

**(2011) 06 BOM CK 0072**

**In the Bombay High Court**

**Case No :** Notice of Motion No. 2327 of 2000 in Suit No. 3323 of 2000

Ratna Rupal Cooperative Housing Society Ltd.

APPELLANT

Vs

Rupal Builders and Others

RESPONDENT

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**Date of Decision :** 27-06-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4  
Contract Act, 1872 — Section 23  
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 7A

**Citation :** (2011) 5 BomCR 561 : (2011) 8 RCR(Civil) 1172

**Hon'ble Judges :** Roshan Dalvi, J

**Bench :** Single Bench

**Advocate :** Anil C. Singh, Anil D. Yadav, instructed by Amit G, for the Appellant;  
Kevic Setalvad, Diren Shah, instructed by Vimla and Co., for the Respondent

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## **Judgement**

Roshan Dalvi, J.—The Plaintiff has sued for compliance of the statutory obligations under the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA) by the Defendants. The specific statutory obligation claimed by the Plaintiff is executing the deed of conveyance in favour of the Plaintiff Society for the plot of land which came to be developed by the Defendants and under which development the Plaintiff's building came to be constructed and the Plaintiff's members, as the flat purchasers, came to be put in possession and occupation of the flats agreed to be purchased by them.

2. The Defendants sought to put up additional construction. They sought to consume further FSI which came to be available on the suit plot pursuant to amendment of the Development Control Regulations, 1991 (DC Rules). The Defendants sought to have the plans of the Plaintiff's plot of land amended. The Plaintiff sought to restrain the Defendants from doing so. So far the amended plans have not been submitted and further construction has not been put up.

3. This Notice of Motion is for the mandatory injunction to comply with the statutory obligation of executing the deed of conveyance as per Section 11 of MOFA and the prohibitory injunction against the Defendants entering upon the suit plot and developing it by putting up additional construction by consuming additional FSI.

4. The members of the Plaintiff as the flat purchasers entered into agreements with the Defendants in around 1975.

Under Clause 1 of the agreement the Defendants stated that they were constructing the building on the suit plot "in accordance with plans approved by the "Municipal Corporation of Greater Bombay" (MMC). The specifications were kept at the building site for inspection. The clause stated that the flat purchasers as the buyers had seen and approved ..... (it is not stated what was approved).

Under Clause 5 of the said agreement the flat purchasers were shown not to have right, title or interest over the land or building until the conveyance was executed. Under Clause 6 of the agreement the flat purchasers would have no claim except the premises acquired by them, other amenities in the building such as open space, parking space, lobbies, staircase, lifts and terrace would remain the property of the Developers until the property was transferred, which was subject to the rights of the Developers.

Under Clause 7 of the agreement the Developer had the right until execution of the conveyance in favour of the Society to make additions, raise storeys or put additional structures as permitted by the MMC and competent authority. Such additional structures were to be their sole properties.

5. It is settled law that agreements between the flat purchasers and the Developers are required to be in accordance with the statutory provisions contained in MOFA and the model agreement. The clauses which give the rights of the parties and agreement of the kind executed by and between the flat purchasers in the Plaintiff Society and the Developers cannot be inconsistent with or in derogation of the statutory provisions under MOFA. Any clause in any agreement by any flat purchasers or the developer which is inconsistent with or against the mandate of the statute would be, to that extent void u/s 23 of the Indian Contract Act being against the provisions of MOFA and against public policy reflected therein. The reliance upon them is completely in vain.

6. The statutory provisions are, therefore, to be examined.

(a). u/s 7 of MOFA the Developer can make no alterations or additions in the structures in respect of which the flats were constructed without the consent of the flat purchasers after plans and specifications were disclosed.

Needless to say that the plans must be sanctioned plans and not draft plans.

(b). u/s 7A, which is an exception to Section 7, it has been clarified that the

construction of additional structures in a layout which are constructed and completed in a layout under a scheme of development with the approval of the Municipality could be constructed even without the consent of the flat purchasers.

