yds., a portion of plot admeasuring about 900 sq. yds. was acquired by the competent authority for the purpose of road widening, leaving the balance area of 1,098 sq. yds. as aforesaid. In or about February, 1965, the Pethe Family submitted plans for

construction of two buildings i.e. Building No. 1 and Building No. 2, which were approved by the Defendant No. 4 herein (wrongly mentioned in the cause title as Defendant No. 5) on 10th June, 1965. On 11th April, 1966 by an Agreement of Sale executed between Mr. Nilkanth Ganesh Pethe i.e. Defendant No. 1 as Karta of his Joint Hindu Family and M/s. Pethe Engineering i.e. Defendant No. 2, the free hold land bearing Final Plot No. 442, admeasuring 1096 sq. yds. was agreed to be sold. However the actual conveyance in favour of Defendant No. 2 did not take place. On 16th April, 1966, a Leave and License came to be executed between the Pethe Family on the one hand and M/s. Pethe Engineering and Construction Company on the other hand inter alia permitting the said M/s. Pethe Engineering and Construction Company to construct the said two buildings with power to sell the flats, as may be constructed by the said Company. It may be mentioned here that the said plot has been attempted to be developed in Three Phases.

22. It is then urged that pursuant to the agreements referred to above, the second defendant was able to construct only building No. 2. They sold the eight flats therein and the agreements with flat purchasers stipulate that subject vendor has almost completed the construction on the said plot consisting of eight residential flats and the Sub-Vendors will have no right to construct any additional floors in Building No. 2 until the conveyance is executed in favour of conveyance of the Housing Society. Thus, as far as building No. 2 which is in occupation of the plaintiffs is concerned, there was an agreement between the defendant No. 2 and the flat purchasers that no additional floors on this building can be put up.

23. However, the agreement itself clarified that nothing contended therein confers upon the flat purchasers any right, title or interest of any kind whatsoever into or over the said land or buildings or any part thereof and such conferment can take place only upon execution of the conveyance to the limited company or Cooperative Society.

24. Clauses 17 and 21 of the agreement with the flat purchasers have been relied upon and they read as under:

17. The Sub-Purchasers shall not let, transfer, convey, mortgage, charge or in any way encumber or deal with, or dispose of his flat nor assign under let or part with his/her interest under or the benefit or this Agreement or any part thereof till all his/her dues or whatsoever, nature owing to the Sub-vendors are fully paid only if the Sub-Purchaser has not been guilty of breach of or noncompliance with any or the terms and conditions of this Agreement and until be obtain previous consent in writing of the Sub-Vendors.

21. In the event of the society or Limited Company or Incorporated Body formed and registered before the sale and disposal by the Sub-Vendors of all the flats in the said building, the powers and authority of the society of the society so formed or of the Sub-Purchase and other Sub-Purchaser of the flats shall be subject to the overall

control or the Sub-Vendors in respect of any of the matter concerning the said buildings, the construction and completion thereof and all amenities appertaining the same and in particular the Sub-Vendors shall have absolute authority and control as regards the unsold flats of which the agreements are cancelled at any stage for some reason or other and the Sub-Vendors have absolute authority regarding the disposal thereof.

25. Therefore, it was the stand of the third defendant that not only the original flat purchasers but all persons claiming through them are bound by the terms and conditions recorded in these agreements. The original flat purchasers have accorded their express consent under Clause 8(a) of the agreement to allow defendant No. 2 to make additions, alterations in and raise storeys or put up additional structures in and raise storeys or put up additional structures on building No. 1 at any time as may be permitted by the Municipal Corporation. Since the defendant No. 4 Corporation has approved plans for construction of building No. 1, none of the plaintiffs have any right to object to interfere with the same. The original sanctioned plan permitted construction of two buildings on the final plot No. 442. However, defendant No. 2 was able to complete only building No. 2 and as regards building No. 1, the defendant No. 2 was unable to construct the same because the front portion of the plot was occupied by various occupants/tenants'' contravening structures and they were not willing to cooperate. It was pointed out by defendant No. 3 that as per the IOD and CC in respect of building No. 1, it was clearly stipulated that the distance between two buildings was 30 feet. Therefore, sanction was given for construction of two buildings way back in 1975 and the IOD in that behalf was relied upon. As to why construction in the second phase of building No. 1 could not proceed has been then pointed out in paras 4.11 to 4.20 and it was alleged that building No. 2 is constructed about 40 years ago. The plaintiffs in the year 2005 had approached defendant No. 3 for reconstruction of building No. 2. Defendant No. 3 expressed its willingness to reconstruct building No. 2 and contended that instead of working in cooperation, the plaintiffs started making unreasonable demands and in these circumstances, their claim is without any merit and substance.