Needless to state that any additional construction of any additional structure must be in accordance with plans and specifications, which are initially sanctioned, shown and offered for inspection at the time the agreements with the flat purchasers are executed.

Needless to further mention that no further additional structures in any further construction under further amended plans, not already sanctioned at the time of the agreement of the flat purchasers is executed can be included or permitted to be constructed by the Developers without the express consent of the flat purchasers.

(c). u/s 10 of MOFA upon the minimum number of persons required to form a Cooperative Society having executed agreements and taken flats, the developer is mandatorily required to apply for registration and get the Society registered. If the developer fails to do so, the flat purchasers obtain the right to form their Society.

(d). u/s 11 of MOFA the Developers are bound to execute the conveyance of the land and the building in accordance with the agreement within the statutory period prescribed under MOFA or Rules made thereunder.

(e). Under Rule 9 of MOFA the prescribed statutory period is 4 months from the date of Registration of the Society.

7. After the execution of the agreements in 1975 the Defendants constructed the building as per sanctioned plans. The Plaintiff's Society came to be registered on 25th September 1978 though not by the Defendants. The Defendants were statutorily bound to execute the conveyance of the land and the building on or before 24th January, 1979. The Defendants failed in that statutory duty and hence the suit.

8. The lis between the parties is within a very narrow ambit. The flat purchasers have admittedly executed agreements for purchase of the flats in 1975. It is not disputed that the Plaintiff Society is registered. On the suit plot of land only one building was to be constructed. No layout plan showing a scheme of development approved by the MMC is produced. None was shown to the Plaintiffs. The Plaintiff's building with the necessary requisite compulsory area was the only construction on the suit plot of land.

There have admittedly been two other chawls on the plot of land which have neither been constructed by the Defendants nor were to be used for any proposed construction under any sanctioned plans or specifications shown to the Plaintiff. Nothing can, therefore, be constructed. The plot of land is a simple plot of land on which one building came to be constructed in about the entire of the plot with two chawls remaining on either side and one recreational area in front

of the building. Therefore, there can be no mistaking that the entire plot of land on which the Plaintiff's building was constructed had to be conveyed by the Defendants to the Plaintiff. That having not been done, the suit is filed.

9. Not only that the Defendants failed in their statutory duties, they sought to put up further construction much later in the day upon the amendment of the DC rules consequent upon which the suit plot of land came to have more FSI. The Defendants sought to consume that FSI on the Plaintiff's plot of land.

10. The Plaintiff alone had right, title and interest on the entire plot of land. Nonperformance of the statutory duty and obligation would not alter the legal position. The Conveyance had to be executed within the specified period. The conveyance was not executed for a number of years. The Plaintiff must be taken to have had full title in the entire plot of land on which their building came to be

11. Since the Defendants sought to trespass upon the Plaintiff's plot of land the Plaintiffs have sued for the aforesaid prohibitory injunction.

12. Mr. Setalvad on behalf of the Defendants flourished before the Court what he called the sanctioned plan showing sanction of additional structures on the suit plot of land.

13. The plan produced by Mr. Setalvad is not a sanctioned plan. It is a plan prepared by the Architect of the Defendants one Decosta Patil Turakhiya. It is not shown to be signed as approved by the MMC. It shows PROPOSED ADDITIONS AND ALTERATIONS TO THE EXISTING BUILDING..... It shows the Plaintiff's building in red, two chawls in purple and pink and access road in brown and the recreational area in green. It does not even show what kind of additional construction of any additional structures is proposed to be put up. It does not show the number of storeys in such additional structures proposed to be constructed.

14. Passing off such a draft plan as a sanctioned plan would insult the intelligence of even a lay person.

15. The Defendants were called upon by this Court to produce the plan showing the layout of the scheme of development and construction got sanctioned by them for putting up additional construction as per the plan referred to in paragraph 1 of the agreement between the parties and which was shown to have been approved by the and offered for inspection for the Plaintiff's members. No such plan has been produced.

16. The Defendants seek to put up additional structures. The Plaintiff contends that their written consent is required to such construction. The Defendants dispute that position in law. Since the layout in the sanctioned plan is not produced, it is not known which additional structures are even sought to be sanctioned by the MMC for construction in any layout, which the Defendants would have a right to construct without the consent of the Plaintiff's members who are the flat purchasers.

17. Mr. Setalvad on behalf of the Defendants contended that the position in law, as reflected from the various proceedings of the Division Bench of this Court as well as the Supreme Court, is that all additional structures can be put up at any stage by the Developers without any written permission or consent of the flat purchasers. To that end he has relied upon a number of judgments essentially setting out the repeated history of MOFA, the balance struck between the rights of the Developers and the flat purchasers and the absolute prerogative of the Developers to put up additional structures without any bar. It need hardly be mentioned that the contention is wholly incorrect. This is apparent from the judgments relied by Mr. Setalvad.

18. Mr. Setalvad contended that in the case of Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, the rights and obligations of the Promoter (Developer of the property) under MOFA came to be considered. In that case the layout plan showing one building with 7 wings was sanctioned. This plan was amended in 1986, 1987, 1989, 1992, 1994 and 2001 without any objection from the flat purchasers. Agreements between the flat purchasers and the Developers were executed from 7th December 1985 onwards until 1991 or so. The FSI of the plot in that suit (as all other plots) came to be included pursuant to the D.C. Rules, which were framed on 25th March 1991.

The Cooperative Society of flat purchasers was registered on 21st September 1993.

19. The completed construction was as per the last amended plan dated 29th March 2001. The Court essentially considered the purport and import of Sections 7 and 7A of MOFA to strike a balance between the rights of the Developers to make additions and alterations in structure of the building and the rights of the flat purchasers to form the Society and obtain the conveyance of the right, title and interest of the property.

In paragraph 16 of the judgment the Court considered how MOFA regulated the activities of the Developers. It observed that u/s 7A the Developer is allowed to construct an additional building provided the construction forms a part of a scheme or a project in accordance with the layout plan.

In paragraph 17 of the judgment the Court observed that every agreement between the Promoter and flat purchasers must comply with the prescribed Form V. The Court had to consider whether the layout plan in that case contemplated construction of one building with 7 wings or 7 independent buildings. It would be based upon that that the right of the Developer to construct would be seen because the right of the Developer to construct without further consent of the flat purchasers would only be as per the layout in the sanctioned plan which are shown to the flat purchasers at the time of their agreements. Consequently the matter was remanded to the High Court for reconsideration.

20. The High Court reconsidered the entire case as also the earlier judgments in its order dated 7th October 2010 produced by Mr. Singh. It considered *inter alia*

that the approval of the local authority is material to be seen, that if the building was to be put up as a wing of existing building it could not be constructed without prior permission of the flat purchasers, whether the plans were altered and amended after the agreements were entered into with the flat purchasers and whether the entire project was placed before the flat purchasers by way of the layout plan approved by the MMC.

The Court sought to balance the rights and obligations of the Developer and the flat purchasers. The Court saw each of the plans of 1985, 1987, 1989, 1992, 1994 and 2001.

21. The Court saw that the sanctioned plan of 1985 showed 7 wings interlinked to each other and thereafter the amended plans changed the number of wings and ultimately had a proposed additional building that was not in the initial sanctioned plan under the layout scheme shown to the flat purchasers who purchased the flats in and from 1985.

22. Paragraph 38 of the judgment it considered the observation of the Supreme Court judgment in the case of White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, thus:

The promoter is not only required to make disclosure concerning the inherent F.S.I., 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 F.S.I./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.