26. It is stated that the entire FSI available on the plot in accordance D.C. Regulation 33(15) has now become available and that is how the plans were submitted. In these circumstances, when the plans have been sanctioned on 26th March, 2007, commencement certificate is issued on 10th August, 2007, then, no interlocutory reliefs should be granted. All the more, when the plaintiffs have caused harassment and have made it impossible for defendant No. 3 to carry on the work by making complaints to the Municipal Corporation, as a result of which a stop work notice had been issued. Thereafter, the clarification has been given to the Municipal Corporation of Greater Bombay stating therein that construction of independent building No. 1 does not require consent from the occupiers of building No. 2 i.e. present plaintiffs. For all these reasons, by denying the plaint allegations, it is urged that motion be dismissed.

27. From the records it appears that a rejoinder affidavit was filed by the plaintiffs wherein they reiterated their earlier contentions and stated that the construction at site is contrary to the agreements entered into with the flat purchasers. It is clear from a perusal of the terms that unless and until the plaintiffs'' consent is obtained, the construction could not have been commenced and completed. For these reasons, they reiterated that the Notice of Motion be made absolute with costs.

28. It is this notice of motion which was placed before the learned Single Judge and by the impugned order, he held that the FSI utilized for construction of building No. 2 and the land under it is not being so utilized and, therefore, the apprehension in that behalf is misplaced. Further, he held that the plaintiffs are not prima facie entitled to stop the construction of building No. 1. Concluding thus, he dismissed this notice of motion.

29. Aggrieved thereby, the appellants plaintiffs are before us in appeal.

30. Shri Kamdar, learned Senior Counsel appearing on behalf of the plaintiffs contended that the learned Single Judge has committed an error in dismissing the motion. He submits that the order under challenge is contrary to the terms and conditions of the agreements between the parties and the provisions of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA). He submits that the learned Judge has failed to notice the clear stipulations in the agreements and the statutory provisions in the field. Shri Kamdar submits that the learned Judge framed wrong questions for consideration at this interlocutory stage. Once the questions as framed by him are on an erroneous assumption and basis, then, ultimate prima facie conclusion is also vitiated. Shri Kamdar was at pains to point out that building No. 2 has been fully constructed and is occupied by the plaintiffs. The flats have been sold to them. It is a construction on a portion of the land being final plot No. 442. Any building on the said plot cannot come up unless plaintiffs'' consent is obtained for such construction. It may be that the original plan envisages construction of two buildings, however, once the building No. 1 was complete and on the own showing of the defendant Nos. 1 to 3, the construction of building No. 2 was complete and they were not able to complete building No. 1 at site, then, now to make such construction and by utilizing additional FSI means that the terms and conditions with the flat purchasers have been violated. The promoters and builders are obliged to disclose the entire plan of construction to the flat purchasers before the flats are offered to them. Further, the lay out plan has to be annexed to the agreement together with the necessary details. If such lay out plans are annexed to the agreement and any construction is provided therein, then, alone the same could have been permitted at site. However, no additional construction or building is permissible unless compliance with the statute is made. Shri Kamdar has invited our attention to the terms and conditions of the agreements, the allegations in the plaint and the definitions in MOFA. Further, he invites our attention to Section 3 of

the said Act and contends that Sub-section (2) Sub-clauses (k) and (l) thereof make it abundantly clear a full and true disclosure of such other information and document in such manner has been prescribed so also true copies of the documents referred to in Sub-section should be provided by the promoter. This obligation remains from 1963 onwards and merely because some amendments have been made to the statute in question does not mean that the interpretation of Section 3(2)(k) is controlled by such amendments. In any event, Shri Kamdar submits that Section 7 was on the statute book. Section 7 makes it amply clear that after plans and specifications are disclosed, no alterations or additions without consent of persons who have agreed to take the flats can be made. He submits that introduction of Section 7A would not mean that the promoter''s obligation to form a Cooperative Society u/s 10, to convey title and execute documents in accordance with the agreements to flat purchasers u/s 11 can be brushed aside or given a go bye by the promoter. Shri Kamdar has also invited our attention to Section 13 of the Act. Shri Kamdar submits that the fallacy in the learned Judge''s prima facie conclusion is that not only he fails to take into account the averments in the plaint and the contents of the agreements but there is no reference to MOFA in the judgment. In such circumstances, the conclusion that the learned Judge reaches with regard to the FSI is erroneous and illegal. He submits that the learned Judge was not required to go into the computations of FSI and more particularly make reference to D.C. Regulation 33(15). There is no question of the additional FSI being available to the defendant No. 3. The proposed building cannot be said to be authorized and legal merely because introduction of D.C. Regulation 33(15).

31. Shri Kamdar submits that the conclusion on the second question also is vitiated because the learned Judge has proceeded on the basis that the claim is restricted to the plot of land under building No. 2 and the FSI available with regard to the same. His assumption and basis itself is erroneous and illegal because unless and until property is conveyed, the promoter is not discharged from his obligation under MOFA. Once the flat purchasers are put in possession pursuant to the agreements for sale of the flats, then, unless and until the flat purchasers are organized into a Cooperative Society or otherwise and their consent is obtained, there cannot be any further construction at site. In such circumstances, the assumption that the plaintiffs'' rights are restricted to building No. 2 and the FSI in respect thereof is erroneous and even on question No. 2, the conclusion of the learned Judge cannot be sustained. For all these reasons, he submits that the order be set aside and the appeal be allowed. Shri Kamdar places reliance upon the following judgments in support of the above contentions:

1. Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, .

2. Harsharansingh Pratapsingh Gujral and Others Vs. Lokhandwala Builders Ltd. and Others, .

3. Ravindra Mutenja and Ors. v. Bhavan Corporation and Ors. 2003 (5) Mh.L.J. 23.

4. Kalpita Enclave Cooperative Housing Society Ltd. v. Kiran Builders Pvt. Ltd. 1985 (1) Bom .L.R. 100.

5. Nahalchand Laloochand Pvt. Ltd. v. Panchali Cooperative Housing Society Limited First Appeal No. 2182 of 2007.

32. On the other hand, Shri Tulzapurkar, learned senior counsel appearing on behalf of the respondent Nos. 1 to 3 submits that the order of the learned Single Judge requires no interference. Shri Tulzapurkar submits that the plaintiffs are now seeking to make out a totally different case. However, they must be held to be bound by their own pleadings. There own case before the learned Single Judge was that the conveyance is bad in law to the extent it impinges upon the rights guaranteed to them under the flat purchase agreement. It was their apprehension that the FSI of building No. 2 and the rights to obtain a conveyance of the land beneath it are in jeopardy on account of the construction commenced at site. However, the plaintiffs themselves do not dispute that more than one building can come up on the site. Building No. 2 is constructed upon a portion of land. Balance constructed portion is meant for construction of building No. 1. That construction of building No. 1 had commenced but could not completed by defendant No. 2. Thereafter it transferred all his rights in favour of the defendant No. 3. Under the document executed with defendant No. 3, all rights of the defendant No. 2 in respect of the plot of land together with the superior rights conferred in defendant No. 1 have been transferred. It is not as if the defendant No. 3 was not told about the rights of the plaintiffs. They were fully apprised of the construction already made and the agreements entered into with the flat purchasers like the plaintiffs. However, the rights which form part of the agreements between the defendant No. 2 and the flat purchasers are also made over to defendant No. 3. Therefore, it is not as if only the benefits under these agreements are available to the plaintiffs. Together with such benefits and advantages, even the limitations and restrictions on their rights equally bind them. It is not permissible for them to urge today that no construction at site can come up. Once it has been clarified that the FSI at site is the one pertaining to building No. 1 and would be utilized only for construction of building No. 1, then, it will not be proper to hold that the plaintiffs have made out a prima facie case. Thus, on all three points viz. prima facie case, balance of convenience and irreparable loss, no case is made out by the plaintiffs and their motion is rightly dismissed by the learned Single Judge.

33. Shri Tulzapurkar has invited our attention to the averments in the plaint and has contended that it is not as if the learned Judge has gone only by the prayers in the plaint. The substantive paragraphs of the plaint also pertain to building No. 2 and the land beneath it. Shri Tulzapurkar has invited our attention to the paras 12,14 and 22 of the plaint. Further, he has submitted that the final relief of permanent injunction is based on the allegations made in para 24 of the plaint. Therefore, he submits that now, the plaintiffs wish to enlarge their case and bring in issue the

construction of building No. 1 and the portion occupied by such construction. That is clearly beyond the pleadings and no relief which is beyond the pleadings can be granted.