23. The Court, therefore, concluded in paragraph 40 of the judgment that it is settled position in law that the prior consent of flat purchasers would only not be required, if the entire project is placed before the flat purchasers at the time of the agreement and the Developer puts additional construction in accordance with the layout plan. It further concluded that if the Developer wants to make additional construction which is not a part of the layout consent of the flat purchasers would be required. The Court further held that once the buildings shown in the approved plan are completed and possession is handed over, the Developer cannot contend that because he has not formed the Society and because he has not conveyed the property he can take advantage of the additional FSI which become subsequently available. That would go to the society to whom the land had to be conveyed. The advantage of the FSI would be taken only when the building is under construction and only for the buildings forming a part of the development plan or layout plan already approved. It further held that subsequent amendment of layout plan without the consent of the flat purchasers was not permissible. Therefore, once the building is completed in terms of the plan and the flat purchasers are to be put in occupation, permission of the flat purchasers would be required. Therefore, if subsequently FSI becomes

available under the D.C Rules, it would be available to the Society to whom the land had to be conveyed.

24. Further the Court considered the judgment of the Supreme Court in *Bjranglal Eriwal and Others Vs. Sagarmal Chunilal and Others*, holding that the specific consent was relatable to the particular project or the scheme of Development which was intended to be implemented. The scheme which could be implemented could only be under the sanctioned plan or a plan under the layout shown to the flat purchasers. In the absence of that the statutory embargo to alter or add to any structures on the plot would continue and would be lifted only upon the written consent of the flat purchasers.

25. The judgment further held that this consent was not a general consent made out in the agreement between the flat purchasers such as the consent relied upon by Mr. Setalvad in this case. Such a consent would defeat public policy. Such a consent would dilute the purposive object and intent of the legislature and would not eliminate the abuses and malpractices which it sought to remedy. Hence the judgment observed that the consent must be an affirmative acceptance of all the purchasers who had agreed to purchase the flats and could not be even implied consent.

26. The Court in that case held that the Developer was obliged to execute the conveyance within 4 months from 28th January 1993 which was the date of the registration of the Society. It held that the additional structure could not be constructed by the Developers without the consent of the Society. It, therefore, enjoined the Developers from putting up any further additional construction.

27. Consequently such additional FSI cannot be claimed by the Developer for putting up any additional building not under the approved plan. Further the failure and neglect to register the society and convey the property would certainly not give any right to the Developer to step upon the property or to claim any FSI. The FSI belongs to the plot. The plot must be taken to be conveyed after the statutory period. The FSI would, therefore, be available only to the true owner of the plot. Failure to convey would not constitute the Developer a true owner. That would be putting a premium upon his default. It would constitute an abuse of legal process. Any FSI for putting up any additional construction not in the initial sanctioned plan can therefore never enure for the benefit of the Developer except with the express written permission of all the flat purchasers or the Society, after its formation. Such FSI would belong to and can be exploited by none other than the Society of flat purchasers.

28. Mr. Setalvad contended that in the case of *Manratna Developers Vs. Megh Ratan Cooperative Housing Society Limited, Rushabh Rikhav Enterprises, Neelkanth Mansions Pvt. Ltd. and Municipal Corporation of Greater Mumbai*, it was held that additional structures could be put up without consent. The judgment observes that the Developers were not constructing anything which is impermissible. The Developers had complied with the requirement of true and

full disclosure. The amenities in the form of recreation ground were not reduced. It referred to the case of Kalpita Enclave Cooperative Housing Society v. Kiran Builders Pvt. Ltd. 1986 Mh.L.J. 110 which necessitated the Legislation by way of addition of Section 7A in MOFA that the Promoter was not entitled to put up additional structure not shown in the layout plan without the permission of the flat purchasers. It further referred to the observation of the Supreme Court in the case of M/s. Jayantilal Investments (supra) laying down the object of the amendment and specifying that if the total layout allows construction of more buildings the consent of the flat purchasers was not required. The judgment considered the additional FSI and the TDR which became available upon plots of land necessitating further construction and hence observed, reproducing the clause of the agreement, that further development in accordance with sanctioned plans phase wise could be allowed to be constructed without consent of the flat purchasers. Paragraph 11 of the judgment specifically observes that it was agreed in that case that the Promoters would be developing the property in a phased manner in accordance with the sanctioned plans or modified sanctioned plans.

29. In this case sanctioned plans showing construction of any structure or building other than the Plaintiff's building is not shown or produced. No such sanctioned plans in a layout are stated to have been shown to the Plaintiff members at the time they agreed to purchase flats.

30. Mr. Setalvad relied upon the judgment in the case of Shailaja Kamalakar Limaye v. Nilkanth Ganesh Pethe 2010 (4) Mh.L.J. 160. In that case the plan was approved on 10th June 1965 for construction of two buildings with a 30 ft. space between them. It was observed that the flat purchasers of the first building knew that one more building would come up on the plot. These facts were disclosed to the flat purchasers as per the approved plans. Hence it was held that the purchasers' consent was not necessary to construct the second building.

31. What is missed by Mr. Setalvad is that in that case the approved plan itself showed the additional building to be constructed. In this case no approved plan is produced. It is not known whether the approved plan showed any building which were to be constructed on the place where the chawls are situated. The entire FSI of the plot was utilized in construction of the Plaintiff's building. The further construction is sought to be put up only because further FSI/TDR is available under the D.C. Rules of 1991 and amendments made thereto. It could, therefore, never be that the original approved plan could have contemplated any building to be constructed on the place where the two chawls are situate. No such construction is shown The case of the Plaintiff is completely different. The Defendants have not made out a case that the construction sought to be put up by them was already approved in the initial approved plans when the FSI was already consumed by them.

32. Similarly the case of Jamuna Darshan Coop. Hsng. Society Ltd. and Ors. v. JMC & Meghani Builders and Ors. 2008 (1) All MR 789 was a case where a

separate building was to be constructed as per sanctioned plan of the Municipal Corporation. Consequently naturally the flat purchasers' further consent was not required to be obtained; it must be taken to have been obtained when their agreement itself was entered into and when they were shown the sanctioned plan.

33. Further in the case of Ralph D'souza and Others Vs. Danny D'souza and Others, also relied upon by Mr. Setalvad related to construction of a new building to be developed as per the layout after obtaining approval of the legal authority.

34. The Defendants defended a lost cause. The Defendants have relied upon judgments which show how they do not apply to the facts of their case at all. The nonproduction of the initial approved plan requires adverse inference to be drawn that, if produced, it would have shown only the Plaintiff's building to be constructed. The fact that the Plaintiff's plot is a small plot of land on which only one building came to be constructed leaving only the requisite 15% open area as recreational ground (RG), itself shows that it was only that building which could be constructed by consuming the then available FSI. Hence also the initial approved plan could never show any additional building in any layout plan approved by the Municipality. None other can be allowed by the Court except when the written consent of the Plaintiff Society. Consequently, the injunction as prayed for by the Plaintiff is required to be granted.

35. Notice of Motion is made absolute in terms of prayers (a)(ii), a(iii), (b) and (c).

36. The Notice of Motion is disposed off accordingly.

37. The Division Bench of this Court has requested this Court to dispose of the suit itself as possible. The Pleadings are complete. Hence admissions, if any are required to be recorded, issues framed and case management directions passed.

38. The execution of the agreement with the flat purchasers is admitted.

## ISSUES

1. Whether the Plaintiffs are entitled to seek enforcement of their rights under the agreements for sale which are unregistered and unstamped.

2. Whether the suit is bad for nonjoinder of necessary parties because the partners of the first Defendants have not been joined as party Defendants.

3. Whether the Defendants are entitled to carry out additional construction on the suit plot of land without the Plaintiff's consent.

4. Whether the Plaintiffs are entitled to object to Defendants 2 to

4. using the balance portion of the suit property for constructing additional structures on the suit plot of land.

5. Whether the Defendants are bound to convey the entire suit plot of land to the

Plaintiff.

6. What relief, if any, are the Plaintiffs entitled to ?

39. The Plaintiffs shall file their affidavit of examination in chief upon the issues of disputed facts.

40. The Plaintiffs shall also file the affidavit of documents, if any, and offer inspection of the documents to the Defendants as required.

41. The Suit is adjourned to 22nd August 2011 for considering the relevancy and admissibility of the documents of the Plaintiff and for passing further case management directions under the provisions of Order 18 Rule 4 of the C.P.C.