34. Mr. Tulzapurkar has invited our attention to the annexures to the plaint. He submits that if the agreement between defendant No. 2 is perused, it is clear therein that Pethe (vendors) and defendant No. 2 as purchasers had entered into a leave and licence agreement. Further, Shri Tulzapurkar submits that the agreement that is entered into with flat purchasers (Annexure `D'' to the plaint) is between defendant No. 2 who were Sub-Vendors and the flat purchasers who are styled as Sub-Purchasers. In this agreement which is dated 10th October, 1968, there is a reference to the leave and licence agreement between Pethe and defendant No. 2 dated 16th April, 1966. There is a reference to all prior agreements and it is clear that the defendant No. 2 have entered upon the plot, started construction work of their first building which is described as building No. 2 and the defendant No. 2 had clearly reserved the rights to enter into separate agreement with diverse persons and parties for selling to them on ownership basis self contained flats in the proposed buildings. The flat purchasers have taken inspection of all the agreements referred to in the recitals i.e. title deeds of Pethes, plans and specifications of the building No. 2 and other particulars with regard to the amenities etc. It has been clarified in the agreement itself (clause 1) that construction of building No. 2 is complete and defendant No. 2 will have no right to construct any additional floor in the said building No. 2 on the said plot of land until the conveyance is executed in favour of the Cooperative Housing Society or any other incorporated body as mentioned therein. Shri Tulzapurkar has invited our attention to clauses 6 and 7 and contended that unless and until the conveyance is executed with the Cooperative Society and the whole of the property is transferred, the flat purchasers can make additions, alterations in and raise storeys or put up additional structures in building No. 1 at any time as may be permitted by the Municipal Corporation and other competent authorities and the Sub-Vendors (defendant No. 2) shall be at liberty to sell, assign, alienate or otherwise deal with or dispose of their rights, title and interest in the said land hereditaments and premises and the buildings constructed and hereinafter to be constructed thereon provided that the defendant No. 2 do not, in any way, affect or prejudice the rights granted in favour of the flat purchasers.

35. Shri Tulzapurkar submits that in the light of these clear stipulations in the agreements, there is no question of the learned Judge proceeding on any erroneous assumptions or basis. Further, there is no question of the learned Judge ignoring or brushing aside the provisions of MOFA. Similarly, the learned Judge cannot be faulted for framing the questions as they are based on the pleadings and contents of the documents. If the learned Judge has proceeded in this manner and by his logic, then, his ultimate prima facie conclusion also cannot be faulted. Consequently, the appeal is liable to be dismissed with costs.

36. Shri Tulzapurkar and Shri Jain relied upon the following decisions:

1. White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, .

2. Jamuna Darshan Coop. Housing Society Ltd. and Ors. v. J.M.C. & Meghani Builders and Ors. Appeal No. 253 of 2009.

3. Ralph D''souza and Others Vs. Danny D''souza and Others, .

4. Jamuna Darshan Coop. Housing Society Ltd. and Ors. v. J.M.C. & Meghani Builders and Ors. Notice of Motion No. 2220 of 2007 in Suit No. 3938 of 2001.

37. With the assistance of the learned Counsel appearing for the parties, we have perused the impugned order. We have also perused the plaint, annexures thereto and all affidavits before the learned Single Judge. We have also perused the relevant statutory provisions and the decisions brought to our notice.

38. The only question that arises for our consideration is whether the learned Single Judge was right in holding that the plaintiffs appellants have not made out any prima facie case nor is the balance of convenience in their favour and further, they will not suffer any irreparable loss and injury if the injunction is not granted.

39. At the outset, we must take note of the submissions of Shri Kamdar that the order under challenge must be scrutinized by us on the basis of the reasons assigned by the learned Single Judge and respondents cannot support his conclusions by their pleas raised before us for the first time. In other words, the order must be taken as it is and nothing should be added or supplanted in it so as to uphold it and all attempts made by Shri Tulzapurkar are of this nature is Shri Kamdar''s objection.

40. Firstly, this objection is raised because Shri Tulzapurkar has invited our attention to the documents on record in the backdrop of the submissions raised by Shri Kamdar with regard to noncompliance of the provisions of MOFA by the original defendant Nos. 1 to 3. It is in answer to Shri Kamdar''s arguments on applicability of several provisions of MOFA that Shri Tulzapurkar took us through the relevant documents and contended that the provisions to which our attention was invited have no application in the facts of this case.

41. Thus, far from making an attempt to support the impugned order by raising extraneous pleas, Shri Tulzapurkar''s attempt was to meet the contentions of Shri Kamdar based on the applicability of MOFA. It is Shri Kamdar who raised these contentions and although the learned Single Judge''s attention was not invited to the several judgments and decisions on MOFA, we permitted Shri Kamdar to do so. This is because the learned Single Judge has in the impugned order held that the provisions of MOFA are not attracted (See para 13 of the impugned order). Thus, there is no substance in the objection of Shri Kamdar and when the learned Judge''s attention was invited to MOFA and an attempt was made to argue that the same has

not been complied with, we are of the view that it would be permissible for us to consider the arguments of Shri Tulzapurkar. In the process, we will refer to the pleas raised by Shri Kamdar as well.

42. Having taken care of this preliminary objection, we now proceed to decide the principal question framed by us. It is common ground that the plaintiffs are flat purchasers and it is their own case that each one of them has purchased the flat in building No. 2. That building No. 2 is constructed on a portion admeasuring 590 sq. mts. Of plot No. 442 and consists of stilt plus four upper floors. It is the case of the plaintiffs that defendant No. 2 partly constructed building No. 1 and that consumed an area of 348 sq. mts.

43. It is the case of the plaintiffs that as per the approved plan of the plot, defendant No. 2 was to construct two buildings being building No. 1 and building No. 2 on the said plot. They have given details and made a reference to the approved plan dated 10th June, 1965. It is this plan to which our attention was invited by Shri Tulzapurkar. It is at page 476 of the appeal paperbook. It is approved by the Bombay Municipal Corporation on 10th June, 1965. It envisages the construction of two buildings and the distance between the two buildings is notified therein as 30 feet. Therefore, one more building will come up on the plot is a fact known to the plaintiffs throughout. Therefore, assuming that Section 3 of MOFA applies, it is not as if particulars of the construction on site are not disclosed. They have been disclosed to the plaintiffs while entering into the agreement for sale of the respective flats and purchasing and occupying them.

44. It is then case of the plaintiffs that they are owners of the respective flats and as per their agreement, the property was to be conveyed to a society or a duly incorporated body to be formed by the flat purchasers. It may be true that the property had to be conveyed but it is not as if this obligation to convey prohibits construction of building No. 1 by utilizing the FSI and availing of other benefits including the one available D.C. Regulation 33(15). This aspect becomes clear from the documents to which our attention has been invited. The agreement for sale of the respective flats itself makes a reference to the documents between defendant No. 1 and defendant No. 2. Further, the document (agreement for sale with the flat purchasers) makes reference to the construction that is to be carried out as each one of them is fully conversant with the plans and have seen the approved plans. It has been very clearly stated that the Sub-Vendors (defendant No. 2) will have no right to construct any additional floors on building No. 2 on the said plot of land until the conveyance is executed in favour of the Cooperative Housing Society or any other incorporated body of the flat purchasers. However, clauses 6,7 and 8 of the same agreement read as under:

6. Nothing contained in these presents shall be construed to confer upon the Sub-Purchasers any right, title or interest of any kind whatsoever into or over the said land or buildings or any part thereof, such conferment to take place only on the

execution of the Conveyance to the Limited Company or a Cooperative Society or an Incorporated Body to be formed of the Sub-Purchasers of different flats in the said buildings as hereinafter stated.

7. The Sub-Purchasers shall have no claim save and except in respect of the particular flat hereby agreed to be acquired in the manner stipulated herein i.e. all open space, lobbies, stair cases, terraces, etc. will remain the property of Sub-Vendors until the whole property is transferred to the proposed Limited Company, a Cooperative Society or an Incorporated Body as hereinafter mentioned.

8. Pending the completion of the transfer of the said plot of land to the proposed Cooperative Society.

(a) the Sub-Vendors shall have a right to make additions, alterations in and raise stories or put up additional structures on building No. 1 at any time as may be permitted by the Municipal and other competent authorities and the Sub-Purchasers hereby consents to the same.

(b) the Sub-Vendors shall be at liberty to sell, assign, mortgage or otherwise deal with or dispose of their right, title and interest in the said land, hereditaments and premises and the buildings constructed and hereinafter to be constructed thereon, provided that the Sub-Vendors do not in any way affect or prejudice the right hereby granted in favour of the Sub-Purchasers in respect of the flat agreed to be acquired by the Sub-Purchasers.

45. A bare perusal of these clauses would make it clear that building No. 1 which was then in incomplete state could have been fully constructed on the basis of the permissions and approvals of the competent authorities and all rights to so construct and deal with that construction are in tact. In fact, the flat purchasers have agreed to these stipulations in the contract knowing fully well of their entitlement under MOFA to get a conveyance of the property. Therefore, until the society or any other incorporate body is conveyed title to the property by defendant Nos. 1 to 3, it is permissible to raise the construction of building No. 1 which has been clearly shown on the plans approved in the year 1965 itself. Therefore, assuming that Shri Kamdar is right, that the judgment of the Hon''ble Supreme court in Jayantilal (supra) mandates compliance with Section 3(2)(k) of MOFA, yet, that has been done in the present case. The disclosures are made and copies of the plans are also supplied to parties. If the controversy before this Court and the learned Single Judge is considered in the above backdrop, then, we do not find any basis for the submission that there is violation of the statutory obligations and the clauses of the individual agreements with the flat purchasers.

46. Any larger and wider controversy as to whether the ratio of the judgment of the Hon''ble Supreme Court in the case of Jayantilal (supra) has been correctly understood and applied in the case of Jamuna Darshan Cooperative Housing Society Limited and Ors. (supra) by this Court need not be considered in the peculiar facts of

this case. Finding that there were clear clauses in the agreement permitting the construction of building No. 1 at site and the plans having already been approved in that behalf so also the construction on the own showing of the plaintiffs having commenced, then, we do not find that the learned Judge was in error in refusing the interim reliefs.

47. It may be true that there was an attempt made to subdivide the plot and it was not so divided, yet, we do not find any basis for the apprehension that the plaintiffs under their individual agreements are, in any way, prima facie adversely affected by the Deed of Conveyance in favour of the defendant No. 3. It may be that the entire plot is conveyed in favour of defendant No. 3 by defendant Nos. 1 and 2 but in that conveyance as well there is a reference to the obligations which have to be discharged by the defendant No. 3. Those are the obligations which the defendant No. 3 will have to fulfill because he is taking over the property subject to the same. In such circumstances, if the conveyance is also subject to the rights of the plaintiffs to get title to the property and prima facie when even they have a restricted entitlement which is to the extent of the area covered by building No. 2, then, we do not see how the learned Judge could be faulted in reaching the conclusion that the plaintiffs have failed to make out a prima facie case.

48. As far as the objection of Shri Kamdar that the defendant No. 3 cannot avail of the benefits of D.C. Regulation 33(15) is concerned, we find that the learned Judge has clearly dealt with that aspect of the matter by referring to the approved plans with regard to building No. 2. As far as the approval for construction of building No. 1 is concerned, the learned Judge has referred to that plan also and has held that the FSI available for the building of the plaintiffs has not been used for the construction of building No. 1/proposed new building. Therefore, the rights of the FSI in respect of plaintiffs'' building are not at all utilized. The plot area and the FSI available has been taken into account by the learned Judge in his reasoning in paras 10 and 11 of the impugned order and we do not find any basis for the apprehension which was reiterated before us. In such circumstances, we are of the opinion that the learned Judge was right in the conclusion that he has reached. There is no substance in the objection with regard to the exploitation of the FSI. The learned Judge has dealt with this aspect of the matter by referring to the relevant documents and applying the correct principles at this prima facie stage. Ultimately, the suit is pending and construction at site is always subject to the final orders therein. However, when the plaintiffs have not been able to make out a prima facie case on their own pleadings and the contents of documents relied upon, then, the conclusion reached cannot be said to be vitiated or erroneous so as to warrant interference in Appeal. However, it is clarified that the refusal to grant interim reliefs should not be construed as a permission to the respondent No. 3 to defeat the rights of the appellants original plaintiffs. Respondent No. 3 can complete construction of building No. 1 strictly in accordance with the Building Rules and Regulations and the approved plans. Further, the original defendants can deal with

the flats in this building and all this is subject to the orders of this Court in the suit. It is directed that the respondents original defendants should not convey the building No. 1 and the land unless they fulfill all their obligations towards the appellants original plaintiffs under the individual agreements more particularly described in paras 6 to 11 of the plaint,

49. In the result and subject to the above clarification, the Appeal fails and is accordingly dismissed. All observations in the interim order and this order are tentative and prima facie. They should not influence the court at the trial of the suit. In the peculiar facts, hearing of the suit is expedited.